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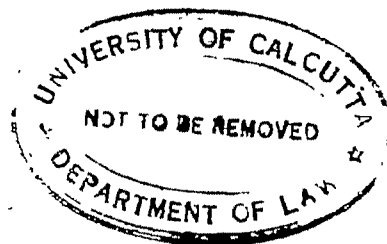
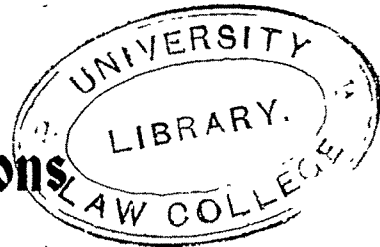
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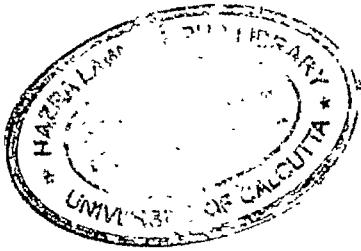
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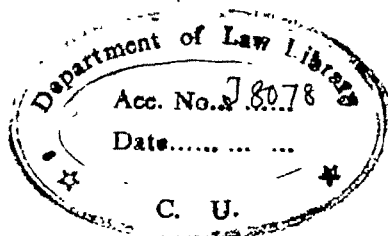


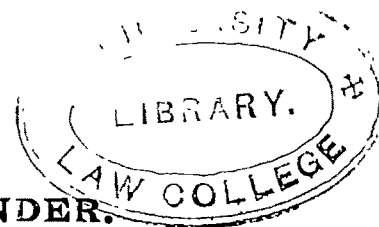


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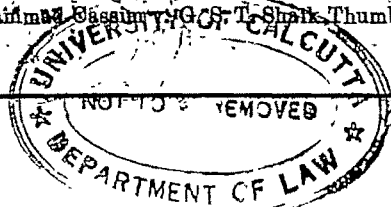
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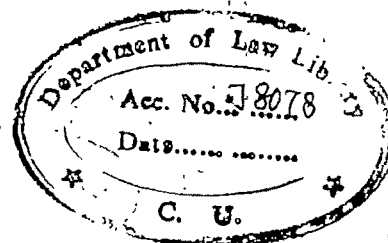


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247	Dattu Ramji Mali v. Waman Damodhar	...	A I R 1940 Nag. 217; 1940 N L J 203; 12 R N 273.
249	Bangali Mal v. Bansidhar	...	A I R 1939 All. 391; I L R (1939) All. 431; (1939) A L J 233; 1939 R D 171; 12 R A 502.
250	Western Electric Co. Ltd. v. Kailas Chand	...	A I R 1940 Bom. 60; I L R (1940) Bom. 13; 41 Bom. L R 1290; 12 R B 420.
252	A. W. Lobo v. J. A. Lobo	...	A I R 1939 Cal. 753; 12 R O 554.
253	Maniklal v. Baikamchand	...	A I R 1940 Nag. 47; 1939 N L J 535; I L R (1940) Nag. 34; 12 R N 272.
254	R. M. S. V. Chettyar Firm v. Ma Ohn Myaing	...	A I R 1940 Rang. 27; 12 R Rang. 313.
256	Baij Nath Bhagat v. Emperor	...	A I R 1940 Pat. 486; 6 B R 410; 41 Cr. L J 427; 12 R P 590; 21 P L T 206.
262	Louis Dreyfus & Co. v. Hemandas Hotchand	...	A I R 1940 Sind 37; 12 R S 224.
266	Maksudan Lal Sahu v. Niranjan Nath Das	...	A I R 1940 Pat. 494; 21 P L T 219; 19 Pat. 507; 6 B R 446; 12 R P 575.
269	Ko Pa Tu v. Azimulla	...	A I R 1940 Rang. 73; 12 R Rang. 311.
270	District Board, Dehra Dun v. H. Trotter	...	A I R 1939 All. 389; I L R (1939) All. 388; (1939) A L J 161; 12 R A 500.
272	Philip William Ravanshawe Hardless v. Gladys Isabel Hardless	...	A I R 1940 Lah. 82; 12 R L 449 S B.
274	Mangal Sen v. Kewal Ram	...	A I R 1940 All. 75; 12 R A 507.
276	Bharat Bandhu Chattopadhyaya v. Ranendra Kumar Dutta	...	A I R 1939 Cal. 752; 70 O L J 370; 12 R O 555.
277	Tota Ram v. Zalim Singh	...	A I R 1940 All. 69; (1939) A L J 1065; 12 R A 504.
280	Guruswami Tevar, & rs	...	A I R 1940 Mad. 196; 51 L W 65; (1940) 1 M L J 124; (1940) M W N 81; I L R (1940) Mad. 158; 41 Cr. L J 437; 12 R M 720 F B.
285	Sumer Chand v. Mukhtari	...	A I R 1940 All. 147; (1940) A L J 101; 1940 R D 73; I L R (1940) All. 198; 12 R A 503 S B.
286	Kamal Krishna Mandal v. Hemendra Krishna Singha	...	A I R 1940 Cal. 39; 44 O W N 129; 71 O L J 413; 12 R O 556.
294	Baru v. Amir Singh	...	A I R 1940 All. 78; (1939) A L J 1015; 12 R A 511.
295	Suganmal v. Umraobi	...	A I R 1940 Nag. 13; 1939 N L J 520; I L R (1940) Nag. 74; 12 R N 275.
299	Sat Deo Prasad v. Debi Badal	...	A I R 1940 All. 143; (1940) A L J 18; I L R (1940) All. 132; 12 R A 510.
300	Members of the Union Committee, Dalsinghsarai v. Sahay Sah	...	A I R 1940 Pat. 474; 6 B R 448; 21 P L T 271; 12 R P 581.
301	Bajroga Khatun v. Province of Bengal	...	A I R 1940 Cal. 113; I L R (1939) 2 Cal. 353; 43 O W N 1096; 12 R O 561.
304	Ishar Das v. Bhaion Ki Dokan Firm	...	A I R 1940 Lah. 39; 41 P L R 823; 12 R L 450.
305	Parbhu Dayal v. Laldas Maganlal	...	A I R 1939 All. 613; I L R (1939) All. 825; (1939) A L J 638; 1940 O L R 194; 12 R A 512.
308	Advocate-General, Burma v. Maung Ohit Maung	...	A I R 1940 Rang. 70; 41 Cr. L J 445; 12 R Rang. 330.
310	Bejoy Krishna Deb v. Shyam Narain Singh	...	A I R 1940 Cal. 30; I L R (1939) 2 Cal. 532; 41 Cr. L J 442; 12 R O 575.
313	Bhan Datta Upadhia v. Tulsa Kuer	...	A I R 1940 All. 151; (1940) A L J 180; 12 R A 515; I L R (1940) All. 246 F B.
317	Shubraton v. Shabbir Ali	...	A I R 1940 Oadh 286; 1940 O W N 375, 1940 O L R 197; 12 R O 369.

321	Sivaprasad Sowcar v. Sekharamantri Narasimhamurthi	...	A I R 1940 Mad. 187; (1940) M W N 41; (1940) 1 M L J 79; 51 L W 73; I L R (1940) Mad. 501; 12 R M 704 F B.
330	Joytish Chandra Chaudhuri v. Profulla Chandra Banyal	...	A I R 1940 Cal. 157; 70 O L J 294; 43 O W N 937; 12 R O 567.
332	Har Prasad v. Sita Ram	...	A I R 1940 All 141; 12 R A 520.
334	Jhorama v. Viswasarayi Latchanna Dora	...	A I R 1940 Mad. 19; (1939) M W N 989; 19 R M 702.
336	Dal Singar Koeri v. Chandi Singh	...	A I R 1940 All. 145; (1939) A L J 1075; 12 R A 522.
338	Ramaswami v. Gurukar Rudrappa	...	A I R 1939 Mad. 688; 49 L W 684; (1939) M W N 464; 12 R M 715.
339	Singheshwar Singh v. Madni Prasad Singh	...	A I R 1940 Pat. 65; 6 B R 453; 12 R P 582.
345	Mukat Lal v. Raghuraj Singh	...	A I R 1940 All. 22; (1939) A L J 1018; 1939 R D 609; 12 R A 525.
347	Tulsibai v. Gapumal Naraindas	...	A I R 1940 Sind 13; (1940) Kar. 135; 12 R S 228.
349	Bhikhali Tewary v. Achaibar Kuer	...	A I R 1940 Pat. 471; 21 P L T 326; 6 B R 464; 41 Cr. L J 451; 12 R P 618.
350	Ko San Paw v. Ko Po Yi	...	A I R 1940 Rang. 75; 12 R Rang. 315.
352	Narayan Chetti v. Panchanathan Chettiar	...	A I R 1940 Mad 89; (1939) M W N 1046 (1); 50 L W 605; (1939) 2 M L J 758; I L R (1940) Mad. 78; 12 R M 724.
353	Ohhatranath Das v. Kashinath Das	...	A I R 1940 Pat. 497; 6 B R 459; 12 R P 596.
354	Ganpat Gatlu v. Navnitlal Ranchhoddas	...	A I R 1940 Bom. 30; 41 Bom. L R 1204; 12 R B 426.
356	Ali Mohamed Ebrahim Shakoor v. Adam Hajee Peer Mohamed Essack	...	A I R 1940 Cal. 131; I L R (1939) 2 Cal. 199; 12 R O 569.
360	Rudrappa Yellappa Sattennanavar v. Mallappa Malleshappa	...	A I R 1940 Bom. 95; 41 Bom. L R 1277; 12 R B 425.
361	Nathu Chaudhury v. Emperor	...	A I R 1940 Pat. 499; 6 B R 461; 41 Cr. L J 452; 12 R P 615.
364	Secretary of State v. Shyamapada Banerjee	...	A I R 1940 Cal. 56; 44 O W N 411; 12 R O 573.
367	Mahadeo Tukaram Mahajan v. Ramchandra Deooyya Yelami Dhoki	...	A I R 1940 Nag. 215; 1940 N L J 658; 12 R N 281.
369	Ghasitoo Mal v. Asa Ram	...	A I R 1940 All. 17; I L R (1940) All. 8; 12 R A 530.
370	Sarah Saul Sofaer v. W. M. Ezekiel	...	A I R 1940 Rang. 78; 12 R Rang. 327.
373	Fatechand Khubchand v. National Tiles Co., Firm	...	A I R 1940 Sind 19; 12 R S 229.
376	Alagiri Chetty v. Muthuswami Chetty	...	A I R 1940 Mad. 102; 50 L W 571; (1939) M W N 1225; 12 R M 716.
380	Maung Po Seik v. Ma Pwa Tin	...	A I R 1940 Rang. 29; 12 R Rang. 334.
383	Mohammad Asgar Ali v. Mohammad Ishaq Ali	...	A I R 1940 All 72; (1939) A L J 1020; I L R (1940) All. 31; 12 R A 531.
385	Beopar Sahayak Bank Ltd., Meerut v. Killo	...	A I R 1940 Lah. 90; 42 P L R 20; 12 R L 454.
387	Emperor v. Dullu Kuer	...	A I R 1940 Pat 513; 6 B R 465; 41 Cr. L J 457; 21 P L T 943; 12 R P 613.
389	Bai Lalita Ratanchand Khimchand v. Tata Iron and Steel Co., Ltd.	...	A I R 1940 Bom. 97; 42 Bom. L R 57; I L R (1940) Bom. 165; 12 R B 438 F B.
404	Sambhco v. Parashram	...	A I R 1940 Nag. 95; 1940 N L J 76; 12 R N 237.
405	The King v. Kyaw Aye	...	A I R 1940 Rang. 81; 1939 Rang. 744; 41 Cr. L J 455; 12 R Rang. 333.
407	Mohammad Sharif v. Diwan Singh	...	A I R 1940 Lah. 95; 41 Cr. L J 458; 12 R L 467.
409	Ramrao Bhagwantrao Inamdar v. Appanna Samage	...	A I R 1940 Bom 121; 42 Bom. L R 143; I L R (1940) Bom. 299; 12 R B 443 F B.
414	Abdul Hameed v. Mohammad Yoonus	...	A I R 1940 Mad. 153; (1939) M W N 1160 (2) 50 L W 754; (1940) 1 M L J 273; 12 R M 725.

416	Amulya Krishna Bandopadhyaya v. Raruli Pioneer Co-operative Bank Ltd. ...	A I R 1940 Cal. 150; 70 O L J 397; 12 R O 578.
419	Lallubhai Bhikhabhai Chunawalla v. Ratanchand Raichand ...	A I R 1940 Bom. 82; 41 Bom. L R 1237; 12 R B 448.
424	Ladha Ram v. Official Receiver, Judicial Commissioner's Court, Karachi ...	A I R 1939 Lah. 495; 42 P L R 92; 12 R L 456.
425	Rameewar Marwari v. Amar Nath Sinha ...	A I R 1940 Cal. 76; 41 Cr. L J 460; 12 R C 594.
426	Ramakrishna v. Panchamal Narasimha Kamath ...	A I R 1939 Mad. 878; 50 L W 347; (1939) M W N 889; (1939) 2 M L J 493; 12 R M 728.
427	Devi Kishen v. Champallalsa ...	A I R 1940 Nag. 74; 1939 N L J 512; I L R (1940, Nag. 45; 12 R N 288.
428	Lachhumal Morumal v. Attamuhammad Khan Nabibaksh Khan ...	A I R 1939 Sind 343; (1939) Kar. 725; 12 R S 279.
434	Sant Ram v. Putti Lal ...	A I R 1940 Oudh. 263; 1940 O W N 352; 1940 O L R 216; 1940 R D 188; 15 Luck. 535; 12 R O 380.
436	Subhanand Chowdhary v. Apurba Krishna Mitra...	A I R 1940 F O 7; 6 B R 499; 1940 O L R 249; (1940) 1 M L J 23 Sup.; (1940) Kar. (F O) 45 Sup.; (1940) M W N 882; 21 P L T 631; 52 L W 127; 44 O W N F O 18; 72 O L J 174; 13 R F O 18 F C.
439	Harkunwar Bai v. Keeri Singh	Bhopal High Court.
440	Jagat Singh v. Sangat Singh ...	A I R 1940 P O 70; 1940 O W N 338; 6 B R 559; 44 O W N 569; 1940 O L R 242; (1940) Kar. (P O) 149 Sup.; (1940) M W N 672; 52 L W 17; 42 Bom. L R 697; I L R (1940) Lah. 330; (1940) 2 M L J 769; 42 P L R 772; 12 R P O 156 P C.
445	S. R. M. S. Chethambaram Chettiar v. Loo Thon Poo	A I R 1940 P O 60; (1940) 1 M L J 68; 6 B R 574; 51 L W 702; 1940 O L R 254; (1940) M W N 702; 42 P L R 450; 12 R P O 166 P C.
449	Francis Day & Hunter Ltd. v. Twentieth Century Fox Corporation Ltd. ...	A I R 1940 P O 55; 21 P L T 355; 6 B R 585; 1940 O L R 266; (1940) M W N 677; 52 L W 10; 12 R P O 161 P C.
453	Prithwi Chand Lal Choudhry v. Sukhraj Rai ...	A I R 1940 F O 25; 6 B R 498; 21 P L T 405; 1940 O L R 263; (1940, 1 M L J 28 Sup.; (1940) Kar. (F O) 52 Sup.; (1940) M W N 685; 52 L W 122; 41 O W N (F O) 29; 72 O L J 142; 13 R F O 22 F C.
454	Ori Lal v. Rahim Zadi ...	A I R 1940 Oudh. 248; 1940 O W N 389; 1940 O L R 218; 14 Luck. 531; 12 R O 381.
456	Arnold Monteath Mathews v. Emperor ...	A I R 1940 Lah. 87; 41 Cr. L J 482; 12 R L 492.
459	Asgaralli Mohammedalli Heraiwala v. Emperor ...	A I R 1940 Bom. 127; 42 Bom. L R 203; 41 Cr. L J 485; 12 R B 497.
460	S. L. S. K. R. Chettyar Firm v. Farok Ahmed ..	A I R 1940 Rang. 83; 12 R Rang. 334.
461	Commissioner of Income-tax Bombay Presidency, Sind and Aden v. Karachi Indian Merchants Association ...	A I R 1940 Sind 56; 12 R S 245.
463	U Pike v. Ma Khin Thein ...	A I R 1940 Rang. 77; 41 Cr. L J 480; 12 R Rang. 339.
464	Sonappa Shina Shetty v. Emperor ...	A I R 1940 Bom. 126; 42 Bom. L R 205; 41 Cr. L J 481; 12 R B 488.
465	Labb Singh v. Gurbaksh Singh ...	A I R 1940 Lah. 19; 42 P L R 704; I L R (1940) Lah. 184; 12 R L 458.
467	P. Rm. St. Subramania Chettiar v. Felix Joseph Sarprasadam ...	A I R 1939 Mad. 817; (1939) M W N 733; (1939) 2 M L J 316; 50 L W 203; I L R (1940) Mad. 45; 12 R M 729.
468	Hardwari Mal Harnath Das Firm v. Municipal Board, Dehra Dun ...	A I R 1939 All. 736; (1939) A L J 1030; I L R (1940) All. 4; 12 R A 533.
470	Emperor v. Ayancheri Kovilagath Sankara Varma Rajah ...	(1940) 1 M L J 272; 41 Cr. L J 465; 51 L W 230; (1940) M W N 240 (1); 12 R M 738.

471	Subhas Chandra Bose v. Gordhandas I. Patel	...	A I R 1940 Bom. 76; 42 Bom. L R 89; I L R (1940) Bom. 254; 12 R B 453.
477	Jadunath Banerjee v. Secretary of State	...	A I R 1939 Cal. 617; I L R (1939) 2 Cal. 268; 43 O W N 1021; 12 R O 581.
480	Ishaque Ali v. Abdus Samad	...	* Bhopal High Court
481	Emperor v. Deyyam Chinnayya	...	(1940) M W N 169; 41 Cr. L J 461; 12 R M 733.
484	Mathura Singh v. Palakdhari Rai	..	A I R 1940 Pat. 512; 6 B R 477; 21 P L T 770; 12 R P 598.
485	Asharfi Lal v. Zamir Fatima Bibi	..	A I R 1940 All. 29; I L R (1939) All. 990; (1939) A L J 1127; 12 R A 534.
492	Bachoo Prasad Singh v. Gobardhan Das	...	A I R 1940 Pat. 62; 6 B R 478; 21 P L T 864; 12 R P 589.
494	Shriram Hanutram v. Mohanlal & Co.	...	A I R 1940 Bom. 93; 41 Bom. L R 1293; I L R (1940) Bom. 249; 12 R B 460.
496	Baba Jagtanand Bramchari v. Barhmdeo	..	A I R 1940 All. 68; (1939) A L J 991; 12 R A 541.
498	P. M. Dixit v. Senior Inspector of Factories	...	A I R 1940 Bom. 87; 41 Bom. L R 1233; I L R (1940) Bom. 96; 12 R B 462.
501	Jaggo Bai v. Harihar Prasad Singh	...	A I R 1940 All. 41; I L R (1940) All. 52, (1939) A L J 1107; 12 R A 542.
504	Irappa Lokappa Vastrad v. Rachayya Madiwalayya	..	A I R 1940 Bom. 118; I L R (1940) Bom. 42; 41 Bom. L R 1300; 12 R B 465.
507	Tulsi Ram Narula v. Gian Chand-Amar Nath Firm	...	A I R 1940 Lah. 96; 41 P L R 838; 12 R L 481.
508	Dattatraya Chandraya Bachuwar v. K. L. Bawa-chekar	...	A I R 1940 Bom. 51; I L R (1940) Bom. 1; 41 Bom. L R 1258; 12 R B 462.
511	Rama Barik v. Emperor	...	A I R 1940 Pat. 185; 6 B R 480; 41 Cr. L J 463; 12 R P 637.
513	Sachidanand Vidya Narasinha Bharati Shankaracharya of Sankeshwar Math v. Chanmalappa Gurusidh Malappa	...	A I R 1940 Bom. 112; 41 Bom. L R 1317; 12 R B 471.
518	Jaga Singh v. Basdeo Singh	...	A I R 1940 Pat. 581; 6 B R 483; 12 R P 601.
521	Dwarkaprasad v. Emperor	...	A I R 1940 Nag. 227; 1940 N L J 108; 1940 N L J 108; 41 Cr. L J 466; 12 R N 298.
522	Ramnandan Prasad Narayan Singh v. Chandradip Narain Singh	...	A I R 1940 Pat. 501; 6 B R 485; 19 Pat. 578; 12 R P 603.
530	Ashinta Nath Saamal v. Gobinda Prasad Das	...	A I R 1939 Cal. 705; I L R (1939) 2 Cal. 366; 70 O L J 1; 43 O W N 1033; 12 R O 588.
531	Travancore National and Quilon Bank Ltd., <i>In the matter of</i>	...	A I R 1940 Mad. 157; (1939) M W N 1096; 50 L W 759; 12 R M 730.
533	Kesrilal Kedia v. Emperor	...	A I R 1940 Pat. 373; 21 P L T 273; 6 B R 493; 41 Cr. L J 467; 12 R P 639.
535	Ashamayi Basu v. Baranagore Jute Factory Co. Ltd.	...	A I R 1940 Cal. 141; I L R (1939) 2 Cal. 330; 12 R O 584.
539	Deorati Kuer v. Dasarath Dubey	...	A I R 1940 Pat. 476; 6 B R 495; 21 P L T 374; 12 R P 612.
540	Narain Das v. District Board, Jhang	..	A I R 1940 Lah. 71; 12 R L 460.
542	Thin Yen v. Secretary of State	...	A I R 1939 Cal. 763; I L R (1939) 1 Cal. 257; 43 O W N 445; 12 R O 589.
547	Ramdeo v. Sri Sadaitan Pande	..	A I R 1940 All. 148; (1940) A L J 93; 1940 R D 68; 1940 A L R 211; I L R (1940) All. 228; 12 R A 546 F B.
549	Jagdiah Bahadur v. Mahadeo Prasad	...	1940 O W N 411; 1940 O L R 213; 15 Luck. 580; 12 R O 375.
551	Radha Kiehan v. Safdar Ali	...	A I R 1939 Lah. 262; 41 P L R 192; 12 R L 462.
553	Mathra v. Kamta	...	A I R 1940 Oudh 244; 1940 O W N 354; 41 Cr. L J 469; 12 R O 394; 1940 O L R 215; 15 Luck. 468.
554	Commissioner of Income-tax v. Indra Sen Raizada, Meerut	...	A I R 1940 All. 154; (1940) A L J 129; 12 R A 548; I L R (1940) All. 274 F B.
571	Sri Ram v. Sital Prasad	...	A I R 1940 Oudh 264; 1940 O W N 385; 1940 O L R 220; 12 R O 378.

573	Advocate-General v. Maung Chit Maung	...	A I R 1940 Rang. 68; 41 Cr. L J 470; 1910 Rang. 188; 12 R Rang. 337.
575	Kashi Prasad v. Sajjadi Begam	...	A I R 1940 Oudh 287; 1910 O W N 356; 1910 O L R 217; 1940 R D 208; 12 R O 377.
576	Allahwarayo Daryakhan v. Emperor	...	A I R 1940 Sind 53; (1939) Kar. 800; 41 Cr. L J 477; 12 R S 250.
580	Agin Singh v. Rhudeo Singh	...	A I R 1940 Pat. 515; 6 B R 496; 12 R P 670.
581	Kishorilal v. Sundarbai	...	Bhopal High Court.
583	Kuer Rai v. Baburam Kuer	...	A I R 1940 Pat. 498; 6 B R 502; 12 R P 619.
584	Pannalal v. Firm of Hasan Dada	...	A I R 1939 Nag. 253; 1939 N L J 319; 12 R N 290.
586	Emperor v. Jate Uraon	...	A I R 1940 Pat. 541; 6 B R 503; 41 Cr. L J 472; 12 R P 641.
591	Tharkam Kojiniyakath Moidin Kutti v. K. N. Subramanya Iyer	...	A I R 1939 Mad. 892; 50 L W 497; (1939) M W N 996; 12 R M 735.
593	Raghubir Singh Chetri v. Texpur Local Board	...	A I R 1939 Cal 587; I L R (1939) 1 Cal. 329; 43 O W N 408; 12 R O 595.
594	Sahaba v. Jagannath	...	A I R 1940 Nag. 84; 1939 N L J 544; 12 R N 292.
597	Gauri Shankar v. Mohan Lal	...	A I R 1940 Oudh 275; 1940 O W N 414; 1940 O L R 222; 12 R O 385.
602	Kodukula Kameswaramma v. Kodukula Thammanna	...	A I R 1939 Mad. 798; 50 L W 195; (1939) M W N 790; (1939) 2 M L J 460; 12 R M 737.
603	S. Hadi Husain v. S. Zainul Ibad	...	A I R 1940 Oudh 261; 1940 O W N 381; 1940 O L R 227; 12 R O 383.
605	Municipal Commissioners, Dacca v. Gangamani Chaudhurani	...	A I R 1940 Cal. 153; 70 O L J 583; 44 O W N 277; 12 R O 598.
609	Maung Po Aung v. The King	...	A I R 1940 Rang. 95; 41 Cr. L J 495; 12 R Rang. 340.
610	Abdul Ghafoor v. Commissioner of Income-tax, Central Provinces and United Provinces, Lucknow	...	A I R 1940 Nag. 119; I L R (1940) Nag. 200; 1940 N L J 27; 12 R N 291.
612	Surendra Prasad Narain Singh v. Gajadhar Prasad Sahu Trust Estate	...	A I R 1940 F O 10; 6 B R 508; (1940) 1 M L J 1 Sup; 1940 O L R 375; (1940) Kar. (F O) 14 Sup.; (1940) M W N 686; 21 P L T 753; 71 O L J 557; 44 O W N F O 1; 12 R F O 23 F O.
621	Ibadul Ghani Khan v. Nasiruddin Khan	...	A I R 1940 Oudh 303; 1910 R D 419; 1940 O W N 479; 1910 O L R 229; 12 R O 393.
622	Birendra Prasad Sakul v. Surendra Prasad Sakul	...	A I R 1940 F O 19; 6 B R 517; 1940 O L R 286; (1940) 1 M L J 21 Sup; (1940) Kar. F O 42 Sup; 52 L W 124; 21 P L T 815; (1940) M W N 916; 44 O W N F O 27; 72 O L J 144; 12 R F O 23 F O.
624	Deputy Commissioner, Kheri; Manager Court of Wards, Mahewa Estate v. Brijendra Bahadur Singh	...	A I R 1940 Oudh 305; 1940 O W N 425; 1940 O L R 237; 15 Luck. 537; 12 R O 390.
627	Rahimalishah Alishah v. Emperor	...	A I R 1940 Sind 61; 41 Cr. L J 493; (1940) Kar. 421; 12 R S 253.
629	Ohandrika Prasad Singh v. Ram Lal Sahu	...	6 B R 521; 12 R P 625.
632	Mahanti Sreeramulu, <i>In re</i>	...	A I R 1940 Mad. 293; 50 L W 787; (1939) M W N 1129; 41 Cr. L J 491; 12 R M 748.
634	Rameshwar Prasad Singh v. Rampratap Thakur	...	6 B R 529; 12 R P 621.
636	Muhammad Ali Yar Muhammad v. Shamsul Haq Pir Ziauddin Shah	...	A I R 1940 Sind 33; 41 Cr. L J 486; (1940) Kar. 162; 12 R S 255.
640	The King v. U Khemein	...	A I R 1940 Rang. 72; 1910 Rang. 122; 41 Cr. L J 497; 12 R Rang. 353.
642	Dal Chand v. Emperor	...	A I R 1940 All. 195; (1940) A L J 154; 41 Cr. L J 498; 12 R A 574.
643	V. K. Subramania Mudali, <i>In re</i>	...	A I R 1940 Mad. 297; (1940) M W N 353; 51 L W 532; 41 Cr. L J 496; 12 R M 763.
644	Hare Krishna Panigrahi v. Jogneswar Panda	...	A I R 1939 Cal. 688; 69 O L J 454; 43 O W N 1025; 12 R O 600.
646	Bhagwan Baksh Singh v. Secretary of State	...	A I R 1940 P O 82; 1940 O W N 431; 6 B R 594; (1940) A L J 333; 1940 O L R 292; (1940) Kar. (P O) 160 Sup.; 44 O W N 765; 52 L W 50; (1940) 2 M L J 205; 72 O O J 1; I L R (1940) All. 432; 12 R P O 169 P C.

650	Punjab Co-operative Bank, Ltd., Lahore v. Muhammad Yusaf	...	A I R 1939 I ah 225; 12 R L 489.
658	Thomas Bear & Sons (India) Ltd. v. Prayag Narain	...	A I R 1940 P O 86; 1940 O W N 439; 6 B R 598; 1940 O L R 296; (1940) Kar (P O) 171 Sup; 44 O W N 737; (1940) M W N 616; 52 L W 25; 71 O L J 511; 21 P L T 611; (1940) A L J 496 (1940) 2 M L J 151; I L R (1940) All. 446; 42 Bom. L R 734; 12 R P O 174 P C
663	Jivaji Keshav Bapat v. Venkatesh Krishna Byadgi	...	A I R 1940 Bom 136; 42 Bom. L R 203; I L R (1940) Bom. 109; 12 R B 478.
670	Lachmeshwar Prasad Shukul v. Girdhari Lal Chaudhuri	...	A I R 1940 F O 23; 6 B R 543; (1910) M W N 464; 1940 O L R 300; 71 O L J 327; 42 P L R 312; (1940) Kar. (F O) 1 Sup.; (1910) 3 F L J 15; 12 R F O 33; 21 P L T 309 F C.
676	Commissioner of Income-tax Lahore v. Krishan Kishore	...	A I R 1940 I ah. 113; I L R (1939) Lah. 520; 12 R L 486 S B.
680	Virabhadrayya Nagayya Shivappanmath v. Basan-gowda Mudigowda Patil	...	A I R 1940 Bom. 154; 42 Bom. L R 279; 1 L R (1940) Bom. 328; 12 R B 485.
682	Jagdish Narain Bajpai v. Emperor	...	A I R 1940 All. 178; (1940) A L J 104; 41 Or. L J 500; 12 R A 575.
686	Kasturi Lal Sant Lal v. Municipal Committee, Jagraon	...	A I R 1939 Lah. 129; 41 P L R 548; 12 R L 483.
689	Fayaz Mohammad v. Sardar Khan	...	Bhopal High Court.
690	Haider Ali v. Emperor	...	A I R 1940 All. 201; (1940) A L J 97; 41 Or. L J 499; 12 R A 79.
691	Commissioner of Income-tax Bihar and Orissa v. Visheahwar Singh	...	A I R 1939 Pat. 24; 18 Pat. 805; 6 B R 524; 12 R P 629.
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PRIVY COUNCIL

Appeal from the Federal Court of India
January 18, 1940

VISCOUNT MAUGHAM, LORD PORTER AND
SIR GEORGE RANKIN
HORI RAM SINGH—APPELLANT

versus

THE KING-EMPEROR—RESPONDENT

Privy Council — Practice — Appeal from Federal Court of India — Leave to appeal — Point technical and of no use in future — Leave refused.

An appeal from the Federal Court would not lightly be admitted by the Board, and should only be admitted if it arises in a really substantial case.

Where the matter was one concerning the construction of a very exceptional section which would have no application in the future, and it was a technical point and the Board had before it the view of the Federal Court with regard to it and, having regard to all the circumstances of the case and the ingenious argument which had been presented to them, their Lordships did not think that it was a case in which they would advise His Majesty to grant leave to appeal.

Messrs. R. Gibson, K. C. and C. J. Colombos, for the Appellant.

Messrs. G. D. Roberts, K. C. and W. Wallach, for the Respondent.

Viscount Maugham.—Their Lordships do not require to hear Counsel for the Crown.

This is an application for special leave to appeal *in forma pauperis* from a judgment of the Federal Court of India, and it has the distinction of being the first application for such leave from that Court.

The question which arises is as to the true construction of s. 270, sub-s. 1, of the Govt. of India Act, 1935. It is in these terms: "No proceedings, civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in execution of his duty as a servant of the Crown in India or Burma before

the relevant date", which is April 1, 1937, "except with the consent" putting it shortly as applying to this particular case, "of the Governor" of the Province in which the petitioner was employed. It is perfectly clear, therefore, that this section is in the nature of an exceptional section which is intended to afford some measure of protection to certain public servants in relation to acts done or purported to be done in execution of their duty, being acts done before the date in question.

Their Lordships ought not to forget the fact that the matter has been before the Federal Court and that an appeal from the Federal Court should not lightly be admitted by this Board, and should only be admitted if it arises in a really substantial case.

In this case it does not seem to their Lordships that the matter is anything but one concerned with the construction of a very exceptional section which will have no application in the future, and it is a technical point. They have had the view of the Federal Court with regard to it and, having regard to all the circumstances of the case and bearing in mind the ingenious argument which has been presented to them, they do not think that this is a case in which their Lordships should advise His Majesty to grant leave to appeal. In those circumstances, the application for leave must be dismissed. The Council Office fees will be remitted as it is a petition *in forma pauperis*, but otherwise there will be no order as to costs.

D.

Application dismissed.

Solicitors for the Appellant: — Messrs. Hy. S. L. Polak & Co.

Solicitors for the Respondent: — The Solicitor India Office.

PRIVY COUNCIL

Appeal from the West African Court of
Appeal

December 11, 1939

LORD CHANCELLOR (VISCOUNT CALDECOTE)
LORD THANKERTON, LORD ALNESS,
LORD ROMER AND SIR GEORGE RANKIN.
ISAAC THEOPHILUS AKKUNNA
WALLACE-JOHNSON—APPELLANT

versus

THE KING—RESPONDENT.

Sedition—Colony of Gold Coast—Incitement to violence, if necessary ingredient.

The elaborate structure of s. 330, Criminal Code (Colony of Gold Coast) (now s. 326 of the Criminal Code of 1936 Revision) suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of the case free from any glosses or interpolations derived from any expositions however authoritative of the Law of England or of Scotland.

There is nothing in the section to suggest that unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention the prosecution for sedition would not succeed. Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result. *R. v. Burns* (1), not applied.

Messrs. D. N. Pritt, K. C. and N. Wiggins,
for the Appellant.

Solicitor General Mr. Kenelm Freedy, for
the Respondent.

Lord Chancellor.—This is an appeal by special leave from a judgment of the West African Court of Appeal (Gold Coast Session) dismissing an appeal by the appellant against his conviction on October 13, 1936, by the Supreme Court of the Gold Coast at the Assizes held at Victoriaborg, Accra. The appellant was tried upon an information containing two counts charging him with offences against s. 330 of the Criminal Code of the Gold Coast Colony (Chap. XXIX). The first count charged the appellant with unlawfully publishing a seditious writing of and concerning the Govt. of the Gold Coast contrary to s. 330 (2) (b) of the Criminal Code. The second count charged him with unlawfully having in his possession documents containing seditious writing of and concerning the Govt. of the Gold Coast contrary to s. 330 (2) (c). The trial took place before the Chief Justice of the Gold Coast Colony sitting with three assessors on October 7, 8, 9, 10, 12 and 13,

1936. The appellant was convicted by the Chief Justice on both counts, and was sentenced to pay a fine of £50 on the first count and, in default of payment within 14 days, to be imprisoned for three months. No punishment was inflicted on the second count.

The appellant appealed to the West African Court of Appeal against his conviction. The appeal was heard on November 17 and 18, and December 1, 1936, and was then dismissed.

The appellant petitioned His Majesty in Council for special leave to appeal, and this was granted on July 22, 1938.

The writing which was the subject-matter of the charges was part of an article signed "Effective" and published in a newspaper circulating in the Gold Coast Colony. The material words as set out in the information, together with allegations as to the meaning attributable to certain words and phrases, were as follows:—

"Personally, I believe the European has a God in whom he believes and whom he is representing in his Churches all over Africa. He believes in the god whose name is spelt Deceit. He believes in the god whose law is 'Ye strong, you must weaken the weak, Ye 'civilised' Europeans, you must 'civilise' the 'barbarous' Africans with machine guns. Ye 'Christian' Europeans, you must 'Christianise' the 'pagan' Africans with bombs, poison gases, etc.'

In the Colonies the Europeans believe in the god that commands 'Ye administrators' (meaning to include therein the Govt. of the Gold Coast) 'make Sedition Bill' (meaning to include therein the Criminal Code Amendment Ordinance No. 21 of 1934 of the Gold Coast) 'to keep the African gagged. Make Forced Labour Bill' (meaning to include therein the Labour Ordinance of the Gold Coast) 'to work the Africans as slaves. Make Deportation Ordinance' (meaning to include therein the Kofi Sechere Detention and Removal Ordinance No. 1 of 1936) 'to send the Africans to exile whenever they dare to question your authority'.

'Make an Ordinance to grab his money so that he cannot stand economically. Make Levy Bill' (meaning to include therein the Native Administration Ordinance No. 25 of 1936 of the Gold Coast Colony) 'to force him to pay taxes for the importation of unemployed Europeans to serve as Stool Treasurers. Send detectives to stay around the house of any African who is nationally conscious and who is agitating for national independence and if possible to round him up in a 'criminal frame-up' (meaning thereby a criminal charge in which the evidence is fabricated) 'so that he could be kept behind the bars' (meaning thereby prison)."

Section 330 of the Criminal Code (now s. 326 of the Criminal Code 1936 Revision) is as follows:—

Sub-s. (2):

"Any person who

(b) prints or publishes by any such act as is specified in Title 18 any seditious words or writing or

(c) being found in possession of any newspaper

book or document or any part thereof or extract therefrom containing seditious words or writing does not prove to the satisfaction of the Court that at the time he was found in such possession he did not know the nature of its contents

shall be liable—

(i) for a first offence under paras. (a), (b), (c) and (d) to imprisonment for two years or to a fine not exceeding one hundred pounds. . . .

(ii) for a first offence under paras. (e) and (f) to imprisonment for one year or to a fine not exceeding fifty pounds. . . .

Sub-Section (8) :

"A seditious intention" is an intention—

(1) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors or the Govt. of the Gold Coast as by law established; or

(2) to bring about a change in the sovereignty of the Gold Coast; or

(3) to excite His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Gold Coast as by law established; or

(4) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Gold Coast; or

(5) to raise discontent or disaffection amongst His Majesty's subjects or inhabitants of the Gold Coast; or

(6) to promote feelings of ill-will and hostility between different classes of the population of the Gold Coast :

It is not a seditious intention—

(a) to show that His Majesty has been misled or mis-taken in any of his measures; or

(b) to point out errors or defects in the Govt. or constitution of the Gold Coast as by law established or in legislation or in the administration of justice with a view to the reformation of such errors or defects; or

(c) to persuade His Majesty's subjects or inhabitants of the Gold Coast to attempt to procure by lawful means the alteration of any matter in the Gold Coast as by law established other than that referred to in para. (2) of this sub-section; or

(d) to point out with a view to their removal, any matters, which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Gold Coast.

Provided that none of the acts or things mentioned in provisos (a), (b), (c) and (d) shall be deemed to be lawful if they are done in such a manner as to effect or be likely to effect any of the purposes (1) to (6) which are declared in this section to be a seditious intention.

'Seditious words' are words expressive of a seditious intention.

'Seditious writing' includes anything intended to be read and any sign or visible representation which is expressive of a seditious intention."

At the trial a plea of not guilty was entered. The appellant admitted the writing and publication of the article. His defence was that the article was not seditious and that it was not calculated to bring the Govt. of the Gold Coast Colony into hatred and contempt. A great deal of evidence was called as to the

application of the article to the affairs of the Colony. Notwithstanding the statements of witnesses for the defence that they did not read the article as having reference to the Gold Coast Colony, it was not really in dispute that the appellant had the Govt. of the Colony in view when he wrote the article and that it referred to legislation and events generally in the Colony. There was no evidence of any outbreak of violence or of any manifestation of hostility to the Govt. of the Colony as a result of the article.

The case presented by Counsel for the appellant for their Lordships' consideration was that the prosecution could not succeed unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention. The foundation for these submissions was sought in the summing up by Cave, J. in *R. v. Burns* (1) quoted at length in Russell on Crime (9th edition) pp. 89—96. Reference was also made to a number of cases on the law of sedition in English and Scottish Courts, which, it was said, supported the statement of the law by Cave, J. Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case however, arose in the Gold Coast Colony and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly, the language of the section, under which the appellant was charged, lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English Law of sedition by Stephen, J. in the Digest of Criminal Law (7th edition), articles 123-126, quoted with approval by Cave, J. in his summing up in *R. v. Burns* (1). The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony and not in English or Scottish cases that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances

(1) (1888) 16 Cox. C C 355.

of the people of the Colony. The elaborate structure of s. 330 suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions however authoritative of the Law of England or of Scotland.

In these circumstances, their Lordships turn to the Code, and they find nothing in the section under consideration to support the appellant's contentions. "Seditious words," in the terms of sub-s. (8) "are words expressive of a seditious intention." By an earlier definition in the same sub-section, "A seditious intention" is an intention to bring into hatred or contempt...the Govt. of the Gold Coast as by law established."

Their Lordships find these words clear and unambiguous. Questions will necessarily arise in every case as in this case as to the facts to which it is sought to apply these definitions. Fine distinctions may have to be drawn between facts which justify the conclusion that the intention of the person charged was to "bring into hatred or contempt.....the Govt. of the Gold Coast," and facts which are consistent only with the view that the intention was no more than, in the words of a later part of sub-s. (8), "to point out errors or defects in the Govt. of the Gold Coast." It is quite another thing to add words which are not in the Code and are not necessary to give a plain meaning to the section. Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result, and their Lordships are unable to import words into s. 330 which would be necessary to support the appellant's argument.

The submission that there must be some extrinsic evidence of intention, outside the words themselves, before seditious intention can exist must also fail and for the same reason. If the words are seditious by reason of their expression of a seditious intention as defined in the section the seditious intention appears without any extrinsic evidence. The Legislature of the Colony might have defined "seditious words" by

reference to an intention proved by evidence of other words or overt acts. It is sufficient to say they have not done so.

For the reasons indicated this appeal should be dismissed and their Lordships will humbly advise His Majesty accordingly.

D. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. Hy. S. L. Polak & Co.

Solicitor for the Respondent:—Mr. Burchells.

ALLAHABAD HIGH COURT

First Appeals Nos. 318 and 327 of 1935

September 11, 1939

IQBAL AHMAD AND BAJPAI, JJ.

ANANT RAI AND ANOTHER—DEFENDANTS
APPELLANTS

versus

BHAGWAN RAI—PLAINTIFF AND ANOTHER—
DEFENDANT—RESPONDENTS

Pre-emption—Suit for—Exception to validity of items of consideration which have in fact changed hands, if can be taken—Vendee having influence over vendor—Burden of proving reality of consideration—Agra Pre-emption Act (XI of 1922), s. 17—Pre-emption decree, when can be passed—Minor—Election—Minor on attaining majority paying off debt incurred by him during minority—If can subsequently bring suit for refund.

The right of pre-emption is a right of substitution for the buyer and it is not open to a plaintiff in a pre-emption suit, while claiming to enforce this right of substitution, to take exception to the validity of the items of sale consideration when, as a matter of fact, those items of consideration have changed hands. [p. 6, col. 2.]

Where therefore, the vendor who had executed a mortgage during his minority in favour of the vendee, agrees on attaining majority at the time of the sale to pay off the mortgage debt and the vendee agrees to set off that amount out of the total sale consideration entered in the sale deed, the transaction is perfectly legal and its legality cannot be impugned either by the vendor or the pre-emptor.

The fact that the vendee had some influence over the vendor is an additional circumstance tending to cast doubt on the genuineness of the amount of consideration as entered in the sale deed. That being so, the burden of proving that the ostensible consideration was the real consideration is on the vendee. 127 Ind. Cas. 589 (2), relied on. [p. 7, col. 1.]

Under s. 17, Agra Pre-emption Act, a decree for pre-emption can be passed in favour of a plaintiff only on payment of either the "actual price" paid by the vendee or on payment of the market value of the property. [p. 6, col. 1.]

It is perfectly permissible at law for a person after attaining majority to elect to pay the debt incurred by him during his minority. [*ibid.*]

If therefore a person after attaining majority has paid the debt due on the mortgage executed by him during his minority, he cannot subsequently bring a suit for the refund of that amount for the simple reason that a contract entered into by a minor though void is not unlawful [*ibid.*]

F. As. from the decision of the Additional Sub-Judge, Ballia, dated April 30, 1935.

Mr. N. C. Vaish, for the Appellants.

Mr. J. P. Bhargava, for the Respondents.

Iqbal Ahmad, J—This is an appeal by defendant-vendees in a pre-emption suit. The plaintiff-respondent has also assailed the decree of the Court below by a cross-appeal which has been numbered as First Appeal No. 327 of 1935. The dispute in both the appeals is about the consideration of the sale sought to be pre-empted. The sale sought to be pre-empted was effected on July 22, 1933, by Kailashpati Rai, defendant No. 3, in favour of Anant Rai, and Trilok Rai, defendants Nos. 1 and 2. The property sold was an area of 24 *bighas* 1 *biswas*, 4 *dhurs* in Patti Mukhraj Rai, Mohal Debi Rai of village Pipra Kalan in the District of Ballia. Village Pipra Kalan is a *bigha doham* village. The revenue of the property sold was Rs. 17-6-0 and the consideration entered in the sale deed was Rs. 13,000. This sale consideration was made up of the following items :

1. Due on a simple mortgage dated January 4, 1929, executed by Kailashpati Rai in favour of Anant Rai and Trilok Rai vendees	Rs. 6,000
2. Due on a possessory mortgage deed in favour of one Ram Autar Rai	" 3,500
3. Due on a possessory mortgage deed in favour of one Mangal Rai	" 1,000
4. Due on a <i>sarkhat</i> of Jeth Badi 13 Sambat 1988 executed by Kailashpati in favour of one Beni Madho	" 2,050
5. Paid to the vendor prior to registration	" 250
6. Paid before the Sub-Registrar	" 200
Total	Rs. 13,000

There was no dispute in the Court below as regards Items Nos. 2, 3 and 6 of the consideration noted above and the genuineness of the remaining items of consideration was impugned by the plaintiff in that Court. The Court below has held that the sum of Rs. 250 (Item No. 5) was paid to the vendor before registration, and this finding of the Court below has not been assailed before us. The dispute in the two appeals is now confined as to Item No. 1 and Item No. 4 of the sale consideration.

The mortgage deed dated January 4, 1929 (Item No. 1) was for a sum of Rs. 2,300 out of which Rs. 2,088 were paid before the Sub-Registrar and Rs. 212 were credited towards two previous *sarkhats* executed by Kailashpati in favour of the vendees. The sum of Rs. 6,000 entered as Item No. 1

was due on account of principal and interest of the said mortgage. The plaintiff's case was that the real consideration of the mortgage was only Rs. 300 and that on the date of the sale sought to be pre-empted the amount due on the basis of that mortgage was only Rs. 400. This case of the plaintiff failed in the Court below and that Court held that the mortgage deed dated January 4, 1929, was for a consideration of Rs. 2,300 and that a sum of Rs. 6,000 was due to the vendees on the basis of that mortgage on the date of the sale. This finding of the Court below has not been assailed in appeal before us.

The Court below however held that out of the sum of Rs. 6,000 due on the basis of the mortgage the vendees were not entitled to get a sum of Rs. 5,600. It was alleged by the plaintiff that Kailashpati was a minor on January 4, 1929, when the mortgage deed was executed and the mortgage transaction was therefore void and could not be ratified by Kailashpati on attaining majority. The plaintiff therefore maintained that he was not liable to pay to the vendees the sum of Rs. 6,000 that was due on the basis of the mortgage. This contention of the plaintiff was accepted by the Court below, but in view of the admission made by the plaintiff that a sum of Rs. 400 was due on the basis of the mortgage the Court below declined to award to the vendee a sum of Rs. 5,600 out of Item No. 1 of the sale consideration. The present appeal by the vendees is directed against this decision of the Court below.

As regards Item No. 4, *viz.*, the amount alleged to be due on the basis of the *sarkhat*, the plaintiff's case was that the *sarkhat* was a fictitious document, was antedated and that no amount was, as a matter of fact, due from Kailashpati vendor to Beni Madho and that Item No. 4 was inserted in the sale deed simply with a view to defeat the plaintiff's right of pre-emption. The Court below overruled this contention of the plaintiff and held that the *sarkhat* was a genuine document and that Item No. 4 of the sale consideration was correct. First Appeal No. 327 of 1935 has been filed by the plaintiff with regard to Item No. 4 of the consideration. It is common ground that Items Nos. 2 and 3 of the sale consideration have not yet been paid by the vendees to Ram Autar Rai and Mangal Rai. As a result of its findings the Court below passed a decree in the plaintiff's favour conditional on the payment of a sum of Rs. 2,900.

We first proceed to deal with the vendees' appeal which relates to Item No. 1 of the sale consideration. The Court below has found that Kailashpati was a minor on the date of the execution of the mortgage deed dated January 4, 1929 and this finding is amply borne out by the evidence in the case. The consideration of the case must therefore be approached on the assumption that the mortgage deed having been executed by Kailashpati when he was a minor was void in law. The fact however remains that Kailashpati had attained majority on the date of the sale and elected to discharge the debt due on the mortgage by sale of his property. The question then arises whether it is open to the plaintiff in the present suit to impugn the validity of this item of the sale consideration. The question whether or not an agreement entered into by a minor can be ratified by him after attaining majority formed the subject of consideration by a Full Bench of this Court in *Suraj Narain v. Sukhu Ahir* (1). All the three learned Judges constituting the Bench delivered three separate judgments. Sulaiman, Ag. O. J. was inclined to the view that if no further advance is made at the time of ratification, the ratification of a contract entered into by a person during his minority is void and unenforceable. In the course of his judgment he referred to cases in which on receiving a further advance a minor after attaining majority had ratified the contract entered into by him during his minority and it was held that the ratification was valid and binding and he did not adversely criticise those cases. Mukerji, J., held that it is always open to a person on attaining majority to ratify an agreement entered into by him during his minority. Boys, J., held that consideration received by a minor during his minority cannot be a good consideration for ratification after he has attained majority. In the present appeal it is argued on behalf of the vendees that as some consideration, apart from the amount due on the basis of the mortgage, was paid by the vendees to Kailashpati, it was open to Kailashpati to ratify the mortgage and to pay the amount due to the vendees, and in support of this contention reliance is placed on the judgment of Sulaiman, Ag. O. J. On the other hand, it is contended on behalf of the plaintiff that the observations of Sulaiman, Ag. O. J. about fresh advances being made at the

time of ratification were in the nature of *obiter dicta* and that, apart from the Full Bench decision, the weight of authority is in favour of the view that contracts entered into during minority cannot be ratified after the minor has attained majority. In the view that we take, it is unnecessary to express an opinion about the merits of the contentions advanced on behalf of the parties.

It is manifest from a perusal of s. 17, Agra Pre-emption Act that a decree for pre-emption can be passed in favour of a plaintiff only on payment of either the 'actual price' paid by the vendee or on payment of the market value of the property. In the present case there cannot be the slightest doubt that Kailashpati agreed at the time of the sale to pay to the vendees the amount due on the basis of the mortgage of 1929 even though that mortgage was void in law. It is equally clear that the vendees agreed to set off a sum of Rs. 6,000 in lieu of the mortgage debt out of the total sale consideration entered in the sale deed. In other words, a consideration of Rs. 6,000 passed from the vendees to the vendor notwithstanding the fact that the mortgage of 1929 was unenforceable at law. The right of pre-emption is a right of substitution for the buyer and it is not open to a plaintiff in a pre-emption suit, while claiming to enforce this right of substitution, to take exception to the validity of the items of sale consideration when, as a matter of fact, those items of consideration have changed hands. Here we are not concerned with any question of ratification of a contract entered into by a person during his minority. The case before us is one in which a person after attaining majority has elected to pay the debt incurred by him during his minority and this is perfectly permissible at law.

To put the matter in another way. If Kailashpati after attaining majority had paid the amount due on the basis of the mortgage of 1929 to the vendees he could not subsequently bring a suit for the refund of that amount for the simple reason that a contract entered into by a minor though void is not unlawful. The set-off of Rs. 6,000 out of the entire sale consideration was to all intents and purposes tantamount to payment of the mortgage debt by Kailashpati to the vendees. The legality of the transaction cannot therefore be impugned either by Kailashpati or by the plaintiff. In this view of the matter the Court below was wrong in holding that the plaintiff was not liable to

(1) 51 A 164; 11 Ind. Cas. 159; A I R 1928 All 440; 26 A L J 1024 (F B).

pay the entire amount due on the basis of the mortgage of January 4, 1929, and the appeal of the vendees must succeed.

We now come to the plaintiff's appeal. This appeal, as already stated, relates to the amount alleged to be due on the basis of the *sarkhat* in favour of Beni Madho. We are not satisfied about the genuineness of this item of the sale consideration. In the plaint it was alleged that Beni Madho was a relation of the vendees and that the *sarkhat* in his favour was fictitious. In the written statement filed by the vendees the allegation that Beni Madho was their relation was denied and so was the allegation about the fictitious nature of the *sarkhat*. At the trial the suggestion of the plaintiff was that Beni Madho was a relation of the vendees. The vendees on the other hand maintained that Beni Madho was a relation of Bhagwan Rai, plaintiff. The suggestion of neither party was substantiated. There are however other circumstances that irresistibly point to the conclusion that the *sarkhat* was not a genuine document.

In holding the *sarkhat* to be genuine the Court below was to a great extent influenced by what it considered to be the market value of the property sold. In the course of its judgment, it made reference to certain exemplars on which reliance was placed by the vendees and held that the property in this village was sold or mortgaged at a consideration varying between Rs. 625 to Rs. 775 per *bigha*. The Court below however took no note of a sale deed dated November 17, 1931, on which reliance was placed by the plaintiff with a view to show that the market value of the property in the village in question did not exceed Rs. 400 per *bigha*. By this sale deed an area of about 8 *bighas* in village Pipra Kalan and of about 4 *bighas* in two other villages was conveyed for a sum of Rs. 3,700. Even if we exclude from consideration the 4 *bighas* of the other two villages the value of the property in Pipra Kalan does not exceed Rs. 450 per *bigha*. That being so, the Court below was not right in proceeding on the assumption that the market value of *zemindari* in Pipra Kalan was at the rate of about Rs. 700 per *bigha*. The fact that according to the exemplars filed by the plaintiff the market value per *bigha* of land in Pipra Kalan did not exceed Rs. 450 was a circumstance pointing to the conclusion that the ostensible price entered in the sale deed was not the actual price. Further, we

have the fact that the vendees had dealings with Kailashpati from a time when the latter was a minor and eventually succeeded in getting a sale deed from him partly in consideration of a debt, that was unenforceable at law. This shows that the vendees had some influence over Kailashpati. This was an additional circumstance tending to cast doubt on the genuineness of the amount of consideration as entered in the sale deed. That being so, the burden of proving that the ostensible consideration was the real consideration was on the vendees *vide Dhanukdhari Singh v. Suresh Singh* (2); and this burden in our judgment was not discharged. The *sarkhat* in question purports to be for a sum of Rs. 2,100 and according to the entries in the same a sum of Rs. 2,050 was paid by the vendees to Beni Madho a few days after the execution of the sale deed. To prove the *sarkhat* and the payment of the sum of Rs. 2,050 three witnesses were examined by the vendees. One of those witnesses was Trilok Rai, one of the vendees. He deposed that he paid Rs. 2,050 to Beni Madho towards the *sarkhat*. He stated that he had summoned Beni Madho "but he did not take the summons". He deposed that when he paid the amount to Beni Madho, Kailashpati and Damri were present. Kailashpati was however not called as a witness in the case. His evidence would have been of great importance and no reason has been assigned by the vendees for the omission to examine Kailashpati. Damri Rai stated that the sum of Rs. 2,050 was paid to Beni Madho by Trilok Rai in his presence. In cross-examination he stated that he had no connection with Trilok Rai or Anant Rai. This statement of Damri was undoubtedly untrue as Trilok Rai admitted in his evidence that "Damri is of my family." Damri also admitted that Trilok Rai had once figured as a witness in a civil suit on his behalf, Damri was therefore not an independent witness. The last witness examined by the vendees on this part of the case was a man named Ram Janam Rai. He was a marginal witness of the sale deed in dispute. He admitted that Damri Rai was his uncle by relationship.

The oral evidence adduced by the vendees in proof of the payment of the amount due on the basis of the *sarkhat* was worthless. Apart from this, no reason was assigned by the vendees for the non-

(2) (1930) A L J 561; 127 Ind. Cas. 589; A I R 1930 All. 363; 52 A 532; Ind. Rul. (1930) All. 941.

production of Beni Madho as a witness in the case. Even if Beni Madho did not accept the summons once, the vendees could very well have made another attempt to summon him and to produce him as a witness. They however did nothing of the kind. The *sarkhat* is scribed by a man named Ram Kishun Rai who is a servant of Beni Madho. Even Ram Kishun Rai was not produced as a witness in the case. If Beni Madho does money-lending business, as is alleged on behalf of the vendees, Ram Kishun Rai could have been summoned along with the account books of Beni Madho.

The *sarkhat* shows that the entire amount advanced was taken by Kailashpati for payment to one Parmeshwar Rai. Parmeshwar Rai was also not called as a witness. No reason worth the name has been assigned by the vendees for not producing Beni Madho, Ram Kishun Rai, Parmeshwar Rai and Kailashpati. It cannot be doubted that the evidence of these persons would have been of great importance on the question of the genuineness or otherwise of the *sarkhat*. The best possible evidence that could easily be produced by the vendees was withheld by them and such evidence as has been produced is worthless. The only point that is in favour of the vendees is that the *sarkhat* is on a stamp paper. The stamp paper is however of only eight annas. It may very well be that Kailashpati had such a stamp paper in his possession. We have considered the evidence bearing on this part of the case and have come to the conclusion that the burden that lay on the vendees to prove the genuineness of this part of the sale consideration has not been discharged.

Before concluding this judgment we may observe that we have some suspicion in our mind that as the learned Judge of the Court below felt compelled on supposed legal ground to disallow the major portion of the amount due on the basis of the mortgage of 1929 he, in order to compensate the vendees for the loss, stretched a point in their favour so far as the *sarkhat* in question was concerned. For the reasons given above Appeal No. 327 of 1935 must also prevail so far as Item No. 4 of the sale consideration is concerned. The result is that both this Appeal and First Appeal No. 327 of 1935 are allowed and the decree of the Court below is varied to this extent that the plaintiff's suit for pre-emption is decreed on payment of Rs. 6,450.

We allow three months' time to the plaintiff for payment of this amount. In default of payment the suit shall stand dismissed with costs in both Courts. If the amount is paid within the time allowed the parties will pay and receive costs in proportion to their failure and success in both the Courts. A decree in terms of O. XX, r. 14, Civil P. C. will be drawn up by the office.

s.

Decree varied.

BOMBAY HIGH COURT

Civil Revision Application No. 377 of 1938.

March 17, 1939

MAOKLIN AND LOKUR, JJ.

MULJEE SICKA & Co.,—APPLICANTS

versus

MUNICIPAL COMMISSIONER,

BOMBAY—OPPONENTS.

Government of India Act, 1935 (25 and 26 Gao. V, Ch. 42), s. 224 (2)—Powers of High Court to issue writ of certiorari, if curtailed—Certiorari—Writ of—Powers of High Court to issue—Chief Judge of Small Cause Court hearing appeal under s. 217, City of Bombay Municipal Act (III of 1888), acting without jurisdiction—His act, if can be controlled by writ of certiorari—Bombay City Municipal Act (III of 1888), s. 151 (2)—Value of machinery, whether to be deducted.

Sub-section (2) of s. 224, Govt. of India Act, does not curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact s. 223 preserves those powers. All that sub-s. (2) of s. 224 means is that the High Courts cannot so interpret sub-s. (1) of that section as to usurp the powers which they did not possess before. [p. 11, col. 1.]

The High Court has power to issue a writ of certiorari in respect not only of the orders of subordinate Courts, but also of the proceedings of any tribunal or officer who, though not a Court, is yet acting judicially in these proceedings. Although the Chief Judge of the Small Cause Court, Bombay, hearing an appeal under s. 217, City of Bom. Municipal Act, 1888, be not a Court, his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority, his act can be controlled by the High Court by a writ of prohibition or certiorari, as the case may be. It is no doubt true that sub-s. (1) of s. 219 of the Act provides that the decision of the Chief Judge upon any appeal under s. 217 against any such value or tax shall be final. But that only means that there are no further appeals but it does not affect the power of the High Court to issue a writ of certiorari. There are two conditions to be fulfilled before a writ can be issued, namely that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. An officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. The mere fact that the order of the Chief Judge of the Small Cause Court, Bombay, is opposed to the principle of *res judicata*, and that the provisions of

sub-s. (2) of s. 154, City of Bom. Municipal Act, have been misinterpreted by him are not adequate grounds for the issue of a *writ of certiorari*. [p. 11, col. 2; p. 12, cols. 1 & 2.]

[Case-law referred to.]

Sub-section (2) of s. 154, City of Bom. Municipal Act, does not require that the value of machinery should be deducted from the rateable value of the buildings. What the sub-section says is that the value of the machinery "shall not be included in the rateable value of such building or land." [p. 13, col. 1.]

O. R. App. from the order passed by the Chief Judge, Court of Small Causes, Bombay, in Municipal Appeal No. M/96 of 1937.

Messrs. G. N. Thakor, H. M. Choksi, S. J. Shah and C. S. Trivedi, for the Applicants.

Sir Jamshedji Kanga, for the Opponents.

Lokur, J.—This is an application for the issue of a *writ of certiorari* in respect of the order passed by the Chief Judge, Small Cause Court, Bombay in Municipal Appeal No. M/96 of 1937. The petitioner firm owns several buildings on the Vithal-bhai Patel Road and they are liable to the Bombay Municipal Corporation to pay a certain percentage of their rateable values as property taxes under ss. 139 and 140, City of Bom. Municipal Act, 1888. For this purpose, the Municipal Commissioner has to fix the rateable value of each building assessable to property tax in accordance with the provisions of s. 154 of the Act. According to that section the rateable value of a building or land is the amount of the annual rent for which such building or land might reasonably be expected to let from year to year, minus a sum equal to ten per centum of the said annual rent, to be deducted in lieu of all allowances for repairs or on any other account whatever. Sub-s. (2) of section 154 says:

"The value of any machinery contained or situate in or upon any building or land shall not be included in the rateable value of such building or land."

When the rateable value of one of the petitioners' buildings known as the "Moolji Mahal" was fixed by the Municipal Commissioner an appeal was presented by him to the Chief Judge of the Small Cause Court, Bombay, under s. 217 of the Act, complaining that in fixing that value the Municipal Commissioner should have, but had not, excluded the value of the machinery, namely three lifts and one pump, provided in the premises of the building. Mr. Chitre who was then the Chief Judge allowed the appeal and ordered the exclusion of the value of the lifts and pump; and for that purpose he appointed an expert as

a Commissioner to assess their value. The valuation of the other buildings was postponed during the pendency of the appeal; but even after the appeal was decided in favour of the petitioners the Municipal Commissioner ignored it and fixed the rateable value of the two other buildings of the petitioners without excluding the value of the lifts and pumps with which they were provided. The petitioners again appealed to the Chief Judge, but this time Mr. Indranarayan who had succeeded Mr. Chitre to that office took a different view and held that although lifts and pumps might be "mainly or partly machinery" no deduction could be allowed from the annual rents of the buildings for the value or cost of the lifts and pumps under sub-s. (2) of s. 154 of the Act. He observed that in taking the rents reasonably expected to be received as the basis for assessment the costs of the lifts as such had nowhere been in fact included. He therefore rejected the petitioners' request in that behalf and it is against that order that the petitioners have applied for a *writ of certiorari*.

The original application of the petitioners asked for a revision of the order of the Chief Judge under the extraordinary and inherent jurisdiction of this Court and its power of revision and superintendence over the Courts subordinate to it. But, when this application was admitted the petitioners obtained permission and added a prayer for the issue of a *writ of certiorari* and it was practically conceded that as the Chief Judge was acting as a *persona designata* and not as a Court in hearing the appeal an application for revision under s. 115, Civil P. C., 1908, was not competent.

The first question that arises is whether this Court has power to issue a *writ of certiorari*. No instances of any such writ having ever been issued by this Court have been brought to our notice, but there are numerous cases in which such writs have been issued by other High Courts and we feel no doubt that we have power to do so in a proper case. The nature of this writ is thus described in Short and Mellor's Crown Practice (Edn. 2, p. 14):

"The *writ of certiorari* is the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions, requires the Judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division whether for the purpose of examining into the legality of such proceedings or for giving fuller or more satisfactory effect to them than could be done by the Court below."

Both the writ of prohibition and the writ of certiorari are of great antiquity in England, forming part of the powers by which the King's Courts restrained Courts of inferior jurisdictions from exceeding their powers. As observed by Atkin, L. J. in *Rex v. Electricity Commissioners*; *London Electricity Joint Committee Co.* (1) (p. 204):

"Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

It is true that the Chief Judge of the Small Cause Court, Bombay, is not a Court when hearing municipal appeals, but acts as a *persona designata*, as the wording of s. 217, City of Bom Municipal Act, 1888, shows. It has been so held in *Ahmad Suleman v. Municipal Commissioner, Bombay* (2) and the High Court is held to have no jurisdiction to interfere with his decision under s. 115, Civil P. C., 1908. In England also, originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word "Court." But, as observed by Bankes, L. J. at p. 193* of the case cited above, "as statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies." The scope of the writ of certiorari is thus described by May, C. J., in *Queen v. Corporation of Dublin* (3), (p. 376):

"It is established that the writ of certiorari does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body em-

powered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

This passage is quoted by Lord Atkin with approval in *Frome United Breweries Co. v. Bath County Borough Justices* (4), at p. 602. When the Supreme Court of Judicature was established in 1823, cl. 5, Letters Patent, invested it with such jurisdiction and authority as the Justices of the Court of King's Bench had and might lawfully exercise, within that part of Great Britain called England, as far as circumstances would admit. It is brought to our notice that cl. 55, which specifically refers to the writ of certiorari, mentions only the various Courts, Justices and Magistrates, and says—

"...the said Supreme Court of Judicature at Bombay is hereby empowered, and authorized to award and issue a writ or writs of Mandamus, Certiorari Procedendo, or error, to be prepared in manner above-mentioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment."

This clause is not intended to curtail the powers of the Supreme Court of Judicature conferred upon it by cl. 5, but only to specify some of those powers in express terms. It does not take away from it any of the powers exercised by the King's Bench in England. This is made clear by Abdur Rahim, Offg. C. J. in the Full Bench decision in *Mrs. Annie Besant v. Emperor* (5) where he points out that while the powers of revision and control are available only over the proceedings of ordinary Courts, a writ of certiorari is issued not only to Courts, but to tribunals specially constituted and entrusted with duties of a judicial character. Thus, while cl. 55 specifies the powers of the High Court with regard to certain Courts and Magistrates, the powers exercised by the King's Bench conferred upon it by cl. 5 are left untouched. When the Act of 1861, 24 & 25 Vic., c. 104, abolished the Supreme Court and the Court of Sudder Dewanny Adawlut and Sudder Foujdarry Adawlut, and established the High Court, cl. 9 of the Act transferred to them:

"All jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts".

Even in that Act the powers which the

(1) (1924) 1 K B 171 (204); 93 L J K B 390; 130 L T 164; 88 J P 13.

(2) 54 B 224; 125 Ind. Cas. 448; A I R 1930 Bom. 231; 32 Bom. L R 178; Ind. Rul. (1930) Bom. 353.

(3) (1878) 2 Ir. 371 (376).

* Page of (1924) 1 K B.—[Ed.]

(4) (1926) A O 586 (602); 95 L J K B 730; 135 L T 482; 50 J P 121; 24 L G R 261; 42 T L R 571.

(5) 39 M 1164; 37 Ind. Cas. 607; A I R 1918 Mad. 1266; 18 Or. L J 239; 32 M L J 151; (1916) 2 M W N 497; 4 L W 625; 21 M L T 190 (F B).

Supreme Court of Judicature possessed over all its Subordinate Courts were specifically granted by cl. 15 without thereby intending to take away from them the other powers which are exercised by the King's Bench in England. All those powers were continued by the Amended Letters Patent granted on December 28, 1865. Interpreting the Letters Patent of the High Court of Bengal which was similarly worded, their Lordships of the Privy Council held in *Surendranath Banerjee v. Chief Justice and Judges of the High Court of Bengal* (6) that the common law powers of the Court of King's Bench in England were vested in the Bengal High Court. That proposition was held to apply equally to this High Court by Shah, J. in *Mahomedalli v. Ismailji* (7), at p. 474. Those powers were again continued by s. 106, sub-s. (1), Govt. of India Act, 1915, and the powers of superintendence over the Courts subordinate to it were conferred by s. 107. This power of superintendence is held to include the power to revise the orders of Subordinate Courts: *Sholapur Municipality v. Tuljaram Krishnasa* (8). The corresponding s. 224, Govt. of India Act, 1935 however contains a new clause which did not find place in s. 107 of the Act of 1915. Sub-s. (2) of s. 224 runs as follows:

"Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision".

This clause cannot have been intended to curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact s. 223 preserves those powers. All that sub-s. (2) of s. 224 means is that the High Courts cannot so interpret sub-s. (1) of that section as to usurp the powers which they did not possess before. This is clear from the expression "not otherwise subject to appeal or revision." It is true that this clause may throw some doubt as to whether the remarks made in *Sholapur Municipality v. Tuljaram Krishnasa* (8), that though an order of a Subordinate Court may not be subject to revision under s. 115, Civil P. O., it can be revised in the exercise of the powers of superintendence conferred by s. 107, Govt. of India Act of 1915, can now hold good. All this discussion is more or less academic, since s. 224, Govt. of India Act of

(6) 10 I A 171; 10 C 109; 4 Sar. 474 (P O).

(7) 28 Bom. L. R. 471 (474); 95 Ind. Cas. 49; AIR 1926 Bom. 332; 27 Cr. L J 721; 50 B 616.

(8) 55 B 544; 134 Ind. Cas. 1240; AIR 1931 Bom. 582; 33 Bom. L. R. 1067; Ind. Rul. (1932) Bom. 24 (2).

1935, deals with the administrative functions of the High Courts, as the marginal note shows. It does not affect the powers conferred upon the High Courts by the Letters Patent and the Charter Act, powers co-extensive with those of the King's Bench in England, and, as I have already pointed out, the Court of the King's Bench has power to issue a *writ of certiorari* in respect not only of the orders of Subordinate Courts, but also of the proceedings of any tribunal or officer who, though not a Court, is yet acting judicially in those proceedings. It is not disputed that, although the Chief Judge of the Small Cause Court, Bombay, hearing an appeal under s. 217, City of Bom. Municipal Act, 1888, be not a Court, his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority, his act can be controlled by this Court by a writ of prohibition or *certiorari*, as the case may be. It is no doubt true that sub-s. (1) of s. 219 of the Act provides that the decision of the Chief Judge upon any appeal under s. 217 against any such value or tax shall be final. But that only means that there are no further appeals, but it does not affect the power of this Court to issue a *writ of certiorari*. The Privy Council had to consider the effect of the insertion of such words in enactments in relation to the remedy by way of a *writ of certiorari* in *Rex v. Nat Bell Liquors Ltd.* (9) and their Lordships observe as follows (pp 159-160):

"Long before Jervis's Acts statutes had been passed which created an inferior Court, and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by *certiorari*."

As remarked in Halsbury's Laws of England, Edn. 2, Vol. 9, p. 861, para 1455:

"*Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior Court, nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior Court."

It is thus clear that if the power to issue a *writ of certiorari* is vested in the High Court, then it is not, and cannot be, taken away by s. 219, City of Bom. Municipal Act, 1888. We therefore hold that we have power to issue a *writ of certiorari* if a proper case is made out. Having come to this conclusion, the next question that arises is whether the case before us (9) (1922) 2 A O 128 (159-160); 91 L J P O 146; 127 L T 437; 33 T L R 541.

justifies the issue of such a writ. The two objections which have been raised against the order of the learned Chief Judge of the Small Cause Court, Bombay, are that it is opposed to the principle of *res judicata* and that the provisions of sub-s. (2) of s. 154, City of Bom. Municipal Act, 1888, have been misinterpreted. Mr. Thakor, the learned Counsel for the petitioners, did not seriously press the first objection as an adequate ground for the issue of a writ of *certiorari*. Even in an application for revision under s. 115, Civil P. C. an erroneous decision on the question of *res judicata* is not regarded as sufficient to justify interference; *Hari Bhikaji v. Naro Vishvanath* (10). It is therefore not necessary to consider whether the learned Chief Judge was bound by the decision given in another case by his predecessor. Mr. Chitre was dealing with the rateable valuation of a different building and for a different year, and although the learned Chief Judge might have taken into consideration the reasons given by Mr. Chitre in arriving at his conclusion, he was not bound to accept and follow his reasoning, and his refusal to do so cannot be regarded as a ground for issuing a writ of *certiorari*. The limits within which such a writ can be issued are clearly set out by Atkin, L. J. in *Rex v. Electricity Commissioners; London Electricity Joint Committee Co.* (1) to which I have already referred, as follows (p. 205*):

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

This passage was quoted with approval by Lord Hewart, O. J. in *Rex v. Minister of Health; Davis Ex parte* (11) at p. 627. The law is summarized in Ryde's Law and Practice of Rating, Edn. 6, at p. 702, thus:

"If the Court of Quarter Sessions refuses to exercise jurisdiction when it has it, the King's Bench will by *mandamus* compel that Court to hear and determine the appeal. And if the Quarter Sessions exercise powers in excess of their jurisdiction, or where they have none, the King's Bench will bring up the proceedings by a writ of *certiorari* and quash them; for there is inherent in the Court of King's Bench authority to bring before it by writ of *certiorari* save where the writ is taken away by statutory enactment or charter, the proceedings of any Court of inferior jurisdiction, with a view to

(10) 9 B 432.

(11) (1929) 1 K B 619 (627); 98 L J KB 636; 141 L T 6; 27 L G R 677; 73 S J 49; 45 T L R 345.

*Page of (1924) 1 K. B.—[Ed.]

quash such proceedings. But this applies only where there is some defect of jurisdiction, or informality or defect apparent on the face of the proceedings. If the Sessions have jurisdiction to hear an appeal and do so, but decide wrongly, the King's Bench will not interfere either by *mandamus* or *certiorari*."

Thus, there are two conditions to be fulfilled before a writ can be issued, namely that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. An officer of tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. This aspect has been fully discussed by Lord Sumner in *Rex v. Nat Bell Liquors Ltd.* (9). In that case it was held that a conviction by a Magistrate for a non-indictable offence cannot be quashed on *certiorari* on the ground that the depositions showed that there was no evidence to support the conviction, or that the Magistrate had misdirected himself in considering the evidence; and it was held that absence of evidence did not affect the jurisdiction of the Magistrate to try the charge. In the course of his judgment his Lordship observed (p. 151*):

"A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has and not a usurpation of a jurisdiction which he has not."

Similarly, the Chief Judge of the Small Cause Court, Bombay, in this case, may have wrongfully interpreted sub-s. (2) of s. 154, City of Bom. Municipal Act and arrived at an erroneous conclusion; but, in doing so, he was acting within his jurisdiction and not in excess of the powers conferred upon him by s. 217 of the Act. Mr. Thakor relied upon the ruling in *Nundo Lal Bose v. Corporation for the Town of Calcutta* (12), which was a case under the Ben. Municipal Act of 1876. In that case the Commissioners had based the rateable valuation of the buildings on a percentage of the estimated cost of the buildings in entire disregard of the principle laid down in the Act, namely that it should be based on the gross annual rent at which any such house or land might reasonably be expected to let from year to year. In

(12) 11 O 275.

*Page of (1922) 2 A C.—[Ed.]

issuing a writ of certiorari. Garth, O. J. observed (p. 281*):

"In this it seems to me they acted beyond their powers. They had no right whatever to make the assessment upon any other basis than that which the Act prescribes. The principle upon which they ascertain the annual value of the premises appears to me to have been obviously fallacious; but whether it was so or not, it was an arbitrary test, and one which the law does not sanction."

Thus, the method followed by the Commissioners in Calcutta in assessing the rateable value of the buildings was not warranted by the Ben. Municipal Act, and, in adopting some other method, they were held to be acting beyond their powers. But in this case the learned Chief Judge of the Small Cause Court has interpreted sub-s. (2) of s. 154, City of Bom. Municipal Act, and fixed the rateable value of the petitioners' buildings according to the provisions of the Act in the light of his own interpretation. He had the power to interpret the sections of the Act, and if his interpretation be not correct, it does not justify the issue of a writ of certiorari.

It is argued that having held the lifts and the pump to be "mainly or partly machinery," the learned Chief Judge acted beyond his legal authority in including them in fixing the rateable value of the buildings. But that is not what he has actually done. In the previous appeal, Mr. Chitre had ordered the lifts and the pump to be separately valued and the value to be deducted from the rateable value of the buildings. Unfortunately, the wording of sub-s. (2) of s. 154, City of Bom. Municipal Act, is unhappy, and the word 'value' used at the beginning of the sub-section seems to have been intended to mean the rateable value. Even then the sub-section does not require that such value of machinery should be deducted from the rateable value of the buildings. What the sub-section says is that the value of the machinery "shall not be included in the rateable value of such building or land." Even assuming that the lifts and the pump are machinery attached to the building, it is difficult to see how their value is not to be included in the rateable value of the building or land, as they are amenities attached to the building for the convenience of the occupants. Sub-s. (1) of s. 154 requires Commissioner to find out the amount of the annual rent for which the building might reasonably be expected to let from year to year, and it is difficult to see how the annual rent can be estimated if the lift is

altogether left out of consideration. That is what the learned Chief Judge has said in his judgment. He says:

"In taking the rents reasonably expected to be received as the basis for assessment the cost of the lift as such has nowhere been in fact included, and I do not see that such a basis offends in any way against the provisions of s. 154."

He is right in saying that no deduction can be allowed from the annual rent of the building under sub-s. (2) of s. 154 as sub-s. (2) does not provide for such a deduction; but the learned Chief Judge has specifically stated that in assessing the reasonable rent of the building the cost of the lift has not been included. He was therefore acting within his jurisdiction, and we do not think that he has exceeded the legal authority vested in him by s. 154. This case is therefore not fit for the issue of a writ of certiorari.

In this view of the case it is not necessary to go into the question whether the interpretation placed upon sub-s. (2) of s. 154, City of Bom. Municipal Act by the learned Chief Judge is or is not correct. Unfortunately, that sub-section has been a source of fruitful litigation for several years past, and different Chief Judges have come to different conclusions in the light of their own interpretation of that sub-section. In Municipal Appeals Nos. M/8 and M/9 of 1922 the learned Chief Judge held that the value of lifts and pumps was not to be excluded from the rateable value of the building under s. 154, sub-s. (2) of the Act. In Municipal Appeal No. M/46 of 1936, Mr. Chitre took the opposite view, and now in this case Mr. Indranarayan has gone back to the view taken in 1922. In *Haji Dawood v. Municipal Commissioner of Bombay* (13) electric fittings and fans were held not to have been shown to be "machinery" within the meaning of s. 154, sub-s. (2), of the Act. All this divergence of view is due to the unhappy wording of that sub-section, and to the fact that in 1888, when the City of Bom. Municipal Act was passed, it could not have been in the contemplation of the legislators that a machinery like an electric lift would be a necessary amenity for a storied residential building. Even in England, prior to the passing of the Rating and Valuation Act of 1925, there had been a sharp controversy as to the inclusion in the valuation of machinery and plant and the extent to which the valuation was to be effected. The Act of 1925 has now made it clear in s. 24

(13) 24 Bom. L. R. 476; 67 Ind. Cas. 426; A I R 1922 Bom. 386.

that in the valuation of hereditaments containing machinery and plant no account shall be taken of such machinery or plant except those mentioned in Sch. III to the Act. That schedule includes, *inter alia*, lifts and elevators mainly or usually used by passengers. Section 154, sub-s. (2), City of Bom. Municipal Act, provides for the exclusion of "machinery" in the fixing of the rateable value of building, without making any such exception. If it be intended that the value of such machinery as lifts and pumps should not be excluded from consideration, then the Legislature must make it clear by suitably amending the sub-section and adding a schedule of exceptions as in the English Rating and Valuation Act of 1925. If the sub-section, as it stands, be strictly construed, it would lead to an absurd result as pointed out in the judgment of the learned Chief Judge. According to the accepted canons of interpretation of statutes, a fiscal enactment imposing a burden on the subject will be strictly construed in favour of such subject, and hence the sooner the sub-section is amended so as to convey clearly what is really meant, the better it will be for the public and the Corporation. We do not however feel called upon to express our considered opinion regarding the correct interpretation of the sub-section, since, even if the order complained of be not correct, we hold that this is not a case in which a *writ of certiorari* should be issued. On these grounds we discharge the Rule with costs.

Macklin, J.—I agree not only that this Court has power to issue a *writ of certiorari* in suitable cases, but also that an order passed by a *persona designata* like the Chief Judge will be a suitable case if it can be shown that the learned Chief Judge has in any way exceeded his jurisdiction. But I agree with the reasons given by my learned brother in thinking that he has not exceeded his jurisdiction, and that it is not open to us to interfere with his order, whether that order be right or wrong. On that view of the case, it is not necessary for us to decide whether his order is right or wrong; and speaking for myself, I am glad that it is not necessary for us to decide that point, since it would involve an interpretation of the very difficult language used in sub-s. (2) of s. 154, City of Bom. Municipal Act, 1888. To my mind, there are no less than three difficulties in that section. The word 'value' (in the expression "value of any machinery") is capable of meaning either the capital value or the annual value. The

word 'machinery' may be intended to be used as it is used in ordinary parlance, or it may have some special meaning as it has in the English Rating Act. And lastly the words "shall not be included in the rateable value" are by no means easy of practical application—at any rate if the section said just the opposite, namely that the value of the machinery was to be included in the rateable value, I do not quite know how the rating authorities would proceed to set about it. To my mind it is desirable that the point should be made clear since it is likely to be a source of difficulty in future, and it is obviously a point of considerable importance not only to the Municipality but to property owners also. I doubt even if the words as they stand in sub-s. (2) of s. 154 can be interpreted so as to correspond with the definition of "annual letting value" given in s. 3, Bom. Municipal Boroughs Act, 1925. It seems to me that it is a matter deserving the serious consideration of the Legislature in order that their intention, whatever that really be, may be clearly expressed.

Per Curiam.—Rule discharged with cost. Costs will be on the appellate side scale.

S.

Rule discharged.

CALCUTTA HIGH COURT

Civil Rules Nos. 1132 and 1153 of 1939

November 28, 1939

NASIM ALI AND NARSING RAU, JJ.
SARAT CHANDRA CHAKRABURTY—
MORTGAGEE—PETITIONER

versus

SASHI BHUSAN MANNA AND OTHERS—
OPPOSITE PARTY

Bengal Tenancy Act (VIII of 1885), s. 26-G—Order passed by Revenue Officer under s. 26-G, if can be revised under s. 115, Civil Procedure Code (Act V of 1908).

Section 26-G, Ben. Ten. Act, empowers a Court as well as a Revenue Officer to entertain applications. A Revenue Officer on the plain language of the statute is not therefore a Court. He is not subject to the appellate jurisdiction of the High Court. The mere fact that his order might have the effect of a decree of Civil Court does not make him a Court, far less a Court subordinate to the High Court within the meaning of s. 115, Civil P. C. His order cannot therefore be revised.

O. Rules issued from the application for setting aside order of the Revenue Officer (Sub-Divisional Officer), Diamond Harbour (24 Parganas), dated July 14, 1939.

Messrs. Saroj Kumar Maity (in No. 1153)

and *Sarat Chandra Janah* (in No. 1132), for the Petitioner.

Messrs. *Sarat Chandra Janah* (in No. 1153) and *Apurba Charan Mukherjee* (in No. 1132), for the Opposite Party.

Nasim Ali, J.—The orders complained of in these two rules are the orders of a Revenue Officer under s. 26-G, Ben. Ten. Act. That section empowers a Court as well as a Revenue Officer to entertain applications. A Revenue Officer on the plain language of the statute is not therefore a Court. A Revenue Officer is not subject to the appellate jurisdiction of this Court. The mere fact that his order might have the effect of a decree of Civil Court does not make him a Court, far less a Court subordinate to the High Court within the meaning of s. 115, Civil P. O. Further I am not satisfied that the decision of the Revenue Officer in these two cases is wrong on the merits. I therefore discharge both the Rules. There will be no order as to costs in these two rules.

Narsingh Rau, J.—The main question arising in these rules is whether an order made by a Revenue Officer under s. 26-G (6), Ben. Ten. Act, can be revised by the High Court under s. 115, Civil P. O. This depends upon the precise implications of the words "such order shall have the effect of a decree of a Civil Court" occurring at the end of the sub-section. What the effect of a decree of a Civil Court is, is not stated in the Ben. Ten. Act itself but is to be gathered from the Civil P. O. But there are two initial difficulties: first, the decree dealt with in the Code are adjudications in suits, and secondly, if they are to have any effect under the Code they must be decrees passed by a Court of Civil Judicature within the meaning of the Code. If therefore we are to give any meaning to the words in question, we must hold that, besides what they expressly state, they necessarily imply (1) that a proceeding under s. 26-G shall be deemed to be a suit and (2) that a Revenue Officer making an order under the section shall be deemed to be a Civil Court within the meaning of the Civil P. O. If we make these two assumptions, but not otherwise, it is possible to give the words some meaning *e. g.* the provisions of the Civil P. O. regarding execution may then become applicable to the Revenue Officer's order. Whether the Legislature intended anything more it is not possible to say.

But even with the above assumptions we cannot say that the Revenue Officer

when acting under the section is a Court subordinate to the High Court, with the result that his order cannot be said to be subject to revision by the High Court under s. 115, Civil P. O. I therefore agree that the Rules should be discharged, although the resulting position can hardly be regarded as satisfactory. Section 26-G is a provision which extinguishes without compensation certain private rights. Orders thereunder, if made by a Civil Court, are subject to the High Court's control. But it would seem that similar orders, if made by a Revenue Officer are, as the law stands at present, subject neither to appeal nor to revision in any quarter.

s.

Rule discharged.

LAHORE HIGH COURT

Criminal Appeal No. 690 of 1939

November 16, 1939

DIN MOHAMMAD AND RAM LALL, JJ.

BHAG SINGH PAKHAR SINGH—CONVICT

—APPELLANT

versus

EMPEROR—OPPOSITE PARTY!

Criminal trial—Onus to prove guilt—General rule that it always lies on prosecution is subject to exception in s. 105, Evidence Act (I of 1872).

The general rule that the onus always lies on the prosecution to prove the guilt is subject to statutory exception contained in s. 105, Evidence Act. The prosecution cannot claim a verdict of guilty because the accused puts forward a false defence. The guilt must be determined on the strength of the prosecution evidence alone, but where the accused puts forward a plea that he did commit the offence charged but in circumstances that excused or mitigated, the prosecution in such cases can show that no such circumstances exist and so the claim is averted. With the rejection of the defence version however the duty of the prosecution does not end and they have still to show that the accused caused death in circumstances which make the offence murder and in this sense the onus never shifts from the prosecution. *Woolmington v. Director of Public Prosecution* (1), explained. [p 17, col. 1.]

Or. A. from the order of the Sessions Judge, Ludhiana, dated June 19, 1939.

Messrs. *J. G. Sethi* and *Dasarundha Singh*, for the Appellant.

Mr. *Basant Krishan*, for The Advocate-General, for the Crown.

Ram Lall, J.—Bhag Singh with his father Pakhar Singh was tried under ss. 302/34, I. P. O., on the allegation that these two persons together with Nahar Singh, absconder, caused murders of Bishen Singh, Jagir Singh and Kehr Singh, just outside their village on the morning.

of February 6, 1939. The learned Sessions Judge acquitted Pakhar Singh, convicted Bhag Singh and sentenced him to death and Nahar Singh is still absconding. Bhag Singh has preferred an appeal to this Court and the sentence is also before us for confirmation under s. 374, Criminal P. O. The case for the prosecution is that Kehr Singh and Jagir Singh were working the well outside the village on the morning of February 6, 1939, when Bhag Singh, appellant, and Nahar Singh, absconder, came there armed with spears and told Kehr Singh and Jagir Singh not to work the well any more. Apparently both the accused and the deceased were entitled to work this well but no definite terms had been fixed. Kehr Singh and Jagir Singh replied that they had still a little more land to water and they would leave off working the well soon. While an altercation was going on Narain Singh, Santa Singh, Salaha Singh, Bachan Singh and *Mst. Basso*, the mother of Jagir Singh, also reached there as did Bishen Singh, father of Jagir Singh and Pakhar Singh, father of Bhag Singh. Pakhar Singh is alleged to have shouted encouragement to Bhag Singh and Nahar Singh whereupon they were attacked by Bhag Singh, appellant, and Nahar Singh, absconder, with spears. Kehr Singh, Jagir Singh and Bishen Singh tried to run towards the village *abadi* which is close by, but they were intercepted and Nahar Singh gave a spear thrust to Bishen Singh in the stomach and Bhag Singh overtook Kehr Singh who stumbled over the boundary of a field as he was running, and he gave him a spear blow on his back towards the left side. Immediately afterwards Bhag Singh got in front of Jagir Singh and thrust his spear into the right side of Jagir Singh. While Bhag Singh was attacking Jagir Singh, Jagir Singh's mother, *Mst. Basso*, tried to catch hold of the spear blade and, in doing so, her right hand was injured.

After doing all this damage the culprits ran away and the three injured men were taken to Jagraon, where Dr. Mohammad Ajmal Husain, Asst. Surgeon, examined them at about 11 A. M. The doctor sent a *rukqa* to the Police Station, Jagraon, to get the statements of the injured men recorded by a Magistrate as their conditions were precarious. The statements of all these three persons were recorded by a Magistrate at the hospital at about 1-20 P. M. and thereafter a formal first information report

was recorded on the basis of these statements at 2-15 P. M. Kehr Singh died the same day, that is, on February 6, 1939, at about 4-45 P. M., Jagir Singh died on February 13, at 6-30 P. M. and Bishen Singh died on February 15, at 2-15 P. M. The medical evidence proved beyond all doubt that the cause of death in each case was spear thrusts. *Mst. Basso* was found to have two incised wounds on the palm of the right hand and an incised wound on the palmar aspect of the right middle finger. The injuries were fresh when they were examined and there is little doubt therefore that they were caused while she had got hold of the spear blade in her hand. The case for the prosecution was supported by the evidence of Bachan Singh, P. W. No. 16, Santa Singh, P. W. No. 17, Salaha Singh, P. W. No. 18, and *Mst. Basso*, P. W. No. 19, who have all deposed as eye-witnesses of the occurrence. There are also dying declarations by each of the three deceased persons recorded at the earliest possible opportunity and in each of which the appellant Bhag Singh has been clearly implicated as the murderer. Bhag Singh and Nahar Singh had both absconded, but Bhag Singh was captured by *Chaudhri Nazir Ahmad* on May 24, when he at first gave a false name. Nahar Singh, as already stated, is still absconding.

Bhag Singh, appellant, and his father Pakhar Singh both pleaded not guilty to the charge. Bhag Singh stated to the committing Magistrate that he was working the well at the time of the occurrence and was attacked by the deceased whom he injured in self-defence, and to this statement he adhered besides filing a lengthy written statement. The story as told by Bhag Singh in his written statement is to the effect that he was working the Persian wheel of the well and Thakra Singh, D. W. No. 1 was helping him at the time when Jagir Singh, son of Bishen Singh, came and wanted the use of the well himself and on the refusal of Bhag Singh mutual abuse took place and Jagir Singh went back to the village in a temper. After a short while, Jagir Singh and Kehr Singh armed with a spear and a *takwa* respectively came from the direction of the village followed by *Mst. Basso* who was entreating them not to fight. The noise attracted a number of persons who appeared as defence witnesses and these persons tried to stop Jagir Singh and Kehr Singh from fighting. Jagir Singh's spear was taken away from him and handed over to *Mst. Basso*. In the meantime, Bishen

Singh also came running from the village with a spear in his hand and at this juncture Bhag Singh says he snatched the spear which the defence witnesses had handed over to *Mst. Basso* from *Mst. Basso's* hand and stood at bay waiting for *Bishen Singh's* attack. *Bishen Singh* as soon as he reached the well shouted to *Kehr Singh* and *Jagir Singh* to attack whereupon *Kehr Singh* attacked *Bhag Singh* with his *takwa* and caused an injury on his right hand. Thereafter, the appellant says, that he used the spear which he had snatched from *Mst. Basso* against *Kehr Singh* and injured him in self-defence. After he had injured *Kehr Singh* *Jagir Singh* attacked him with a spear as also did *Bishen Singh*. In order to protect himself he injured both *Jagir Singh* and *Bishen Singh*. He goes on to say that at this stage he escaped and went to a doctor at *Kokri Hospital* to get his injured hand treated.

The version put forward by the defence appears to be inherently absurd. It is impossible to believe that one man initially unarmed should be able, when attacked by three heavily armed men in the prime of life, to snatch a spear from a member of the opposite party, even if that person be a woman, and therewith cause mortal injuries to each of his three assailants successively. If the appellant was injured, as he says he was with a *takwa*, before he himself inflicted any injury the causing of the damage that he did cause becomes all the more difficult to understand. The whole setting of the story seems unnatural. It is unlikely that defence witnesses who had disarmed *Jagir Singh* should hand over *Jagir Singh's* spear to *Mst. Basso*, and not keep it themselves. It is still more unnatural that the witnesses who professed to be there in order to prevent a fight should not have tried to protect *Bhag Singh* till after *Bhag Singh* had killed each one of his three assailants. It appears further unlikely that if *Bhag Singh's* story was true he would run away and so create suspicion against himself. *Dr. Naranjan Singh* says that he examined the appellant on February 7, at his dispensary at *Kokri Kalan* in the *Ferozapore District*. At that time he had a superficial incised wound on his right hand and three stitches had to be applied to it. A superficial wound can be caused at any time in order to bolster up a defence to a serious charge like murder and this injury appears to be either self-inflicted or self-suffered. That this injury was not caused in the manner alleged by

Bhag Singh, appellant, appears to be clear from the fact that if a heavy blow was given by an able-bodied assailant with a hatchet it would cause something more serious than a superficial wound on the hand and secondly it is not without significance that the appellant thought of getting himself examined the next day at a village dispensary in a district different to his own. It appears far more likely that the elaborate written statement put in by the appellant was prepared by a legal mind and sought to find some explanation, however, crazy, of all the injuries found on the party of the complainants and legal colour was added to the story by manufacturing a superficial injury on the hand of the appellant and getting it examined by a doctor in a surreptitious manner in a different district. Learned Counsel who has appeared before us has argued that if a man had made up his mind to abscond he would not think of manufacturing such false evidence. It appears to us however that there is nothing strange or unlikely about an accused person in the position of *Bhag Singh* in manufacturing evidence and then absconding with the object of using this manufactured evidence if and when he is arrested and brought to trial. We have no hesitation therefore in rejecting the defence version as wholly concocted and false.

Learned Counsel who appeared before us on behalf of the appellant urged that the case for the prosecution had not been proved with any degree of satisfaction and that if that be so we are not entitled to look at the defence that his client has put forward and victimize him for having told a story which is not convincing. In this connection he urged on the authority of a recent well-known decision in the House of Lords *Woolmington v. Director of Public Prosecution* (1) that the onus of proving the guilt of an accused person invariably and throughout the trial rests on the prosecution and it is incorrect to say that the onus ever shifts. This proposition is true only to a limited extent. Under s. 105, *Evi. Act*, when a person is accused of any offence and he pleads the existence of circumstances which show that the act committed by him comes within any of the general exceptions in the *I. P. O.*, the burden of proving such circumstances is on the person accused and the Court must presume the absence of such circumstances.

(1) (1935) A C 462; 104 L J K B 433; 25 Cr. App. R 72; 51 T L R 446; 153 L T 232; 79 S J 401.

In other words, under the Indian Law the Statute expressly creates a presumption which an accused person has to rebut if he wishes to get the benefit of any exceptions exonerating him or mitigating his offence. This circumstance alone appears to us to distinguish *Woolmington v. Director of Public Prosecution* (1) where Lord Sankey observed that the general rule that the onus always lies on the prosecution to prove the guilt rests on the prosecution is subject to any statutory exception that may exist. This statutory exception appears to us to exist in this country in s. 105, Evi. Act.

The proposition however is correct if it means that the prosecution cannot claim a verdict of guilty because the accused puts forward a false defence. The guilt must be determined on the strength of the prosecution evidence alone, but where the appellant puts forward a plea that he did commit the offence charged but in circumstances that excused or mitigated, the prosecution in such cases can show that no such circumstances exist and so the claim is averted. In the present case the right of private defence of person is pleaded and an injury to the hand of the appellant is put forward in support of this plea. It is open to the prosecution to argue that the injury if received by the appellant as alleged by him would have made it impossible for the appellant to inflict further injuries so as to kill three men one after another. Again, the prosecution can show that if an attack had been made on him, as suggested by him, the injuries to him would have been far more serious than a flesh wound on the hand. With the rejection of the defence version however the duty of the prosecution does not end and they have still to show that the appellant caused death in circumstances which makes the offence murder and in this sense the onus never shifts from the prosecution.

In the case before us, the story for the prosecution is supported by the three dying declarations which were recorded on the day of the occurrence by a Magistrate and is further supported by a number of eye-witnesses of whom the presence of *Mst. Basso* is corroborated by injuries on her hand and her presence is indeed not denied by the defence. It is objected regarding these dying declarations that their language is almost identical but this is easily explained by the fact that these statements are very short and were recorded by the same person at about the

same time. In all three the same story is told and Bhag Singh, appellant, is clearly implicated in all as a murderer. Beyond the fact that Dharam Singh and Bachan Singh were present when the dying declarations were recorded, there is nothing to show that these statements were prompted or made at the instigation or under the influence of a relative.

If the dying declarations are believed, they themselves afford a sufficient basis for the conviction, but the case is supported by other evidence. *Mst. Dasso*, as stated already, was admittedly present and was therefore an eye-witness. In this view of the matter, the objection raised by learned Counsel that *Mst. Basso* is wrong when she says that she was taking tea for Jagir Singh and Kehr Singh loses all significance. Whether she was taking tea or was attracted by the cries of Jagir Singh and Kehr Singh becomes in our opinion immaterial. It is true that her statement like that of some of the other witnesses for the prosecution who have appeared as eye witnesses is open to the objection that there are minor discrepancies between the statements in Court and those made before the Police particularly regarding the circumstances in which Pakhar Singh came to the spot and what he said to Bhag Singh by way of encouragement before or during the assault. Pakhar Singh however has been acquitted on the strength of these somewhat minor variations, but there appears nothing on the record to shake the general truth of the story for the prosecution that because of some quarrel over the turn of water, no matter by whom started, the appellant with others came armed with spears and killed three persons. The statement of Bechan Singh is objected to on the ground that this man was implicated in a dacoity and had appointed Bishan Singh deceased as his *mukhtar* for about two months. This is apparently the only interest that the witness had in the deceased and it does not appear to us to be likely that Bachan Singh would for this reason lend himself as a false eye-witness to a murder. The other eye-witnesses are Santa Singh and Salaha Singh. Santa Singh had been implicated in cases of illicit possession of opium and liquor and sentenced and he has otherwise mortgaged the whole of his land and for that reason it is urged that he was unreliable. As the witness's antecedents are more than doubtful, we consider that his statement can be left out of account. The state

ment of Salaha Singh too is open to objection on various minor grounds. We consider that if these two statements are left out of account there is ample evidence which will support the prosecution. In our opinion on the strength of this evidence a clear case of murder has been made out.

We have already said that the counter-version of the defence which is supported by two or three defence witnesses is unbelievable. Karnail Singh (D. W. No. 5) says that Jagir Singh was armed with a spear and Kehr Singh with a *takwa* and later Bishan Singh also came armed with another spear, and all three attacked Bhag Singh whereupon Bhag Singh gave a spear blow to Kehr Singh in self-defence and as Bishan Singh, Kehr Singh and Jagir Singh advanced towards him, he killed them one after the other. This witness's father was implicated in a murder case but acquitted. It was suggested by the prosecution that Partapa, brother of Pakhar Singh accused and uncle of Bhag Singh appellant, appeared as a defence witness in that case and the witness deny that this was so. In these circumstances, it is not unlikely that he is paying off a debt in kind. The next witness Mit Singh (D. W. No. 6), tells a similar story and his motive for giving evidence for the defence too is clear, for Ran Singh, father of the absconder in this case, appeared as a witness for the prosecution in a case brought by him under s. 324, I. P. C., against one Sarwan Singh. This witness was in the village when the Head Constable arrived on the scene but he did not appear before him. The next witness for the defence in support of the counter-version is Sham Singh (D. W. No. 7) and he too did not appear before the Police during the course of the investigation. The other evidence to the similar effect was not even touched upon by learned Counsel in his arguments. The witnesses for the defence appear to us to be unbelievable in the story they tell and therefore the question of their bias or motive becomes a matter of secondary importance.

In the view that we have taken of the matter, the prosecution appears to us to have clearly established the case of murder against the appellant and the defence to have totally failed to substantiate the plea of the right of private defence put forward. In these circumstances, we are satisfied that Bhag Singh, appellant, has been rightly convicted of the offence of murder. For

such an offence there can be no penalty other than death and for these reasons we reject his appeal and confirm the sentence of death.

s.

Appeal dismissed.

BHOPAL HIGH COURT

Original Civil Jurisdiction Suit No. 2
of 1939

July 18, 1939

MOHAMMAD AHMAD KHAN, O. J.

Diwan Bahadur KESRI SINGH—

PLAINTIFF—

versus

Sethani HARKANWAR BAI AND Seth
GOPALDAS—DEFENDANTS

Jurisdiction—Foreign Court—Submission to its jurisdiction—Effect—Ex parte decree—Steps taken to set it aside and suit defended—Whether submission to jurisdiction—Decree passed on merits—Binding effect—Test to determine whether decree is passed on merits—Putting appearance to search papers after ex parte decree or executing general power-of-attorney to defend suits in foreign Court does not amount to submission to jurisdiction—Decree passed ex parte by British Indian Court against resident of State not submitting to its jurisdiction—Validity—If can be enforced in State—Foreign country, what is—Indian States, whether foreign countries in relation to British India—Hindu Law—Adoption—Effect on family partnership.

Where in a suit filed in British Indian Court against the defendant, a resident and subject of an Indian State an *ex parte* decree is passed and the defendant gets the *ex parte* decree set aside and files written statement, and defends the suit through properly constituted attorney, these acts amount to voluntary submission to the jurisdiction of the foreign Court. The case no longer remains *ex parte* against him and a decree subsequently passed on merits is fully binding on him. *Harris v. Taylor* (1) and 89 Ind. Cas. 129 (2), relied on. [p. 21, col. 2.]

The true test for determining whether a judgment has or has not been passed on merits is to see whether it has been pronounced as a penalty for any conduct of the defendant, or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. [p. 22, col. 2.]

It is a well-settled rule of international law that Courts cannot by their judgments bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and, therefore, a judgment of a foreign Court obtained against an absent defendant cannot be enforced where the defendant at the time of the commencement of the suit was neither a subject of, nor resident in the country in which the judgment was obtained. [p. 23, col. 2.]

A decree against an absent foreigner is valid only so far as the same is made operative by local Legislature within the country of the forum pronouncing the same. Beyond the limits of that country the decree would remain a nullity in spite of the authority given to it by the local Legislature. [p. 25, col. 2.]

An Indian State whose Legislature is not subject to the Legislature of British India is a distinct and separate political entity. Such a State is, therefore, a foreign country in relation to British India within the meanings and for the purpose of the Civil P. O. Section 20 of Civil P. O., (of British India) may give jurisdiction to British Indian Courts to pass a decree against residents of such a foreign State but it has no effect against State subjects within the territorial limits of that State and should be considered an absolute nullity. Hence a decree passed by a British Indian Court against the subject of Bhopal State who at the time of commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable against the defendant in the forum of Bhopal State, wherever the cause of action might have arisen, *Gurdial Singh v. Raja of Faridkot* (3), approved, *Annamalai Chetty v. Murugasa Chetty* (6), explained and distinguished, 153 Ind. Cas. 824 (11), dissented from. [p. 26, col. 2; p. 27, col. 1.]

Putting in an appearance to take search of papers after an *ex parte* decree was pronounced, by a foreign Court does not amount to an act of submission to jurisdiction. So also mere execution of a general power-of-attorney in favour of certain person for defending suits in foreign Courts does not amount to submission to jurisdiction of foreign Courts. 82 Ind. Cas. 425 (12), distinguished. [p. 27, col. 2.]

Ordinarily in Hindu Law the rights of an adopted son arise at his adoption. Even in the case of an adoption by a widow, though the adoption by her is for her husband still the adoptee's rights do not relate back to the death of the husband. But in the case of a trading partnership the adopted son takes the place of the deceased as from the date of his death, thus preventing its automatic dissolution. Under the ordinary law a firm of partnership dissolves upon the death of a partner and his heir does not *ipso facto* become its member since the continuance of a partnership depends upon the mutual consent and confidence of the partners. These incidents have, however, no application to an ancient family trade in which partnership continues unaffected by the deaths of old members and the births of new ones. As such, a partnership of which the father was a member would continue in spite of his death, the son taking the father's place whether then living or posthumous. As such if a person was afterwards adopted his adoption relates back to the death of the father, so that the partnership is deemed to continue with him added as a partner from the date of the father's demise. [p. 22, col. 2; p. 23, col. 1.]

Mr. Mohammad Yaqub Khan, for the Plaintiff.

Messrs. Mohammad Nasiruddin and Syed Mohammad, for the Defendants.

Judgment.—This is a suit filed by one D. B. Kesri Singh, a resident of Bombay, against Sethani Harconver Bai and Seth Gopal Das, both residents of Ichhawar in Bhopal State, for the recovery of Rs. 1,21,606-3 on the basis of a judgment of the High Court of Bombay. The plaintiff's case as disclosed in the plaint is

that Seth Naraindas Sunderlal and his minor son Jaikishan Das Naraindas carried on business as Shroffs and commission agents in Bombay under the name and style of Messrs. Saligram Narayandas and the defendants carry on business at Bhopal and other places in the Bhopal State in the firm names of Ramkishan Pirthiraj, Ramkishan Akheyraj and Ramkishan Dhanraj. That the said firm of Saligram Narayandas acted as the commission agents of the defendants firm of Ramkishan Pirthiraj in Bombay since 1924. That on June 12, 1928 the account was finally made up and adjusted and a sum of Rs. 81,900 was ascertained as due and payable by the defendants to the said firm of Saligram Narayandas, for which an acknowledgment was also passed by Bal-kishondas a partner in the firm of Ramkishan Pirthiraj acting on behalf of the defendants. That on the defendants failing to pay, the said firm of Saligram Narayandas filed a suit being suit No. 2552 of 1929, on December 17, 1929 in the High Court of Bombay. That both the present defendants though duly served did neither obtain leave to defend the suit nor made appearance in any manner and an *ex parte* decree was passed against them on March 11, 1930. That subsequently by an assignment dated May 23, 1933 the said firm of Saligram Narayandas assigned the said decree to D. B. Kesri Singh the present plaintiff, for a sum of Rs. 25,000. After purchasing the decree the present plaintiff applied for the issue of usual notice under r. 16 of O. XXI, Civil P. O. which was made absolute on July 7, 1933. That on June 12, 1933 the first defendant moved the Court to set aside the *ex parte* decree stating that the writ of summons was not served on her. Thereupon the decree was set aside and the first defendant put in her written statement contesting the suit on various grounds. That the suit proceeded and ultimately ended in a decree for Rs. 1,06,830 with future interest at the rate of 6% per annum, on July 9, 1934. The defendants not having satisfied the decree the present suit was filed in this Court on the basis of foreign judgments of the Bombay High Court passed against defendant No. 1 on merits on July 9, 1934 and against defendant No. 2 *ex parte* on March 11, 1930.

Both the defendants have filed separate written statements in this Court but their case is substantially the same. The first defendant pleaded *inter alia* that the property left by her husband was taken under

the management of the Court of Wards in 1917 and remained under its superintendence till 1931, that she as a ward was under disability to transact any business and did not in fact transact any business at all with the said firm of Saligram Narayandas. She also pleaded that the Court of Wards was not a party in the suit filed in the High Court of Bombay and the decree of that Court was not binding on her. She further pleaded that she had adopted one Hiralal with the permission of the Court of Wards and on his death Hiralal's widow adopted Gopal Das defendant No. 2, who is now the sole proprietor of the estate of late Seth Hemraj including the firm of Ramkishon Pirthiraj. There was also a plea to the effect that the decree against her was not passed on merits and the suit resulting in the said decree was the result of collusion between Balkishondas and Saligram Narayandas who were related as son-in-law and father-in-law.

Defendant No. 2 raised almost all the pleas taken by defendant No. 1 and pleaded further that the decree dated March 11, 1930 was not binding on him because he was a resident and subject of the Bhopal State and did not submit to the jurisdiction of the High Court of Bombay.

The following issues were framed in the presence of the learned Counsels for the parties.

1. Whether defendant Nos. 1 and 2 were incompetent as wards to enter into contracts in British India at the time of the institution of the suit in Bombay by Saligram Narayandas; and was their position that of a ward for these contracts?

2. Whether the Court of Wards of Bhopal was a necessary party in the suit filed by Saligram Narayandas?

3. Whether ss. 34 and 52 of the Bhopal Court of Wards Act barred the suit filed by Saligram Narayandas?

4. Whether the firm of Ramkishon Pirthiraj was under the management of the Court of Wards at the time of the institution of suit by Saligram Narayandas?

5. Whether the judgment of the High Court of Bombay dated July 9, 1934 was not passed on merits and is as such not binding on defendant No. 1?

6. Did the defendant No. 2 submit to the jurisdiction of the High Court of Bombay or not, and is the decree dated March 11, 1930 not binding on him?

7. Are the defendants liable to pay

the amount claimed. If so, to what extent?

8. Whether on an account being taken on June 12, 1929 a sum of Rs. 81,000 was found due from the defendants to the firm of Saligram Narayandas for which an acknowledgment was also passed by Balkishondas on behalf of the defendants? If so, what is its effect?

9. To what relief the plaintiff is entitled?

Findings :—Issues Nos. 1, 2, 3, and 4. These four issues can conveniently be grouped and disposed of together. No document has been filed by the defendants to prove that the estate of late Seth Hemraj was taken under the management of Court of Wards and was under such management when the suit was filed in Bombay, and that they were declared wards. The defendants might have easily proved this fact by producing the *Govt. Gazette of Bhopal* but they did not make any such attempt. No oral evidence even has been adduced on this point, so much so that the defendant No. 2 who has come to the witness-box did not make any mention of this fact in his statement. Issue No. 1 is therefore decided against the defendants. Issues Nos. 2, 3 and 4 automatically go against the defendants after the decision of first issue, because when the fact of the estate being under the management of the Court of Wards is not proved no question of the Court of Wards being made a party or the suit being barred by ss. 34 and 52 of the Court of Wards Act does arise. The Issues Nos. 1 to 4 are therefore decided against the defendants.

Issue No. 5. This plea of defendant No. 1 appears to be untenable. She admittedly submitted to the jurisdiction of the High Court of Bombay. She got the *ex parte* decree of March 11, 1930 set aside and filed her written statement and defended the suit through her properly constituted attorney. The learned Counsel for the defendant has argued that submission to jurisdiction after the passing of an *ex parte* decree was no submission at all. I see no force in this argument. When a defendant after getting an *ex parte* decree against him set aside files a written statement and contests the suit, the case no longer remained *ex parte* against him and a decree subsequently passed on merits is fully binding on him. Defendant No. 1 was not originally subject to the jurisdiction of the High Court of Bombay, and she chose to appear voluntarily to defend the suit

which amounts to a submission to that Court's jurisdiction. In *Harris v. Taylor* (1) followed in *Janki Sethani v. Laxminarayan* (2) which will be subsequently referred to, Buckley, L. J. observed:

"...The doctrine applicable to these cases is that if the defendant has placed himself in such a position that it has become his duty to obey the judgment of the foreign Court then the judgment is enforceable against him in this country..."

In *Janki Sethani v. Laxminarayan* (2), Kotwal, A. J. O. observed:

"It is difficult to see how the appearance for the purpose of obtaining an adjournment or for applying to set aside the *ex parte* decree, can have been anything but voluntary and did not amount to a submission to the jurisdiction of the Court."

In that case a suit was filed at Hoshangabad in C. P. on the basis of a judgment of a Civil Court in Bhopal. The defendant not being a resident of Bhopal State had made an application to the State Court for an adjournment of the suit which was disallowed. She had also applied to get the *ex parte* decree set aside. Her application having been disallowed she went in appeal which was also dismissed. The question before the Court was whether the acts referred to above amounted to submission to the jurisdiction of Bhopal State Court or not, and it was held that appearance for the purpose of obtaining an adjournment or for applying to set aside an *ex parte* decree in a foreign Court was a voluntary act and amounted to a submission to the jurisdiction of the foreign Court. It was not therefore open to defendant to raise the plea of jurisdiction after having defended the suit on merits. Now the question whether the judgment dated July 9, 1934 was or was not passed on merits remains to be considered. The contention of the learned Counsel for defendant No. 1 is that it was given by way of punishment to the defendant for his default in not attending the Court on the date of hearing. What happened is this: Defendant No. 1 got the *ex parte* decree set aside and filed her written statement. The suit was partly heard on different dates and ultimately came up for hearing on July 9, 1934. On that date Counsel for defendant No. 1 applied for adjournment stating that Hariram defendant's constituted attorney had suddenly left Bombay on account of ill-health. The plaintiff opposed the application stating that there was no proof of illness, and that Hariram had got

the *ex parte* decree set aside on the false allegation that defendant No. 1 did not know of the suit at all. The documents in the Prothonotary's office revealed that she was aware of it. It was owing to these facts that Hariram had disappeared. The adjournment application was disallowed, and the Counsel for the defendant No. 1 thereafter withdrew. The Counsel for the plaintiff then examined Balkishondas Sri-kishondas on behalf of the plaintiff. All these facts are borne out by the notes of evidence taken by the Hon'ble Mr. Justice Kania who tried the case, and by the decree, dated July 9, 1934. The true test for determining whether a judgment has or has not been passed on merits is to see whether it has been pronounced as a penalty for any conduct of the defendant, or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. In the present case there was evidence on the record on which the Court could have proceeded on merits. A perusal of the record shows that the Court did apply its mind to the merits of the case and considered the plaintiff's claim as proved. I therefore decide the issue against defendant No. 1.

Although Issues Nos. 1 to 5 have been decided against defendant No. 1 and a decree as prayed by the plaintiff could be passed against her on the basis of the foreign judgment, there is yet another aspect of the case which deserves consideration. Sethani Harconver Bai defendant No. 1 has pleaded that she adopted one Hiralal and on his death his widow adopted Gopal Das who was now the sole owner of the estate of late Seth Hemraj including the firm of Ramkishan Pirthiraj and that she had no concern with the said firm. This plea is supported by the evidence of Seth Gopal Das who has deposed all these facts in his statement. This piece of evidence stands un rebutted. The frame of the plaintiff's suit also shows that the fact of adoption was admitted by him. In his plaint he has described Gopal Das as adopted son of Hiralal. Ordinarily in Hindu Law the rights of an adopted son arise at his adoption. Even in the case of an adoption by a widow, though the adoption by her is for her husband still the adoptees rights do not relate back to the death of the husband. But in the case of a trading partnership the adopted son takes the place of the deceased as from the date of his death, thus preventing its automatic dissolution. Under the

(1) (1915) 2 K B 580; 113 L T 221; 84 L J K B 1839.

(2) A I R 1926 Nag. 77; 89 Ind. Cas. 129; 22 N L R 82.

ordinary law a firm of partnership dissolves upon the death of a partner and his heir does not *ipso facto* become its member since the continuance of a partnership depends upon the mutual consent and confidence of the partners. These incidents have however no application to an ancient family trade in which partnership continues unaffected by the deaths of old members and the births of new ones. As such a partnership of which the father was a member would continue in spite of his death, the son taking the father's place whether then living or posthumous. As such if a person was afterwards adopted his adoption relates back to the death of the father, so that the partnership is deemed to continue with him added as a partner from the date of the father's demise. The present is undoubtedly a case of ancient family trade in which the adoption of Hiralal will relate back to the death of Hemraj although he was adopted many years after the death of Hemraj, and he will be deemed to have become a partner in the firm of Ramkishon Pirthiraj from the death of Hemraj. In the same way Gopal Das will be deemed to have become a partner of Ramkishon Pirthiraj from the time of the death of Hiralal. The result is that the widows of Hemraj and Hiralal cannot be deemed to have become partners in the firm of Ramkishon Pirthiraj at any time material to the suit. It is rather surprising to note that the plaintiff while suing the firm of Ramkishon Pirthiraj has chosen to make the widows also parties to this suit. The plaintiff by an application dated July 15, 1936 withdrew his case against Baldeodas and Kasturibai for reasons best known to him. For these reasons I hold that Sethani Harconver Bai defendant No. 1 has unnecessarily been impleaded as defendant in the suit. She has no concern with the firm of Ramkishon Pirthiraj and as such the suit is liable to be dismissed against her.

Issue No. 7. The chief contention of defendant No. 2 is that he resided and carried on business in Bhopal State and did not submit to the jurisdiction of the High Court of Bombay. He did not contest the suit in Bombay, nor did any act by which he could be deemed to have submitted to the jurisdiction of that Court. A certified copy of a general power of attorney dated July 1, 1921 executed by defendants Nos. 1 and 2 in favour of one Chhthmal has also been filed and proved

by summoning the original record from the Registration Office at Sehore, and by leading evidence of Mr. Bihari Charan the then Sub-Registrar of Sehore. With reference to this document the learned Counsel for the plaintiff argued that this act of defendant No. 2 amounted to submission to jurisdiction of the High Court of Bombay and the decree dated March 11, 1930 was binding on him. It is a well-settled rule of international law that Courts cannot by their judgments bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and therefore a judgment of a foreign Court obtained against an absent defendant cannot be enforced where the defendant at the time of the commencement of the suit was neither a subject of, nor resident in the country in which the judgment was obtained. That being so, one of the questions that arises for determination in a suit based on a foreign judgment is: Was the defendant at the time of the commencement of the suit in the foreign Court, residing within the territorial limits of the jurisdiction of the State in which the suit was brought? This Court following the Privy Council ruling of *Gurdayal Singh v. Raja of Faridkot* (3) has consistently held that Courts of British India or of any other native State had no jurisdiction over a person who was the subject of the Bhopal State and who neither resided nor carried on any business there. This view has clearly been expressed in the case of *Gendalal v. Bachraj* (4). There appears to have been a conflict of opinion, among the different High Courts of British India on this point. All the High Courts are agreed so far as the above mentioned principle of international law was concerned; but a nice distinction has been drawn in certain cases holding that the Courts of British India were possessed of jurisdiction to pass a decree even against a non-resident foreigner if the cause of action arose within the territorial limits of their jurisdiction. In *Tadepalli Subba Rao v. Nawab Syed Mir Ghulam Ali Khan* (5), a Bench of the Madras High Court held that a defendant who executed a pro-note in a native State promising to pay the amount thereof at any

(3) 22 O 222; 21 I A 171; 4 M L J 267; 6 Sar, P O 503; 112 P R 1894 (P O).

(4) (1932) Bho. Law Rep. 270.

(5) 29 M 69.

place in British India, the Courts of that place had jurisdiction to entertain the suit because of the cause of action arising within their territory even though the defendant might not be living or carrying on business there. This ruling really follows a Privy Council case reported in *Annamalai Chetty v. Murugasa Chetty* (6), and the pertinent remarks made by Sir S. Subrahmanya Ayyer the learned Officiating Chief Justice in endorsing this view run as under:¶

"The statement of the law by the Earl of Selbourne in that case (Faridkot case) that the accrual of cause of action in a particular place did not confer on the Courts of that place jurisdiction over a non-resident foreigner has not been referred to by Lord Lindley, but that does not relieve us from the necessity of being ruled by the latest pronouncement of the Judicial Committee on the point. Whether what weighed with their Lordships in the last mentioned case in upholding the decision of the Bombay Court in *Girdhar Damodar v. Kassigar Hiragir* (7), was the dependent character of the foreign territory or the argument of convenience with reference to commercial relations between the residents of the paramount and the protected states argued by Bittleston, J. in *Bavah Meah Sahib v. Khaje Meah Sahib* (8), by Sargent, C. J. in *Girdhar Damodar v. Kassigar Hiragir* (7) by Farren, C. J. in *Ram Rao Ji Jambhekar v. Pralhaddas Subkaran* (9) and by Candy, J. in *Rambhat v. Shankar Banswant* (10), is a matter which is not for us to enter. Assuming that the rule laid down in *Annamalai Chetty v. Murugasa Chetty* (6), at p. 542*, was not intended to extend to subjects of a foreign independent state but was confined to subjects of protected Indian territories, the present is such a case....."

It is clear from the above remarks that the learned Bench did not consider it necessary to go deep into the question simply because the new ruling of the Judicial Committee was before them. It was binding on the Bench as being the latest pronouncement by the Privy Council although it happened to be against a previous decision of the same Court. The facts of the case as reported in *Annamalai Chetty v. Murugasa Chetty* (6) appear to be these. A suit was brought in British India to recover a sum of money on a decree of a French Court at Pondichery. The only issues really contested in the suit were (i) whether the British Indian Court was prevented from entertaining the suit by reason of the cause of action not having arisen within its territory, and the defendant not being a resident or carrying on business within its jurisdiction, and (ii)

whether or not the defendant resided or carried on business within the jurisdiction of the British Indian Court on the date when the cause of action arose. Evidence was adduced to show that Kandasami was manager of business in which defendant-respondent had a share and which was carried on by Kandasami within the jurisdiction of the Court in which the suit was brought. Their Lordships of the Privy Council in this connection remarked,

"In both Courts in British India it was apparently assumed that the question of jurisdiction turned on s. 17 of the Civil P. O., and that although the defendant was a foreigner, and although the cause of action arose in foreign territory, and although the defendant did not personally reside within the local limits of the jurisdiction of any Court in British India, and was not even temporarily in Arcot when sued there yet he could be sued in the Arcot Court if he carried on business through an agent in the local limits of that Court's jurisdiction."

Further at p. 552* their Lordships remarked,

"Their Lordships see no reason for doubting the correctness of the decision of the case of *Girdhar Damodar v. Kassigar Hiragir* (7) where the defendant was a native of Dutch and the cause of action arose within the local limits of the jurisdiction of the British Indian Court in which the action was brought. But that case does not cover the present case."

This ruling makes no reference to the Faridkot case. What actually was decided in the case is that the agency of Kandasami was not proved. His position is that of a manager of a joint family business of which the defendant was a partner and as such he could not be considered as a regular agent of the joint family. His residence did not affect the members of the family. The point whether a non-resident foreigner was deemed to submit to the jurisdiction of Court by carrying on business through an agent within the limits of that Court was left undecided. It appears that the point neither arose for the decision of their Lordships of the Privy Council nor did they propose to lay down any rule regarding the circumstances under which British Indian Courts acquired jurisdiction against non-resident foreigners. They wanted to clarify the points of the case before them in which even the cause of action had not arisen in British India. Reference to *Girdhar Damodar v. Kassigar Hiragir* (7), did not mean that their Lordships had accepted every point decided therein. At best such a reference could be called an *obiter dictum*, and cannot be given force of a ruling, particularly because there was no direct discussion on the point

(6) 26 M 544; 30 I A 220; 8 Sar. 523; 7 O WN 754; 13 M L J 287; 5 Bom. L R 494 (P O).

(7) 17 B 622.

(8) 4 M H C R 218.

(9) 20 B 133.

(10) 25 B 528; 3 Bom. L R 82.

and the previous ruling thereon in *Raja of Faridkot's case* (3), was not even mentioned.

The learned Counsel for the plaintiffs has further relied on a more recent ruling of the Allahabad High Court. The opinion expressed by the learned Bench of that Court in *Gaekwar Baroda State Railway v. Sheikh Habeebullah* (11), deserves a rather detailed survey. The learned Judges while dealing with the principles of international law have held that the British Indian Courts had jurisdiction even against a foreigner who had never resided in British India if the cause of action against him arose within the territorial limits of the jurisdiction of such Courts. This principle has elaborately been dealt with particular reference to the residents of Indian States. According to the view of the learned Judges s. 20 of the Civil P. C., gave full jurisdiction to the Courts in British India to entertain suits against non-resident foreigners if the cause of action against them arose within the territorial jurisdiction of such Courts. Rachpal, J. at p. 755* remarked :

"If it had been the intention of the Legislature that this part of s. 20 would not be applicable to non-resident foreigners even though the cause of action arises wholly or in part in British India, such intention would have been made clear."

Reference has also been made to *Ram Raoji Jambhekar v. Pralhaddas Subkaran* (9), wherein the contention raised was very much similar to one involved in the present suit. Farren, C. J., in his learned judgment made the following observation which threw a flood of light on the point under discussion.

"It has however been argued on the authority of *Gurdial Singh v. Raja of Faridkot* (3) that admitting that a part of the cause of action did arise in Bombay, still the Court had no jurisdiction over the defendant who was a subject of Baroda State and a foreigner inasmuch as before the suit was filed he had ceased to carry on business in Bombay and to be amenable to the jurisdiction of this Court. The answer to this question is to be found in a passage of the Privy Council judgment itself. In a personal action..... a decree pronounced in *absentem* by a foreign Court to the jurisdiction of which the defendant has not in any way submitted is by international law an absolute nullity. He is under no obligation of any kind to obey it and it must be regarded as a mere nullity by the Court of every nation except (when authorised by special local Legislature) in the country of the forum by which it was pronounced."

In *Rambhat v. Shankar Banswant* (10), the High Court of Bombay has held that according to the Civil P. C., the British Indian Courts were empowered to pass a

decree against a non-resident foreigner provided the cause of action arose within the jurisdiction of the Court pronouncing the judgment. It may be noted that the learned pronouncement of the highest judicial authority in India accepts the validity of a decree against an absent foreigner only so far as the same was made operative by local Legislature within the country of the forum pronouncing the same. Beyond the limits of that country the decree would remain a nullity in spite of the authority given to it by the local Legislature. As regards the effectiveness of such a judgment in a foreign country the learned Court held that the point did not arise in that case. It is perfectly correct to say that according to the provisions of s. 20 of the Civil P. C., the British Indian Courts had jurisdiction to entertain and decide a suit against an absent foreigner and whatever may be the value of such a judgment in the Courts of other countries, it could not be called ineffective in the country of the forum which passed it. But the question still remains as to the value of such a judgment in the countries or states where the provisions of the British Indian Civil P. C., were not in force. In *Gurdial Singh v. Raja of Faridkot* (3), the learned Privy Council has elaborately discussed the principles of international law and ruled that all the leading authorities were unanimous on the point that all jurisdiction was properly territorial, and in whatever country the cause of action might arise, the Court having jurisdiction to pass a decree against the defendant was the Court within the territorial limits of which the defendant resided at the time of action. This rule is subject to only one exception as mentioned above. Local Legislature might protect the decree within the country, but in a foreign country that protection becomes useless owing to the universally accepted principles of international law. Therefore such a decree must be treated as a nullity by the Courts of all countries other than that of the Court which passed it. This discussion leads us to another point of considerable importance. We have to find whether British India and the Indian States are foreign countries with relation to each other for the purposes of the Civil P. C., applicable to either of them. The mere fact that both places are governed by their own independent laws is enough to show that they are countries foreign to each other so far as legislative authority was concerned. In the above mentioned Allah-

(11) A I R 1934 All. 740; 153 Ind. Cas. 824; (1934) A L J 1093; 7 R A 611; 56 A 828.

*Page of A I R 1934 All. —[Ed.]

abad cases of 1934, a different view has however been expressed. Relying on the following observations of their Lordships of the Privy Council in the Faridkot case.

"That no territorial legislation can give jurisdiction which any foreign Court ought to recognize against foreigners who owe no allegiance or obedience to the power which so legislates."

Niamatullah, J. learnedly argued that since the residents of Indian States owed allegiance and obedience to the power which could legislate for British India they could not be termed as foreigners in relation to British India. This argument is based on the hypothesis that the power to legislate possessed by the Indian Legislature was derived from Act of Parliament to which undoubtedly every Indian State and its subjects owed allegiance and obedience. The provisions of the Indian Councils Act of 1861 have been referred to whereby the Governor-General-in-Council has been given powers to make laws and regulations. But there is no provision in that Act or in the Amendment Act of 1869 by which the Governor-General-in-Council has been empowered to make laws for the subjects of the Indian States. Such power extend only to the making of laws and regulations for the subjects of British India or for such subject of His Majesty within the Dominions of Princes and States in India in alliance with His Majesty whether in the service of the Govt. of India or otherwise. These powers, really speaking, do not confer any authority to make laws for the subjects of Indian States. Therefore with due respect to the learned Judge, it is observed that the conclusions arrived at by His Lordship do not necessarily follow. In the course of the judgment the learned Judge has been pleased to remark:—

"The power thus conferred upon the Governor-General is very wide and comprehensive, and it cannot be doubted that any law passed by the legislative authority in British India which has received the assent of the Governor-General must be recognized as binding on those residing in Indian States so far as such law affects them."

This proposition holds good only to the extent mentioned therein, *viz.*, regarding British Indian subjects residing in Indian States whether as servant of the Govt. of India or otherwise. It does not follow that the subjects of Indian States were also bound by such Laws and Regulations. Therefore the argument loses its force. It is as clear as day light that neither the Govt. of India nor the British Parliament has authority to make laws for the subjects of the Indian States. The relation subsisting between British India and the States

are purely the outcome of political pacts and agreements. It will be perfectly in accordance with the rules of international law to hold that an Indian State whose Legislature was not subject to the Legislature of British India was a distinct and separate political entity. Such a State was, therefore, a foreign country in relation to British India within the meanings and for the purpose of the Civil P. C. Section 20 of Civil P. C. of British India may give jurisdiction to British Indian Courts to pass a decree against residents of such a foreign State but it has no effect against State subjects within the territorial limits of that State and according to Lord Selbourne should be considered an absolute nullity. Moreover, British India and Indian States stand on an entirely different footing with regard to their relations with England. The question of jurisdiction with regard to British India and Indian States is not identical with that relating to England and British India for the simple reason that the governing body of British India derived all its authority and power from the Act of the British Parliament. England and British India being thus under the sovereignty of one power, the subjects of England could not properly be called foreigners in relation to British India. There could be no difficulty in accepting the views of the learned Judge of the Allahabad High Court expressed in the case referred to above, if the position of Indian States in relation to England would have been the same as that of British India, that is to say, if the British Parliament were the source of legislative authority in these States as well. On the other hand the Indian States with reference to their inherent rights and privileges are, as shown above, separate political entities. Their sovereignty so far as Legislature is concerned resides in their Rulers or such bodies as are constituted or appointed by Rulers. On giving full consideration to all the authorities cited above and referred to on this subject it is decided that there is no valid reason to dissent from the Privy Council ruling in *Gurdayal Singh v. Raja of Faridkote* (3). I, therefore, hold that a decree passed by a British Indian Court against the subject of this State who at the time of commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable against the defendant in the forum.

of this State, wherever the cause of action might have arisen.

The copies of the Precipe and Appearance filed by the plaintiff do not help him at all. Putting in an appearance to take search of papers after an *ex parte* decree was pronounced, did not amount to an act of submission to jurisdiction. On the authority of *Janoothassan v. Mahamad Ohuttu* (12), it is contended that Gopal Das should be deemed to have submitted to the jurisdiction of the High Court of Bombay because he executed a general power-of-attorney in favour of one Chothmal for defending suits in foreign Courts. That case is distinguishable from the present case. In that case the attorney resided and carried on business within the jurisdiction of the Columbo Court where the action was commenced. In the present case the attorney did neither reside nor carry on any business in Bombay where the suit was filed by the original plaintiff, the firm of Saligram Narayandas. I, therefore, hold that by merely executing a general power-of-attorney in favour of Chothmal defendant No. 2 did not mean and intend to submit to the jurisdiction of the High Court of Bombay or any particular Court in British India; and that act did not amount to a submission to jurisdiction. No mention was made of the present suit filed by Saligram Narayandas in the said power-of-attorney nor any powers were given to the attorney with special reference to any particular suit. Therefore, the issue is decided against the plaintiff.

Issue No. 8. The plea of acknowledgment taken by the plaintiff is simply redundant. He has not based his claim on the original cause of action and has come to Court only on the strength of foreign judgment. The acknowledgment is proved by the evidence of Prabha Shankar, the head *munib* of the plaintiff, but it does not help the plaintiff in any way. It is dated June 12, 1929. The present suit was filed in this Court on March 3, 1933, that is, more than three years after the execution of the acknowledgment. It is, therefore, clear that the plaintiff's claim was time-barred if he had based it on the acknowledgment. This issue is decided accordingly.

The result of the above findings is that the plaintiff's suit against both the defendants entirely fails and is liable to be dismissed. It is, therefore, ordered that

(12) A I R 1925 Mad. 155; 82 Ind. Cas. 425; 47 M L J 356; 20 L W 677; 47 M 877.

the plaintiff's suit be dismissed with costs to the contesting defendants.

s.

Suit dismissed.

BOMBAY HIGH COURT

Second Appeal No. 166 of 1933

August 17, 1939

BEAUMONT, C. J. AND SEN, J.

RUSTOMJI DOSSABHAI BILLIMORIA

AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BAI MOTI—PLAINTIFF—RESPONDENT

Interpretation of Statutes — Retrospective effect—Guiding principles—Transfer of Property Act (IV of 1882), s. 53-A — Applicability to transactions which took place before April 1, 1930, where suit is brought after April 1, 1930—Registration Act (XVI of 1908), s. 49 as amended in 1929 — Amendment, effect of in considering whether s. 53-A, Transfer of Property Act is retrospective.

No doubt the general principle is that Acts of the Legislature are not given retrospective effect unless the language makes it clear that such was the intention, but in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wishes to preserve rights acquired in such transactions.

Section 53-A, T. P. Act, applies to transactions which took place before April 1, 1930, where the suit was filed after that date. 139 Ind. Cas. 870 (5), dissenting from.

The amendment of s. 49, Reg. Act, was only passed *ex abundante cautela* and was not necessary, and the fact that that amendment was not made retrospective cannot, have any great weight in considering whether s. 53-A, T. P. Act, is made retrospective.

S. A. from the decision of the Assistant Judge, Thana, in Appeal No. 26 of 1937.

Messrs. R. W. Desai and R. R. Desai, for the Appellants.

Messrs. S. T. Desai and R. M. Gandhi for the Respondent.

Beaumont, C. J.—This is a second appeal from the Assistant Judge of Thana. It raises a point of law which has given rise to a certain amount of difference of opinion amongst the High Courts in India, the question being whether s. 53-A, T. P. Act, which came into operation on April 1, 1930, applies to transactions which took place before that date. In the present case the plaintiff transferred to the defendant certain immovable property in February and March 1926, and the purchaser was let into possession; but the documents of transfer were not registered. This suit was

filed on June 20, 1935, and by it the plaintiff, i. e. the vendor, seeks to recover possession of the property, her case being that the defendant cannot rely on the transfers to himself because they are not registered and cannot be given in evidence by reason of s. 49, Reg. Act. The answer of the defendant is that he is entitled to give his transfers in evidence under s. 53-A, T. P. Act. The learned trial Judge held that the defendant was entitled to rely on s. 53-A, T. P. Act, but in appeal the learned Assistant Judge held that s. 53-A could not operate upon a transaction which took place before that section was introduced by the Legislature. It is conceded on this appeal that the transfers in question are such as to fall within the operation of s. 53-A, and the only question is whether the section has any retrospective effect.

There have been a lot of cases in India on the question and, I think, the preponderating view of most of the High Courts, including this High Court is that s. 53-A does apply to a transaction which took place before April 1, 1930, provided that the suit in which the question arises was commenced after April 1, 1930. But curiously enough none of the cases in which that view has been accepted deal with one argument which Mr. S. T. Desai has urged for the respondent, which is, I am disposed to think, the strongest argument in his favour, and therefore I will deal with the question more fully than otherwise I might have thought it necessary to do. Section 53-A, T. P. Act, came to be enacted in these circumstances:—There were cases in India in which the doctrine of part performance, which is a doctrine invented by Courts of Equity in England in order to mitigate hardships resulting from the application of the statute of frauds, which requires certain contracts to be in writing, had been applied in India in order to mitigate what was considered the hardship resulting from a strict application of the Reg. Act. In *Ariff v. Jadunath Majumdar* (1) the Privy Council held that those cases were wrongly decided, and that there was no justification for introducing the English equitable doctrine of part performance into India for the purpose of defeating the plain terms of an Indian statute. In that

state of affairs, the Legislature passed as from April 1, 1930, s. 53-A, T. P. Act, the effect of which is to introduce in certain cases the doctrine of part performance as an answer to non-registration under the Reg. Act. No doubt the general principle is that Acts of the Legislature are not given retrospective effect unless the language makes it clear that such was the intention, but I apprehend that in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wished to preserve rights acquired in such transactions. I therefore read s. 53-A without any preconceived idea that in all probability the Legislature did not intend it to have any retrospective operation. Now, what the section provides is that "where any person contracts to transfer for consideration any immovable property" and the transfer contains the provisions specified in the section, "then, notwithstanding that the contract, though required to be registered, has not been registered, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession."

The section in the opening words "where any person contracts" uses the present tense. It does not say "shall have contracted" or "shall hereafter contract," and I think the use of the present tense denotes that the question whether the section is to operate or not should be answered at the time when it arises, that is when the suit is filed. The section in effect provides that where there is a contract of a certain nature, then certain results are to follow. That seems to me to be the natural meaning of the language, and that is the meaning which has been accepted by this Court in *Tukaram v. Atmaram* (2) by the High Court of Patna in *Wakefield v. Sayeeda Khatun* (3) and by the High Court of Calcutta in *Ashutosh Chattopadhy v. Nalinakshya Bandopadhyaya* (4) to mention only some of the cases. The High Court of Madras in *Kanjees and Mooljee Bros. v. Shanmugam*

(1) 33 Bom. L. R. 913; 131 Ind. Cas. 762; A. I. R. 1931 P. O. 79; 58 C. 123; 58 I. A. 91; 60 M. L. J. 538; 33 L. W. 586; 53 C. L. J. 359; 35 O. W. N. 550; 15 R. D. 354; 8 O. W. N. 739; (1931) M. W. N. 480; Ind. Rul. (1931) P. O. 154 (P. O.).

(2) 40 Bom. L. R. 1192; 180 Ind. Cas. 40; A. I. R. 1939 Bom. 31; I. L. R. (1939) Bom. 71; 11 R. B. 272.

(3) 15 Pat. 786; 166 Ind. Cas. 797; A. I. R. 1937 Pat. 36; 17 P. L. T. 963; 3 B. R. 233; 9 R. P. 355.

(4) A. I. R. 1937 Cal. 467; 170 Ind. Cas. 267; 64 C. L. J. 558; 10 R. O. 128.

Pillai (5) has taken a different view, and has held that s. 53-A in its terms has no retrospective effect. I am unable to agree with that view. I prefer the view taken by the other High Courts. But the matter does not rest there. Reliance is placed on s. 63 of Act XX of 1929, which is the Act, by which the T. P. Act was amended. The addition to the T. P. Act of s. 53-A was introduced by s. 16 of the amending Act. Section 63 of the amending Act provides in effect that nothing in any of the sections enumerated shall be deemed in any way to affect transactions which took place before April 1, 1930. Now s. 16 is not amongst the sections enumerated, but s. 63 (d) deals with the sections which are not so enumerated and provides that:

"...nothing in any other provision of this Act shall render invalid or in any way affect anything already done before 1st day of April 1930, in any proceeding pending in a Court on that date; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Act had not been passed".

It seems to me that that section, though not very happily worded, amounts to this: that in the case of the enumerated sections, which do not include s. 16, their provisions have no retrospective effect and do not apply to any transaction which took place before April 1, 1930; and the provisions of the other sections of the Act, which include s. 16, do not affect anything which took place before April 1, 1930, in a suit pending in a Court on that date, and I think the final words of sub-s. (d) are merely consequential and enact positively that remedies and proceedings which have been saved by the earlier part of the section can be enforced as if the section had not been passed. It was held by this Court in *Suleman Haji Ahmed Umar v. P. N. Patel* (6), and the view has been accepted by other High Courts, that the omission from s. 63 of s. 16 amongst the enumerated sections is a clear indication of the intention of the Legislature that that section should apply in the case of transactions which took place before April 1, 1930, and I think that there is a great deal of force in that contention.

The learned Assistant Judge relied on a judgment of Tyabji, J. in *Chhaganlal v. Chhunilal* (7), in which he analyzes the

terms of s. 63. But in that case the suit had been filed before April 1, 1930, so that the question with which we have to deal did not arise. There is no doubt that s. 53-A would not apply to a suit filed before the date when the section came into operation. It seems to me that so far as s. 63 is concerned it does not in terms cover this case; but it does undoubtedly indicate that the Legislature intended s. 53-A to apply to transactions which took place before April 1, 1930, where the suit was filed after that date. But then we have to consider the effect of s. 15, Act XXI of 1929, which deals with the Reg. Act, and I do not find that that section has been referred to in any of the cases, except the Madras case which I have mentioned. As I have pointed out s. 53-A expressly provides that in the contracts referred to in spite of non-registration the transferor is debarred from enforcing his rights. If no amendment had been made in the Reg. Act, it seems to me clear that s. 53-A would have overridden s. 49, Reg. Act, in respect of contracts falling within the former section. But, I suppose, from excess of caution, the Legislature thought it desirable to amend s. 49, and accordingly a proviso was added to that section (as from April 1, 1930, which so far as material enacts that an unregistered document affecting immovable property and required by this Act to be registered may be received as evidence of part performance of a contract for the purposes of s. 53-A, T. P. Act, 1882. Now, that proviso was added by s. 10, Act XXI of 1929, and s. 15 of that Act is expressed in terms almost identical with those of s. 63 of Act XX, but it applies to the whole Act, and not merely to enumerated sections. It provides:

"Save as provided in sub-s. (2) nothing in this Act shall be deemed to affect—

(a) the terms or incidents of any transfer or disposition of property made or effected before 1st day of April, 1930;

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date".

It is argued that as the transfers in this case were made before April 1, 1930, and had not been registered, they could not be relied upon nor used in evidence and that the amendment of s. 49, Reg. Act, was expressly given no retrospective effect. If that is correct, as it seems to me to be, and if I am right in thinking that s. 53-A, T. P. Act, has retrospective effect, then there would seem to have been a slip in the drafting of the amending Acts. It cannot have been intended to make the amendment

(5) 56 M 169; 139 Ind. Cas. 870; A I R 1932 Mad. 724; 63 M L J 587; (1932) M W N 897; Ind. Rul. (1932) Mad. 605; 36 L W 626.

(6) 35 Bom. L R 722; 145 Ind. Cas. 557; A I R 1933 Bom. 361; 6 R B 81.

(7) 36 Bom. L R 277; 152 Ind. Cas. 267; A I R 1934 Bom. 189; 7 R B 133.

of the T. P. Act retrospective, and to make the consequential amendment of the Reg. Act non-retrospective, and one has to consider which of the amending Acts represents the true intention of the Legislature. It seems to me that the amendment of s. 49, Reg. Act, was only passed *ex abundante cautela* and was not necessary, and the fact that that amendment was not made retrospective cannot, I think, have any great weight in considering whether s. 53-A, T. P. Act, is made retrospective. For the reasons which I have already given which are based, first, on the language of s. 53-A, and secondly, on the omission of s. 16 from the enumerated sections in s. 63, Act XX of 1929, I am of opinion that s. 53-A was intended to apply and does apply to transactions which took place before April 1, 1930. In my opinion therefore the decision of the trial Judge was right; and this appeal must be allowed and the plaintiff's suit must be dismissed with costs throughout.

Sen, J.—I agree.

D.

Appeal allowed.

MADRAS HIGH COURT

Appeal No. 107 of 1936

July 18, 1939

WADSWORTH, J.

Sri CHELIKANI SITARAMAYYA—

APPELLANT

versus

KOPPULA PEDDA VENKANNA—

RESPONDENT

Civil Procedure Code (Act V of 1908), s. 144—Basis of order of restitution—Judgment-debtor held entitled to interest on decretal amount deposited by him as condition for grant of stay of execution, on reversal of decree.

The basis of an order of restitution should not be the benefit which had accrued to the party whose decree has been reversed, but the loss suffered by the successful party as a result of the erroneous decree and the Court's orders thereunder.

A judgment-debtor applied to the Court to stay execution of the decree and the Court ordered him to furnish security for the amount of the decree as a condition precedent to the grant of stay. He, however, deposited into Court the full amount of the decree, praying the Court to order the decree-holder not to draw out the amount except on furnishing security. The Court did so order; but the decree-holder was unable or unwilling to furnish the security, with the result that the decree remained stayed and the money remained in Court. Eventually the decree was reversed in appeal and the judgment-debtor applied for restitution, including in his claim interest on the amount in deposit for the period for which it was in Court:

Held, that the interest could be awarded to the judgment-debtor. 139 Ind. Cas. 348 (1), relied on.

A. against the order of the Sub-Judge, Coconada, dated July 26, 1935.

Mr. K. Bhimasankaram, for the Appellant.

Messrs. Ch. Raghava Rao, S. Rajaraman and S. Kothandarama Nainar, for the Respondent.

Judgment.—This appeal arises out of an application for restitution made by a judgment-debtor, the decree against whom had been reversed in appeal. The appellant is the plaintiff whose decree was reversed. The full records of the proceedings after this decree are not before me and to a large extent I have had to rely upon statements of the learned Advocates on both sides the correctness of which I do not doubt. It is established that after the decree was passed the appellant took out execution but withdrew his petition on the respondent paying the amount of costs. After this execution petition had been withdrawn the respondent, presumably apprehending further steps in execution though there was no overt act so far as we are aware by the decree-holder, applied to the Court to stay execution of the decree. This application was opposed and the Court appears to have ordered the respondent (judgment-debtor) to furnish security for the amount of the decree as a condition precedent to the grant of stay. The respondent found difficulty in furnishing security and instead of obeying the Court's order literally, he deposited into Court the full amount of the decree, praying the Court to order the decree-holder (appellant here) not to draw out the amount except on furnishing security. The Court did so order; but the decree-holder was unable or unwilling to furnish the security, with the result that the decree remained stayed and the money remained in Court. Eventually the decree was reversed in appeal and the respondent applied for restitution, including in his claim interest on the amount in deposit for the period for which it was in Court. The lower Appellate Court has awarded interest at 12 per cent. on this amount and it is against this order for interest that the present appeal is preferred by decree-holder.

So far as I am aware there is no case which precisely covers the point now before me though the decision of the Bench in *Shanmugasundara v. Ratnavelu* (1) deals

(1) 63 M L J 383; 139 Ind. Cas. 348; A I R 1933 Mad. 33; 55 M 1025; Ind. Rul. (1932) Mad. 661; (1932) M W N 1044; 39 L W 504.

with somewhat similar facts. That was a case of a decree for money in which an application was made for stay at a time when no execution petition was pending, as is also the position here, but the Court itself ordered the deposit of a portion of the decree amount in cash and the giving of security for the remainder and directed the decree-holder not to draw the cash deposit except on furnishing security. The deposit was made; the decree-holder failed to furnish security and draw out the cash deposit and on the decree being reversed, restitution was ordered in the shape of interest on the amount deposited in cash, the reason being that the basis of an order of restitution should not be the benefit which had accrued to the party whose decree has been reversed, but the loss suffered by the successful party as a result of the erroneous decree and the Courts orders thereunder.

It is argued for the appellant here that the position in the present case is different in that the order of the Court as a result of the decree and the stay application was not for the deposit of cash but for the giving of security and that it was the voluntary act of the present respondent in substituting a cash deposit in place of the security ordered which resulted in the loss of interest on the money so deposited. On the other hand it is contended for the respondent that though the respondent on his own initiative made the cash deposit instead of giving security, the act of the respondent was ratified and adopted by the Court in its final order staying the decree by virtue of this deposit and ordering the appellant to furnish security as a condition for withdrawing the amount deposited. With some hesitation, I accept the contention of the respondent. If once we adopt the criterion laid down in the case just quoted that the basis of restitution is to be the loss suffered by the judgment-debtor by reason of the wrongful decree and the orders resulting therefrom, I think it follows that the present respondent is entitled to interest on the deposit. It is true that he could have escaped the necessity for a deposit by furnishing security. He was unable to do so and tendered the money into Court subject to certain terms. The Court accepted the deposit and decided that the terms suggested by the respondent were suitable terms upon which the appellant should be allowed to withdraw the money and it was on the basis of these terms that the Court stayed exe-

cution of the decree. It seems to me therefore though the first act in the making of the deposit instead of furnishing security was due to the initiative of the respondent the Court itself took the responsibility for treating that deposit as the basis for the stay order and imposing certain terms upon the appellant. It follows that the order for the retention of the money in Court as a condition of stay and the terms imposed upon the appellant form part of an act of the Court resulting directly from a decree which has been held to be erroneous and that order has in fact deprived the respondent of the use of money which would have been at his disposal had it not been for the erroneous decree. Therefore in accordance with the general principle embodied in s. 144, Civil P. O., the order of the lower Appellant Court requiring the appellant to pay interest on the amount of his deposit is correct. The appeal is therefore dismissed with costs. (Leave to appeal is granted).

N.-S.

*Appeal dismissed.***ALLAHABAD HIGH COURT**

First Appeal No. 154 of 1937

September 15, 1939

MOHAMMAD ISMAIL, J.

Mst. KUTIKA KUER—PLAINTIFF—**APPELLANT***versus.***SRIDHAR MISIR AND OTHERS—DEFENDANTS**
—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 10 (2), 19—Order rejecting appeal under O. XLI, r. 10 (2)—Appealability—Order refusing to restore such appeal, if appealable.

An order rejecting an appeal under O. XLI, r. 10 (2), Civil P. O., is not a decree and is not therefore appealable as such. It is not appealable even as an order under O. XLIII, r. 1. *Lekha v. Bhauna* (1), relied on.

Order XLI, r. 19 is not applicable in a case where the date on which the appeal was rejected under O. XLI, r. 10 (2) was not fixed for the hearing of the appeal. An order therefore refusing to restore the appeal so rejected is not appealable. No power is vested in the Court to allow the appellant to proceed with his appeal even if he is put to great hardship in not allowing him to proceed with it. *Firozi Begam v. Abdul Latif Khan* (3), referred to.

F. A. against an order of the District Judge, Azamgarh, dated April 5, 1937.

Mr. K. L. Misra, for the Appellant.

Mr. Ambika Prasad, for the Respondents.

Judgment.—The facts that have given rise to these connected appeals may be briefly stated. Mst. Kutika Kuer, plaintiff, brought a suit for a declaration that the house described in the plaint was not saleable in execution of the decree in favour of the respondent Sridhar Misir. The suit was

dismissed by the trial Court. The plaintiff appealed from the decree of the Court of first instance. At the instance of the respondents on August 8, 1936 the Court directed the appellant to furnish security within a fortnight. It is not necessary to refer to various applications and orders that were made after the passing of the order on August 8, 1936. Ultimately the appellant furnished security of immovable property. The respondent raised objections to the sufficiency of the security and the Court fixed February 13, 1937 for the disposal of the objection. On the date fixed, no one appeared on behalf of the appellant to prove that the security furnished was in compliance with the order of the Court and was sufficient. The appeal was accordingly rejected. The appellant then made an application to the lower Appellate Court for the restoration of her appeal. This application was also dismissed on April 5, 1937. The appellant has now filed first appeal from the order of April 5, 1937 and second appeal from the former order rejecting the appeal which was passed on February 13, 1937. The first question for determination is whether the orders appealed against are appealable. Under r. 10, O. XLI, Civil P. O., the Appellate Court may, in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both. The order passed by the lower Appellate Court was obviously under this Rule. Sub-r. (2) provides:

"Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal."

The order passed by the Court below rejecting the appeal is not a decree within the meaning of s. 2, sub-s. (2). The order of the Court was by no means the formal expression of an adjudication which so far as the Court expressing it, conclusively determined the rights of the parties. That being so no appeal is permissible under the Code from an order rejecting the appeal under O. XLI, r. 10, sub-r. (2). Similarly the order of the Court below is not appealable as an order. An examination of O. XLIII, r. 1 will show that an order rejecting an appeal under O. XLI, r. 10 is not one of the orders from which an appeal is allowed. This question was considered by a Full Bench of this Court in *Lekha v. Bhauna* (1). It was held that:

"An order rejecting an appeal under s. 549, Civil P. O., (O. XLI, r. 10) is not appealable either as an order or as a decree."

(1) 18 A 101; A W N 1895, 238 (F B).

The Full Bench overruled an earlier ruling reported in *Siraj-ul-haq v. Khadim Husain* (2). For the reasons given above, I hold that the order of February 13, 1937 is not appealable. Now coming to the order of April 5, 1937, I find that this is also not one of the orders mentioned in O. XLIII, r. 1. Learned Counsel for the appellant contends that it is in effect an order of dismissal of the appeal for the appellant's default provided by r. 17, O. XLI of the Act. If this contention is well-founded, then the subsequent application for restoration would be covered by r. 19, O. XLI. An appeal is provided from an order of refusal under r. 19, O. XLI to re-admit an appeal. I however consider the argument of learned Counsel untenable. The date on which the appeal was rejected was not fixed for the hearing of the appeal and therefore it could not be dismissed for the appellant's default under r. 17. It follows therefore that r. 19 also is inapplicable. The order of the Court below clearly shows that the appellant was ordered to furnish security for costs of the respondent to enable him to proceed with his appeal. Unless the appellant complied with the order no date of the hearing of the appeal could possibly be fixed. I have no doubt whatsoever that the rejection of the appeal was under O. XLI, r. 10, sub-r. (2) and not under r. 17. Under these circumstances the appellant is not entitled to appeal from that order.

Learned Counsel for the appellant contends that his client has now deposited sufficient security for the costs of this Court as well as of the Court below and that it would be a great hardship if he is not allowed to argue his appeal. Unfortunately, no power is vested in the Court to allow the appellant to proceed with his appeal. I therefore cannot consider the question of hardship. I however wish to refer to a passage in the judgment of a Bench of this Court in *Firozi Begam v. Abdul Latif Khan* (3) at p. 145:

"We are compelled therefore to sustain the preliminary objection. At the same time we take the opportunity of expressing our opinion that, considering the serious consequences entailed by an order under s. 549, it would be well if the Legislature should consider whether it is not advisable to embody in the new Civil P. O. some provision analogous to that contained in para. 2 of s. 381 and to give a right of appeal from orders passed under s. 549 (O. XLI, r. 10)."

I respectfully agree with the observations made by the learned Judges. In the result I dismiss the appeals with costs.

s.

Appeals dismissed.

(2) 5 A 380; A W N 1883, 60.

(3) 30 A 143 (145); 5 A L J 109; A W N 1908, 53.

MADRAS HIGH COURT

Criminal Appeal No. 363 of 1938

September 26, 1939

LAKSHMANA RAO, J.

In re J. S. DHAS AND ANOTHER—

APPELLANTS

Penal Code (Act XLV of 1880), ss. 420, 120-B—Grant of false transfer certificate of export quota rights, by clerk of Tea Licensing Committee—Transferor under certificate making transfer of quota far in excess of what was due to his credit—Both clerk and transferor held guilty under ss. 420 and 120-B.

An owner of a tea estate made an application to the Tea Licensing Committee for transfer of export quota rights in which he mentioned the export quota far in excess of what was fixed to his credit by the Committee. A clerk of the Committee whose duty was to check whether the transferor had in fact the quota sought to be transferred to his credit, wrote on the application that the quota mentioned therein was 'available' for transfer. Due to this false endorsement the transferor was granted the quota transfer certificate which enabled him to transfer export quota rights far in excess of what was to his credit and thereby made a huge wrongful gain:

Held, that the fraud was committed at the instance of the transferor and as the quota transfer certificates were by themselves property and the documents of title both the transferor and the clerk were guilty under ss. 420 and 120-B, I. P. O. 165 Ind. Cas. 505 (1), 56 Ind. Cas. 510 (2) and *Ramaswami Ayyar v. Vaithilinga Mudali* (3), relied on.

Cr. A. against the order of the Sessions Court, Coimbatore Division, in C. O. No. 77 of 1938.

Messrs. K. S. Jayarama Iyer, E. Antony Lobo and G. Gopalaswami, for the Appellants.

The Public Prosecutor, for the Crown.

Judgment.—Appellant No. 1 was the ledger clerk of the Tea Licensing Committee at Coonoor and appellant No. 2 is the proprietor of the Kudikadu Estate. Both have been convicted under s. 120-B read with s. 420, I. P. C., of the offence of conspiracy to cheat and obtain tea export quotas of the value of Rs. 22,523-15-0 and sentenced to rigorous imprisonment for two years. The Tea Licensing Committee was constituted in 1933 for regulating the export of tea from India to foreign countries, and the Office of the Committee for Southern India was located at Coonoor. It consisted of P. W. No. 5 the joint controller, and P. W. No. 7, the assistant joint controller, with an establishment, and it was the function of the committee to distribute the right of exporting the quantity allotted to Southern India to the various Estates in Southern India according to productive capacity, and issue licenses to export the tea. Sales of export quota rights were

permitted and it was part of the duty of the committee to facilitate them. The vendor had to submit an application in the prescribed form signed by himself and the vendee, and on receipt, the application would go to the transfer clerk to ascertain whether the transferor and transferee were on the books of the committee. The application would then go to the accountant to verify whether the necessary fees had been paid by the parties and it would then be sent to appellant No. 1, the ledger clerk, to ascertain whether the transferor had to his credit the export quota rights intended to be transferred. It was the duty of appellant No. 1 to write the word 'available' on the form if the transferor had to his credit the export quota sought to be transferred, and the application would then go to the transfer clerk for preparing the quota transfer certificates in triplicate. The transfer certificates and the application would then be sent to P. W. No. 7, the assistant joint controller and he would initial the certificates if the word 'available' is found written on the application by appellant No. 1. The transfer certificates without the application form would then go to P. W. No. 5 and they would be signed by him if P. W. No. 7's initials are seen there. The certificates would then be sent to the despatching clerk and one copy of the certificate and duplicate copy of the application would be sent to the transferor. Another copy of the certificate would be sent to the transferee and the third copy and the original application would be retained in the office. The necessary debit and credit entries would be made in the ledgers and a cursory glance at the ledgers would show the amount of export quota to the credit of the respective estates. Appellant No. 1 was in sole charge of these ledgers and the transactions had also to be entered in a transfer register, Ex. F. There was also "the main controlling account" which used to be written by appellant No. 1, and P. W. No. 7 used to act as joint controller during the absence of P. W. No. 5 on leave. Appellant No. 1 used to act as assistant controller in addition to his duties as ledger clerk and dealings of Kudikadu Estate were carried on by appellant No. 2.

The joint controller went on leave from April to October 1937 and P. W. No. 7 was acting for him. Appellant No. 1 was acting as assistant joint controller in addition to his duties as ledger clerk and Exs. B-3, B-5, B-7, B-9, B-11, B-13, B-14,

B-16, B-17, B-19, B-21, B-23 and B-25, the transfer applications, were received from appellant No. 2. The word 'available' was written on them by appellant No. 1 though the estate had not the necessary quota to its credit and Exs. B-6, B-8, B-10, B-12, B-13, B-20, B-22 and B-24 the quota transfer certificates, were prepared. Appellant No. 1 initialled them as acting assistant joint controller, and they were signed in the usual course by P. W. No. 7 the acting joint controller and issued to the parties. P. W. No. 5, the joint controller, called for the ledgers for his customary check, on his return in October, and appellant No. 1 stated that he was writing them up. They were called for again a few days later and appellant No. 1 replied that it would take some days to bring the balance up to date. Appellant No. 1 reported later that the ledgers had disappeared from the office, and a new set of ledgers were compiled under his direction from the office records including Exhibit F, the transfer register which was not in his custody. The balance would not tally and appellant No. 1 went on leave. P. W. No. 6, the accountant, was asked to verify the figures and Ex. A-1, the wrong credit entry for 63,597 lbs. of export quota rights transferred by the Achankoil Estate to the Denington Estate on June 4, 1937, was discovered in the re-constructed ledger of the Kudikadu Estate. The relative folio number was found altered in the transfer register, and Ex. O-2, the credit entry for 63,597 lbs. of export quota rights in the handwriting of appellant No. 1 was found interpolated in the reconstructed ledger of the Denington Estate. The failure to balance the figures was due to Ex. A-1, the wrong credit entry in the re-constructed ledger of the Kudikadu Estate and it transpired that appellant No. 2 had been enabled to transfer 48,249 lbs. of export quota rights in excess of the quota to the credit of the Kudikadu Estate and make a wrongful gain of Rs. 22,523-15-0. Appellant No. 1 was summoned by the joint controller but he made himself scarce.

That appellant No. 2 transferred 48,249 lbs. of export quota rights on behalf of the Kudikadu Estate in excess of the quantity to the credit of that estate and made a huge wrongful gain is beyond question, and it was not suggested that the account was overdrawn by any arrangement with the Tea Licensing Committee. That some others were permitted to transfer quota rights in anticipation of acquisition of rights has no bearing and it was not disputed in

this Court that P. W. No. 7, the acting joint controller, would not have signed the quota transfer certificates but for the word 'available' written on the application forms by appellant No. 1 as ledger clerk and his initials thereon as acting assistant joint controller. It was not suggested hitherto that appellant No. 1 wrote the word 'available' and put his initials in ignorance of the state of accounts and his statement in answer to a Court question that he must have got the permission of the joint controller to do so is unfounded. The disappearance of the accounts, not to mention the subsequent conduct of appellant No. 1 belies it, and there is no ground for dissent from the conclusion of the learned trial Judge that the quota transfer certificates were obtained by cheating. There was no occasion for such fraud except it be for consideration, and the fraud must have been committed at the instance of the person benefited by it. Appellant No. 2 had dealings with appellant No. 1 direct as appearing from Ex. M-1 and he had contracted to transfer 59,000 lbs. of export quota rights in excess of the quantity to the credit of his estate on May 31, 1937. Copies of the quota transfer certificates used to be sent to the parties and Ex. H series show that appellant No. 2 knew the state of the account of the Kudikadu Estate in June, 1937. But the contracts entered into without the necessary export quota rights to the credit of the estate had to be fulfilled and as pointed out by the trial Judge in para. 21 of the judgment appellant No. 2 was in desperate straits. The conclusion is therefore irresistible that the fraud was committed at his instance, and the appellants would undoubtedly be guilty under ss. 415 and 120-B, I. P. C.: *vide Aswini Kumar Gupta v. Emperor* (1). The quota transfer certificates are by themselves property (*vide In re Packinathan* (2) and *Ramaswami Ayyar v. Vaithilinga Mudali* (3)) and even otherwise, what was transferred was not a "power" and the evidence is that export quota rights have an independent value. The quota transfer certificates would also be documents of title, and the appellants would be guilty under ss. 420 and 120-B, I. P. C. The conviction is therefore correct and it would make no difference in the sentence even if the conviction should

(1) 1 L R (1937) 1 Cal. 71; 165 Ind. Cas. 505; A I R 1936 Cal. 403; (1936) Or. Cas. 655; 37 Or. L J 1156; 40 C W N 956; 9 R C 413.

(2) 11 L W 368; 56 Ind. Cas. 510; 21 Or. L J 478; A I R 1920 Mad. 131.

(3) 1 Weir 28.

be under ss. 415 and 120-B, I. P. O. The conviction of the appellants is therefore confirmed and having regard to the nature and extent of the fraud the sentence is not excessive. The sentences too are therefore confirmed and the appeal is dismissed.

N.E.

*Appeal dismissed.***LAHORE HIGH COURT**

First Appeal No. 357 of 1938

June 13, 1939

TEK CHAND AND DALIP SINGH, JJ.
SAIN DASS CHAWLA—PLAINTIFF—
APPELLANT

*versus***Baba UJAGAR SINGH AND ANOTHER****—DEPENDANTS—RESPONDENTS**

Res judicata—Suit against father and son for declaration that son had saleable interest in three properties—Suit dismissed against son but against father only in respect of two properties—No appeal preferred—Decision if can be attacked in appeal from decree relating to matters left undecided—Practice—Declaration of title, when refused.

A suit instituted under O. XXI, r. 63, Civil P. O., by a decree-holder against father and son for declaration that the son had saleable interest in certain properties and that all the properties were liable to attachment, was dismissed as against son in respect of all the properties and against the father in respect of two properties and it was held that the suit could proceed against the father in respect of one property. No appeal was preferred against this decision:

Held, that the decision was clearly a final adjudication between the parties relating to these matters and was, therefore, a "decree" as defined in s. 2, cl. (2), Civil P. O. No appeal having been filed, the decree became final and was not liable to attack on appeal from the decree relating to other matters, which had been left undecided.

Held, also that as the suit was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants it was competent to the Court to decide the dispute relating to the various properties separately. 15 Ind. Cas. 563 (3), distinguished.

A Court will not grant a declaration of right which would be stamped with something in the nature of futility. 37 Ind. Cas. 161 (4), relied on.

F. A. from the decree of the Sub-Judge, First Class, Rawalpindi, dated July 11, 1938.

Messrs. Mela Ram and Nand Lal Saluja, for the Appellant.

Messrs. D. R. Sawhney, Gurbachan Singh and Shamair Chand, for Respondents Nos. 2 and 1 respectively.

Tek Chand, J.—The appellant, Sain Dass Chawla, obtained a money decree against Tikka Sant Singh, son of Baba Ujagar Singh Bedi, from the Court of the Senior

Subordinate Judge, Rawalpindi, on November 20, 1933. In execution of the decree, he attached a bungalow known as "Oosynook" at Murree, and one-fourth share in *Sarai* Baba Khem Singh and in the building known as Damdama Sahib at Rawalpindi. Baba Ujagar Singh objected to the attachment, alleging that the attached properties belonged to him exclusively and that the judgment-debtor had no interest in them. The judgment-debtor also filed objections saying that he had only a right of residence in "Oosynook" and that this right was exempt from attachment and sale under s. 60 (1) (n), Civil P. O. He also averred that he had no interest in the other two properties which could be attached and sold. In the course of the inquiry into the objections, the decree-holder made a statement on November 2, 1935, that "for the time being" he did not wish to proceed against the judgment-debtor's alleged share in the Damdama Sahib and *Sarai* Baba Khem Singh and that execution should proceed against "Oosynook" only. On this statement, the executing Court released these two properties and restricted the inquiry to "Oosynook." Subsequently, relying on a decree passed by the Senior Subordinate Judge, Lahore, on February 27, 1928, in terms of the award of Nawab Mohammad Hyat Khan Noon, dated November 9, 1927, it held that "Oosynook" was owned by Baba Ujagar Singh and that Tikka Sant Singh had only a right of residence in it and that he had no power to dispose of this right. It accordingly allowed the objections and released "Oosynook" from attachment. From this decision the decree-holder preferred an appeal to this Court.

The appeal was decided by Agha Haidar, J., sitting in Single Bench on May 26, 1936: *Sain Das v. Tikka Sant Singh* (1). The learned Judge affirmed the finding of the executing Court that "Oosynook" could not be attached and sold in execution of the decree, but he held that it was liable to be dealt with by way of "equitable execution" and he ordered that a Receiver be appointed to collect the rent and after deducting the expenses, pay it to the decree-holder till the decretal amount was discharged. From this order the judgment-debtor preferred an appeal under the Letters Patent, but the appeal was dismissed on January 14, 1937: Letters Patent Appeal No. 103 of 1936 *Tika Sant*

(1) A I R 1936 Lah. 830; 165 Ind. Cas. 519; 9 R L 254.

Singh v. Saindas Chawala (2). In the meantime, on October 13, 1936, the decree-holder had instituted a suit under O. XXI, r. 63, Civil P. C., against Baba Ujagar Singh and Tikka Sant Singh for a declaration that the latter had a saleable interest in one-half of "Cosynook" and one-fourth of *Sarai* Baba Khem Singh and Damdama Sahib respectively, and that all the three properties were liable to attachment and sale in execution of the decree to the extent stated. The suit was resisted by both the defendants on various pleas. The learned Subordinate Judge at first framed the following three preliminary issues:

"1. Whether the plaintiff is entitled to maintain this suit in respect of Damdama Sahib and *Sarai* Baba Khem Singh?

2. How does the statement of the plaintiff, dated November 2, 1935, releasing these properties from attachment, affect the present suit?

3. What is the effect of the decision of the High Court, dated May 26, 1936, on this suit."

These issues were decided by the learned Subordinate Judge on December 21, 1937. He held that the plaintiff decree-holder having withdrawn the attachment against Damdama Sahib and the *sarai* was not entitled to maintain a suit for declaration against either defendant under O. XXI, r. 63, Civil P. C., or under s. 42, Specific Relief Act, in respect of these two properties. He further held that in view of the decision in the execution proceedings that the judgment-debtor's interest in "Cosynook" was not liable to attachment and sale in execution of the decree, which had been affirmed by the High Court on appeal, the plaintiff's suit against the judgment-debtor Tikka Sant Singh was barred by s. 47, Civil P. C. He accordingly dismissed the suit against Tikka Sant Singh in respect of all the three properties and against Baba Ujagar Singh in respect of *Sarai* Baba Khem Singh and Damdama Sahib. He held however that the suit as regards "Cosynook" could proceed against Baba Ujagar Singh only. In accordance with this judgment a decree sheet was prepared on December 21, 1937, dismissing the plaintiff's suit against Tikka Sant Singh in respect of all the three properties and against Baba Ujagar Singh in respect of the *sarai* and Damdama Sahib. No appeal against this decision was preferred by the decree-holder.

The suit proceeded against Baba Ujagar Singh in respect of "Cosynook." Issues were framed on the merits and after evidence for

(2) 175 Ind. Cas. 447; A I R 1937 Lah. 433; I L R (1937) Lah. 486; 39 P L R 839; 10 R L 739.

the parties had been recorded, the learned Judge, on July 11, 1938, dismissed the suit against Baba Ujagar Singh *qua* this property also, leaving the parties to bear their own costs. From this decree, dated July 11, 1938, the plaintiff has appealed, impleading both Baba Ujagar Singh and Tikka Sant Singh as respondents. In this appeal the appellant has challenged not only the decision of the lower Court in favour of Baba Ujagar Singh in respect of "Cosynook," as given in the judgment of July 11, 1938, but also the decree of the lower Court, dated September 21, 1937, dismissing the suit relating to "Cosynook" against Tikka Sant Singh, and the suit in respect of the *sarai* and Damdama Sahib against both defendants.

A preliminary objection is raised on behalf of the respondents that the plaintiff not having appealed against the decree passed by the lower Court on December 21, 1937, is not entitled to agitate in this appeal matters which had been finally decided between the parties by that decree. After hearing Counsel for the appellant I am of the opinion, that this contention is well-founded and must succeed. The learned Counsel for the appellant contends that the decision of the lower Court dated December 21, 1937, did not amount to a "decree" but was merely an interlocutory order passed in the course of the suit and that the order was not appealable. This contention is without any force whatever. As has been stated above, the Court had, by its judgment of that date, dismissed the suit against Tikka Sant Singh with regard to all the properties which were the subject-matter of the suit and against Baba Ujagar Singh with regard to the *sarai* and the Damdama. This was clearly a final adjudication between the parties relating to these matters and was therefore a "decree" as defined in s. 2, cl. (2), Civil P. C. An appeal from this decree lay under s. 96 of the Code but no such appeal was filed within the period of limitation prescribed by law and therefore the decree has become final and is not liable to attack now on appeal from the decree relating to other matters, which had been left undecided. Mr. Mela Ram in support of his contention referred us to a decision of the Chief Court reported in *Gehna v. Khuda Bakhsh* (3). That case however is clearly distinguishable, as there an issue relating to *res judicata* had been decided in favour of the plaintiff, it being

(3) 16 P R 1913; 15 Ind. Cas. 563; 191 P L R 1912.

held that the suit could proceed and that the former decision relied upon did not bar the suit. That order was clearly of an interlocutory nature: there was no final determination of the rights of the parties in regard to the subject-matter of the suit or any part thereof and therefore it did not amount to a "decree".

It was further argued that the Subordinate Judge should not have decided the suit piecemeal. But the suit, in this case, was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants. It was therefore competent to the Court to decide the dispute relating to the various properties separately. It is conceded that the plaintiff could have brought three separate declaratory suits relating to each property and each suit could have been dealt with separately. It therefore makes no difference that the plaintiff has joined the three claims in one suit. Further the Court, in this case, did, as a matter of fact, give a final adjudication relating to some of the subject-matters in dispute on December 21, and passed a formal decree on that date. If the plaintiff considered the judgment or the decree to be illegal or wrong on the merits, his remedy was by way of appeal or review, but he not having availed himself of either of these remedies, the decision has become final and unassailable and cannot be challenged now in regard to the matters finally determined by it. The present appeal against Tikka Sant Singh is therefore clearly incompetent and so also against Baba Ujagar Singh with regard to the *sarai* and Damdama Sahib.

The only remaining point is the claim against Baba Ujagar Singh in respect of "Cosynook." Though the plaintiff's appeal against Baba Ujagar Singh relating to this matter is competent, but in view of the decision as regards the rights of Tikka Sant Singh in this property it is futile to give any adjudication on the merits in regard to this property. Admittedly, any declaration given by us would in the circumstances be entirely barren, and as observed by their Lordships of the Privy Council in *Janaki Ammal v. Nraayanaswami Aiyar* (4), at p. 639 a Court will not grant a declaration of right which 'would be stamped with something in the nature of futility.' As stated already, it has been decided in the course

(4) 39 M 634, (639); 37 Ind. Cas. 161; A I R 1916 P O 117; 43 I A 207; 20 M L T 168; 31 M L J 225; 14 A L J 997; (1916) 2 M W N 188; 20 O W N 1323; 18 Bom. L R 856; 24 O L J 309; 4 I. W 530 (P O).

of the execution proceedings—and that decision (whether right or wrong on the merits) is final in the present suit as between the plaintiff and Tikka Sant Singh—that the latter had no saleable interest in this property which could be attached and sold in execution of the plaintiff's decree against him, and the only relief by way of "equitable execution" which could be given to the plaintiff has been granted to him. This being so, it is wholly useless to decide, for the purposes of the execution of the decree of the plaintiff against Tikka Sant Singh, as to what the rights of Baba Ujagar Singh in this house are. The appeal fails and I would dismiss it with costs. Baba Ujagar Singh has filed a cross-objection against that part of the decree of the lower Court which left the parties to bear their own costs of that suit. After hearing his Counsel I can find no substance in this objection. In the circumstances of the case, the lower Court had exercised a sound judicial discretion in leaving the parties to bear their own costs. I would therefore dismiss the cross-objection with costs.

Dallp Singh, J.—I agree.

s.

Appeal dismissed.

RANGOON HIGH COURT

Second Appeal No. 268 of 1938

June 7, 1939

BA U, J.

U KYAW DUN—APPELLANT

versus

MAUNG NGE AND ANOTHER—RESPONDENTS

Trade-mark—Cigars imported and sold by importer with his own trade-mark—Importer bestowing great care and skill in selecting goods and advertisement etc.—Whether entitled to protection in respect thereof—Action against manufacturer using similar trade-mark.

Where the cigars imported had been sold by the importer who registered the trade-mark in his own name, had leaves selected for the cigars and sold them with his own trade-mark and because of his care and precaution in selecting leaves and because of his advertisement and pushing, cheroots had acquired a great reputation:

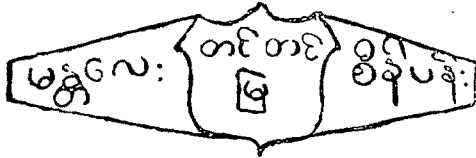
Held, that the importer was entitled to protection of the Court and could maintain an action against the manufacturer of those goods using marks closely resembling that used by the importer. 10 Ind. Cas. 802 (1), *Hirsch v. Jonas* (2) and 80 Ind. Cas. 1013 (3), relied on.

S. A. against the decree of the Assistant District Court, Mandalay, dated July 20, 1938.

Dr. Ba Han, for the Appellant.

Messrs. Clark and Surridge, for the Respondents.

Judgment.—The plaintiff-appellant U Kyaw Dun is a resident of Prome while defendant-respondent No. 1 U Nge is a resident of Mandalay. Respondent No. 2 Daw Mi is the wife of respondent No. 1. In or about the year 1292 B. E. (1930) they commenced dealing with each other in the matter of manufacture and sale of Burmese cheroots. U Nge manufactured them in Mandalay and U Kyaw Dun imported them from Prome and sold them there. At that time the figure of a peacock was used by the respondent U Nge as his trade-mark; but some time later the trade-mark was changed. Instead of using the figure of a bird or an animal they used a combination of three names, Mandalay, Tin Tin Mya, Seinban, written in Burmese characters in the following manner:



The mark was registered in Mandalay by the plaintiff-appellant U Kyaw Dun as his trade-mark on March 4, 1931, *vide* Ex. B, and each cheroot imported by U Kyaw Dun bore this trade-mark. The cheroots thus became known as Tin Tin Mya cheroots or Tin Tin Mya *say baw lait*. This went on till about the end of 1937 when a difference of opinion took place between U Kyaw Dun and U Nge. U Kyaw Dun complained that the cheroots which he had been getting lately were not of the same quality as before; U Nge replied that as they were not made by machine he could not maintain their uniform quality. As a result of this difference of opinion U Kyaw Dun ceased dealing with U Nge and started placing orders for cheroots with a woman named Daw Mi of Sein Ban quarter, Mandalay. He sold these cheroots with his registered trade-mark, Tin Tin Mya, thereon. U Nge also used the same trade-mark with the addition of the words "... (golden spectacles) in very small type under the name "Tin Tin Mya." Unless one looks very carefully, one will not notice the words "golden spectacles" on the labels of the respondent U Nge. The two labels impressed with these trade-marks are thus in no way distinguishable from each other. In these circumstances the cheroots of one will and can easily pass off as the cheroots of the other.

For these reasons the respondent filed a suit, Civil Regular No. 25 of 1938, in the Court of the Sub-Divisional Judge, Mandalay, asking for the cancellation of the registration of the trade-mark registered in the name of the appellant U Kyaw Dun alleging that he allowed the Tin Tin Mya trade-mark to be registered in the name of the appellant U Kyaw Dun as the appellant agreed to act as his sole agent in Prome. In reply thereto the appellant U Kyaw Dun launched both civil and criminal proceedings. In the civil proceedings out of which the present appeal arises U Kyaw Dun makes the following allegations:

"(1) That the plaintiff has for the last seven years or more sold in Prome District Burmese cheroots or *saybawlaits* manufactured by the defendants at Seinban Quarter, Mandalay, bearing a trade-mark or label round each cheroot or *saybawlait* and known as "Tin Tin Mya *saybawlaits*." This trade-mark was registered by the plaintiff at Mandalay on March 4, 1931. A sample of the trade-mark or label is attached to this petition, marked A. The plaintiff has extensively advertized and sold these *saybawlaits*. In consequence thereof the *saybawlait* with the said label have become known in both Mandalay and Prome Districts. ...

"(2) That the plaintiff's trade-mark or label bears the name "Tin Tin Mya," Maung Tin being the name of the only nephew of the plaintiff and Ma Mya being the name of the only grandchild of the plaintiff whom he has adopted as his *keittima* daughter, and thus "Tin Tin Mya" is a combination of these two names.

"(3) That during the period the plaintiff has been using the said "Tin Tin Mya" trade-mark or label affixed on them, these cheroots or *saybawlaits* acquired a very high reputation in Prome District, and the sales have been large and profitable.

"(4) That the defendants have been selling at Mandalay and Prome, the cheroots or *saybawlaits* manufactured by them at Mandalay during the last two months using the "Tin Tin Mya" trade-mark or label round each cheroot or *saybawlait* which closely resembles the trade-mark or label used by the plaintiff in colour, size, general make-up and marking in order to pass off fraudulently the cheroots or *saybawlaits* as those bearing the trade-mark or label of the plaintiff."

In reply the respondent states *inter alia* as follows:

"As regards para. 1 of the plaint these defendants admit that the plaintiff was the representative of the defendants at Prome to sell Burmese cheroots or *saybawlaits* manufactured by the defendants at Seinban Quarter, known as 'Mandalay Tin Tin Mya Seinban Quarter'. Defendant No. 1 was the owner of the said trade-mark and it was registered in the name of the plaintiff on condition that he the said plaintiff will act as the sole agent of defendant No. 1 at Prome for selling the abovementioned cheroots. Defendant No. 1 has already filed a suit in this Court for cancellation of the registration of the said trade-mark and for other relief being Civil Regular Suit No. 25 of 1938 of this Court."

On these pleadings suitable issues were framed and a good deal of evidence was produced by both sides. I have carefully

examined the evidence and I am satisfied that the following points are satisfactorily proved: (1) That the plaintiff-appellant U Kyaw Dun was not the agent of the defendant-respondent U Nge, (2) that U Kyaw Dun was an importer and U Nge was a manufacturer of Burmese cheroots, (3) that U Kyaw Dun financed U Nge to a certain extent to carry on his business as a manufacturer, (4) that U Kyaw Dun himself selected leaves and sent them to Mandalay and with the leaves so sent U Nge made cheroots and sent them to U Kyaw Dun, (5) that U Kyaw Dun sold these cheroots with the Tin Tin Mya trade-mark thereon, and (6) that U Nge sent cheroots to other places bearing not Tin Tin Mya trade-mark, but some other trade-mark.

In holding that these points are proved, I rely on the letters written by the defendant-respondent U Nge to U Kyaw Dun, the evidence of U Nge's own witness, Beresford (D. W. No. 5), and the evidence of U Kyaw Dun and his grandchild, Ma Mya. Their evidence was also accepted by the trial Judge. On the facts thus found proved the question that arises is whether an importer can acquire a right of use to a trade-mark against a manufacturer. A good number of cases were cited at the Bar. As the facts of some of those cases are entirely different from the facts of the present case, they are of no help; but the principle enunciated in all these cases is the same, and the principle is as enunciated by Sir Basil Scott, C. J., in *West End Watch Co. v. Berna Watch Co.* (1). It is as follows:

"The importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation, even against the producer of the goods."

In *Hirsch v. Jonas* (2), Jessel, M. R., made observations to the same effect. The learned Master of the Rolls said:

"I can understand a man saying, 'I am not the actual manufacturer of goods, but the selector of goods, and my reputation for cleverness and selection is so great that goods marked with a mark to shew that they had been selected and approved of by me will fetch a higher price in the market.' If Hirsch had put on the box 'Gloria de Inglaterra Havannah' (cigars, selected by Hirsch) he might have had a case to prevent other people imitating that. It would shew that the cigars selected were approved of by him. If he got a great reputation in that way, I can understand he would have a right of protection for that which indicates to the public

that the cigars were selected and approved of by him."

The Privy Council also laid down the same principle in *Imperial Tobacco Co. v. Albert Bonnan* (3), where their Lordships said:

"It is possible for an importer to get a valuable reputation for himself and his wares by his care in selection or his precautions as to transit and storage, or because his local character is such that the article acquires a value by his testimony to its genuineness; and if therefore goods, though of the same make, are passed off by competitors as being imported by him, he will have a right of action."

The present case is much stronger than any of these cases inasmuch as, as I have pointed out above, it was the plaintiff-appellant who registered the trade-mark in his own name and had leaves selected for the cigars and sold them with his own trade-mark. Because of his care and precaution in selecting leaves and because of his advertisement and pushing, Tin Tin Mya cheroots have acquired a great reputation. In these circumstances I am clearly of opinion, that the plaintiff-appellant U Kyaw Dun is entitled to the protection of the Court. For these reasons I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the trial Court with costs throughout.

D.

Appeal allowed.

(3) AIR 1924 PO 187; 80 Ind. Cas. 1013; 51 I.A. 269; 51 O 892; 26 Bom. L.R. 683; 2 Pat. L.R. 230; 47 M.L.J. 69; (1924) M.W.N. 602; 20 L.W. 495; 29 C.W.N. 81 (P.O.).

ALLAHABAD HIGH COURT

Second Appeal No. 819 of 1937

October 6, 1939

IQBAL AHMAD, J.

DARSHAN SINGH—DEFENDANT—
APPELLANT

versus

PRAG SINGH—PLAINTIFF AND OTHERS—
DEFENDANTS—RESPONDENTS

Co-sharers—Sale of house by tenant to one co-sharer—Other co-sharers can sue for joint possession of site by removal of materials.

All the co-parceners in a joint *patti* or *mahal* are joint owners of the site of the houses of tenants and *raiyyats* situated in that *patti* or *mahal*. If the tenants or *raiyyat* dies without leaving any heir or abandons the house the right to the joint possession of the site and the materials vests in all the co-sharers and in such a case one co-sharer has no right to take possession of the materials or of the site to the exclusion of the other co-sharers. It is also clear that a tenant or a *raiyyat* has the right to transfer the materials of the house to any person he likes provided the materials belong to him and there is no custom prohibiting such a transfer. A sale of his house by a tenant or *raiyyat* to one of

(1) 35 B.425; 10 Ind. Cas. 805; 13 Bom. L.R. 212.
(2) (1876) 3 Ch. D. 584; 45 L.J. Ch. 364; 35 L.T. 228.

the co-sharers, does not entitle that co-sharer to retain possession of the house along with the site to the exclusion of the other co-sharers. The tenant or *raiyyat* has a disposing power only so far as the materials of the house are concerned and has not a transferable interest in the site of the house. The retention of possession by one of the co-sharers of the house of a tenant or *raiyyat* that has been purchased by him furnishes the other co-sharers with a cause of action for a suit for joint possession of the site by removal of the materials. The question of special damage does not arise and the cause of action in such cases is constituted by the invasion of the right of the co-sharers to joint enjoyment of the site of the house. 168 Ind. Cas. 650 (1), relied on.

S. A. from the decision of the Civil Judge, Fatehpur, dated March 30, 1937.

Mr. K. L. Misra, for the Appellant.

Mr. K. C. Mital, for the Respondents.

Judgment.—The dispute in the suit out of which the present appeal arises was with respect to the site of two houses that belonged to a tenant named Beni. We are concerned in the present appeal with the site of only one of the houses. Beni sold the house in dispute to certain persons in the year 1932 and the vendees in their turn sold the house to Darshan Singh, defendant-appellant. It is common ground that both Prag Singh, plaintiff-respondent, and Darshan Singh, defendant-appellant, are co-sharers in the site in which the house in dispute is situated. The suit was brought by the plaintiff-respondent for joint possession of the site after the removal of the materials thereon. Beni had died before the institution of the suit. The suit was contested on various grounds by Darshan Singh but most of those grounds were rightly overruled by both the Courts below and need not therefore be stated in this judgment. One of the pleas raised in defence by Darshan Singh, which found favour with the trial Court, was that no special damage was caused to the plaintiff in consequence of the purchase of the house by Darshan Singh, and as such the plaintiff was not entitled to the relief prayed for by him. This plea formed the subject of Issue No. 7 framed by the trial Court which ran as follows: "Whether the plaintiff suffered a loss? If not, how does it affect the suit?" The trial Court held that no loss was suffered by the plaintiff and the suit was not maintainable. In this connection the trial Court made specific reference to the fact that by the sale-deed the site of the house in dispute was not transferred and continued to belong to the *zamindars*. On appeal by the plaintiff the lower Appel-

late Court held that though there was no evidence of special damage to the plaintiff the plaintiff as a co-sharer in the village was entitled to a decree for joint possession of the site and accordingly reversed the decree of the trial Court and decreed the plaintiff's suit. In my judgment the decree of the lower Appellate Court is perfectly correct. At the very outset I must make it clear that in the present litigation we are concerned with a village in which no custom entitling a *raiyyat* to transfer his house along with the right of residence exists.

It cannot be disputed that all the co-parceners in a joint *patti* or *mahal* are joint owners of the site of the houses of tenants and *raiyyats* situated in that *patti* or *mahal*. If the tenants or *raiyyat* dies without leaving any heir or abandons the house the right to the joint possession of the site and the materials vests in all the co-sharers and in such a case one co-sharer has no right to take possession of the materials or of the site to the exclusion of the other co-sharers. It is also clear that a tenant or a *raiyyat* has the right to transfer the materials of the house to any person he likes provided the materials belong to him and there is no custom prohibiting such a transfer. The question then arises whether a sale of his house by a tenant or *raiyyat* to one of the co-sharers, entitles that co-sharer to retain possession of the house along with the site to the exclusion of the other co-sharers. In my judgment the answer to the question must be in the negative. The tenant or *raiyyat* has a disposing power only so far as the materials of the house are concerned and has not a transferable interest in the site of the house. The transfer made by him can therefore be operative only so far as the materials of the house are concerned and cannot adversely effect such right as the entire body of co-parceners have in the site.

I am unaware of any principle of law that may justify the inference that the fact that transfer is in favour of one of the co-sharers has the effect of depriving the other co-sharers of the right to the joint possession of the site. If the co-sharer who purchases the house enters into possession of the same, his possession constitutes an infringement of the right of the other co-sharers to the joint possession of the site. The other co-sharers therefore have the right to ask the purchasing co-sharer to remove the materials of the house and thus

enable those co-sharers to take joint possession of the site of the house. In short the retention of possession by one of the co-sharers of the house of a tenant or *raiyyat* that has been purchased by him furnishes the other co-sharers with a cause of action for a suit for joint possession of the site by removal of the materials. The question of special damage does not arise and the cause of action in such cases is constituted by the invasion of the right of the co-shares to joint enjoyment of the site of the house. No case directly bearing on the point before me has been cited by either party, but the view that I take receives support from the decision of a Division Bench of this Court in *Shankar Lal v. Pati Ram* (1). For the reasons given above I hold that the rights of the case were with the plaintiff and not with the defendant-appellant and that the suit was rightly decreed by the lower Appellate Court. Accordingly I dismiss this appeal with costs.

(N. B.—Leave to appeal under the Letters Patent is granted.)

D. *Appeal dismissed.*

(1) (1937) A L J 126; 168 Ind. Cas. 650; A I R 1937 All. 293; 1937 R D 62; 9 R A 663; 1937 A L R 386.

BOMBAY HIGH COURT

First Appeal No. 38 of 1936 with Second Appeal No. 493 of 1935, C. R. A. No. 376 of 1935 and C. A. No. 441 of 1938
July 18, 1939

N. J. WADIA AND INDARNARAYEN, JJ.
CHHAGANLAL KALYANDAS SHAH

— DEFENDANT NO. 1—APPELLANT

versus

JAGJIWANDAS GULABDAS—PLAINTIFF
—RESPONDENT.

Partnership—Accounts—Suit on promissory note executed by one partner in favour of another, maintainability of, without taking final accounts of partnership—Evidence Act (I of 1872), s. 92, Proviso 3—Applicability—Whether can be applied to nullify effect of document.

If one partner gives to his co-partner a bill or note which is in such a form as to bind, not the firm, but the partner who gives it, he may be sued by his co-partner thereon, whatever the state of the accounts between the two may be, and although the bill or note in question has reference to some partnership transaction. 1 Ind. Cas. 384 (1) and 31 Ind. Cas. 430 (2), relied on. [p. 43, col. 2.]

Section 92, proviso 3, Evi. Act, speaks of the existence of a separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property which may be allowed to be proved. This clearly presupposes that in a case to which it could

be applied the contract, grant or disposition of property itself remains intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder. [p. 44, col. 1.]

Where in a case on a promissory note the facts pleaded do not aim at proving a condition precedent to the attaching of the legal liability to the document, but lay the axe at the very foundation of it nullifying entirely the effect of the promissory note and its existence, s. 92, Proviso 3, is not applicable and such evidence will not be allowed. 105 Ind. Cas. 476 (5) and 63 Ind. Cas. 673 (6), relied on. [p. 44, cols. 1 & 2.]

F. A. from the decision of the First Class Sub-Judge, Broach, in Special Civil Suit No. 391 of 1932.

Mr. R. J. Thakor, for the Appellant.

Messrs. A. G. Desai, T. C. Gandhi and Bansilal Kinkhabwala, for the Respondent.

Indarnarayan, J.—This is an appeal from the decision of the First Class Subordinate Judge at Broach in Special Civil Suit No. 391 of 1932. The plaintiff herein sued the defendants on a promissory note dated November 5, 1929 for a sum of Rs. 6,784-13-6. The promissory note sued upon is signed individually by the three defendants and there is no mention therein of any partnership firm of Chhaganlal Kalyandas. The promissory note, as usual, contains a promise to pay the amount thereof on demand to the plaintiff. The plaintiff sent a notice of demand on October 20, 1932, and filed this suit on non-compliance thereof on November 4, 1932. The defendants filed written statements *inter alia* pleading that they were agriculturists within the meaning of the term under the Dekkhan Agriculturists' Relief Act, and alleging that it was agreed at the time when the promissory note in suit was passed that it was not to be enforced, but that the amount thereof was to be adjusted in the making up of the partnership accounts of the firm of Chhaganlal Kalyandas in which they alleged that the plaintiff himself and his third brother, Pasubhai, were also partners, and that the taking of such partnership accounts was a condition precedent to the attaching of any liability to them on this promissory note. They further denied that the plaintiff being one of the partners in the said firm could maintain the suit as he sought to do. The plaintiff is described in para. 10 of the written statement as "a learned and clever Pleader" and it is stated there that by reason of misrepresentation and fraud on his part in getting the promissory note executed the suit is not maintainable. The learned trial

Judge has rightly held that there is no fraud or misrepresentation proved on plaintiff's part. One of the defendants, defendant No. 2, is plaintiff's own brother and a partner in the firm of Ohhaganlal Kalyandas. I do not think we are concerned here with the allegation that the taking of this promissory note by the plaintiff was a successful attempt to overreach the defendants. In the written statement the defendants pleaded their status as agriculturists and the plaintiff evidently appears to have got scared at this plea, and in order to avoid it he presented an application to the trial Court on March 4, 1933, praying for an amendment of the plaint. Permission was accordingly granted by the Court and hence he added para. 1-A to the plaint which reads as follows :

"1-A. There was a firm of Shah Ohhaganlal Kalyandas in Broach. Defendants Nos. 1, 2 and 3 mentioned above were the partners of the same. I the plaintiff had advanced money to the said firm. Accounts of the same were settled and an amount was found due with interest to me from the said firm. For the payment of the same, all the three partners, defendants Nos. 1, 2 and 3, mentioned above, executed the suit promissory note in favour of me, the plaintiff. At the top of the plaint, instead of mentioning in brief as the firm of Ohhaganlal Kalyandas, the names of the three partners of the said firm are mentioned for the sake of clarity and in order that no confusion might arise."

The title of the defendants in the plaint stated :

"(1) Shah Ohhaganlal Kalyandas.

(2) Jethalal Gulabdas Modi.

(3) Shah Ohhotalal Kalyandas.

Partners of the firm of Ohhaganlal Kalyandas."

The prayer clause however, which is para. 7 of the plaint, reads as follows :

"Therefore, I file this suit and pray that you will pass a decree for the principal Rs. 6,784-13-6 and Rs. 1,335-5-6 in all Rs. 8,120-3-0 which are due from the defendants with running interest and the costs of the suit against the property of the firm of Ohhaganlal Kalyandas and against the person and property of the defendants and give such other relief as may seem proper, on considering the facts of the case."

It is to be noted here that the relief asked for is two-fold, viz. (a) against the property of the firm of Ohhaganlal Kalyandas and (b) against the person and property of the defendants. It is extremely lucky, I think, for the plaintiff that this part of the prayer was left unamended. That the firm Ohhaganlal Kalyandas does not seem to have been intended to be sued is clear from the title of the suit, and the words "Partners of the firm of Ohhaganlal Kalyandas" in the title are a mere description

of the three partners named above who are sued individually as executants of the promissory note, which also mentions them as individuals, and not as partners of the firm of Ohhaganlal Kalyandas. It is sought to be argued here with considerable stress by the learned Counsel for the defendant-appellant that this amendment can leave no manner of doubt that the suit, as it stands, is against the firm of Ohhaganlal Kalyandas only and not against the individual partners mentioned as (1), (2) and (3) in the title of the suit. Before I consider the merits of this argument, I consider it necessary to point out that in the trial Court the defendants themselves seem to have contended and they conducted their defence on the basis that the suit was against the defendants in their individual capacity, and not as against the firm. If the suit were against the firm only, there could have been no question of their going into the status of the defendants as to whether they were agriculturists or not. Evidence was led on this disputed question of status, and the learned Judge after trial has found against the contention of the defendants. It is however clear from this that the defendants were under no doubt that they were being sued in their individual capacity as executants of the promissory note and not merely *qua* partners in the firm of Ohhaganlal Kalyandas. I do not think therefore that they are entitled in appeal here to contend that the suit is not against them individually but only against the firm. There is no doubt that the very unfortunate and ill-advised application for amendment which aimed at avoiding the plea of "agriculturists" has necessarily resulted in a hornet's nest for the plaintiff. But considering the two-fold prayer (in the prayer clause of the plaint) which are distinct and separate, I am not prepared to hold that the suit is against the firm only. While the learned Advocate for the defendants was entitled to emphasize the frame of the pleadings and the amendment application filed, it cannot be overlooked that the suit is substantially one based on the promissory note, and against the individuals signing it. Too much stress cannot be laid upon the language of pleadings which appear to have been entirely ill-drafted in Gujarati. After all the function of pleadings is to focus the attention of the parties and of the Court to the points in dispute and not to defeat justice. In connection with this it may

be stated that Mr. Desai, the learned Advocate for the plaintiff, has frankly stated that he cannot support the latter part of the decree passed by the learned First Class Subordinate Judge, wherein it is stated :

"Decree for plaintiff Rs. 8,120-3-0 costs and future interest at 6 per cent. on Rs. 6,784-13-6 from date of suit against defendants and the firm of Chhaganlal Kalyandas."

Mr. Desai states that he has no objection to these italicized words being deleted from the decree. Though most of this trouble has been caused by the ill-considered amendment, I do not think we can well refuse this request, considering the two separate reliefs asked for in the prayer clause as it yet stands in the plaint. The next point which might be considered is the contention of the defendants that the plaintiff himself was a partner in the firm of Chhaganlal Kalyandas and hence cannot maintain this suit as final accounts have not been taken, and as it was agreed that the amount of this promissory note was to be adjusted in making up the final accounts. The cause of action on the promissory note is entirely independent of the partnership accounts; nor are the parties to this promissory note described anywhere therein as partners of the said firm. A promissory note is a document which confers special and valuable rights on the holder, e. g. by way of presumptions mentioned in the Negotiable Instruments Act, and if the defendants' contention were to be upheld, all these valuable rights arising from the promissory note would have to be entirely brushed aside and destroyed. I am, therefore, of opinion that the learned Advocate for the plaintiff has rightly contended that this cannot be done. Assuming for the purposes of argument that the allegation of the defendants that the plaintiff was their partner in the firm of Chhaganlal Kalyandas is in fact correct, there is ample authority to show that even without a final settlement of partnership accounts a partner may, in certain circumstances, such as those in the present case, well sustain an action against his partners and be entitled to a decree. In *Venkata Reddi v. Narasayya* (1), it was held by Sir Arnold White, C. J. and Abdur Rahim, J.

"In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in respect of a matter, which, though arising out of partnership business, or connected with it does

not involve the taking of general accounts, the Court will as a rule give the relief applied for."

It may here be noticed in passing that the promissory note sued upon in this case mentioned the amount in annas and pies. and even if this was the result of the adjustment of a part of the partnership account, or even assuming that the plaintiff was a partner, yet the suit on this independent cause of action could well be maintained. Lindley in his *Treatise on Partnership*, Edn. 10, at p. 653, states :

"Again if one partner gave to his co-partner a bill or note which was in such a form as to bind, not the firm, but the partner who gave it, he might be sued by his co-partner thereon, whatever the state of the accounts between the two might be, and although the bill or note in question had reference to some partnership transaction; for by giving the bill or note, the demand in respect of which it was given was isolated from the general partnership account."

In *Ramnath Gagoi v. Pitambar Deb* (2), it was held by Mookerjee and Roe, JJ. that an action on the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties, and at p. 741* in the judgment therein occurs the following passage :

"In this situation, the principle formulated by Lord Cottenham in *Rawson v. Samuel* (3) applies, viz. that an action for the balance of a settled account would not be restrained merely because there were other unsettled accounts between the parties. In the present case, there are not even cross-demands: the defendant has not chosen to sue the plaintiff for adjustment of the partnership accounts and he cannot invite the Court to assume that the balance of that account would be found to be in his favour. Reference may be made to the earlier decision in *Preston v. Strutton* (4) where the pendency of an unsettled partnership account, upon which the balance was in dispute, was held to be no ground for an injunction to restrain execution upon a judgment which had been obtained upon a note given for a balance upon a former settlement."

If the contentions of the defendants (in which plaintiff's brother defendant No. 2 joins) to the effect that plaintiff is on the whole a debtor and not a creditor are correct, it was certainly open to them to have filed a suit against the plaintiff for rendition of partnership accounts immediately the plaintiff filed this suit on this promissory note against them. The plaintiff's suit was filed as far back as 1932, and it appears that no suit for partnership accounts has yet been filed by the defend-

(2) 43 C 733; 31 Ind. Cas. 430; A I R 1916 Cal. 788; 22 O L J 339; 21 O W N 632.

(3) (1839) Cr. & Ph. 161; 10 L J Ch. 214; 3 Jur. 947.

(4) (1792), 1 Anst 50.

*Page of 43 O.—[Ed.]

(1) 32 M 76; 1 Ind. Cas. 384; 19 M L J 10; 4 M L T 456.

dants against him. Another allegation made by the defendants in their written statement was that a third brother of the plaintiff by name Pasubhai was also a partner in the firm like defendant No. 2, and that he was a necessary party to this suit. It is, I think, the plaintiff's choice which partners of the firm he chooses to proceed against for his claim. This, of course, presupposes that Pasubhai was a partner (though the plaintiff does not admit it), and I hence fail to see how it can be said that Pasubhai was a necessary party to the suit.

Under s. 92, Proviso 3, Evi Act, it is contended by the learned Advocate for defendant No. 1 that his client was entitled to show by evidence that there was a condition agreed to at the time the promissory note was passed, which was a *sine qua non* for the attaching of liability on this promissory note. Section 92, proviso 3 speaks of the existence of a separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property which may be allowed to be proved. This clearly presupposes to my mind that in a case to which it could be applied the contract, grant or disposition of property itself remains intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder. Applying that to the facts of the present case, it seems to me that what is pleaded in the written statement to resist the liability on the promissory note is a virtual negation of the promissory note as such, for in effect the written statement states that the promissory note was never to be paid in cash, nor demanded payment of, nor was it to be sued upon, but that the amount thereof was only to be adjusted in the final making up of accounts. It is obvious that, whether this promissory note existed or not, in the taking of accounts the amounts debit and creditable in the partnership accounts would have to be set down and the result found out as to what was due by each partner to the other. It is difficult to see how in this process this promissory note could come in as an instrument which was being enforced or given effect to according to its contents. I am of opinion that the facts pleaded do not aim at proving a condition precedent to the attaching of the legal liability to this document, but lay

the axe at the very foundation of it nullifying entirely the effect of the promissory note and its existence. I do not think that the language of s. 92, Proviso 3, can bear such strain, and I therefore agree with the opinion of the trial Judge when he decided Issue No. 6 (c) in favour of the plaintiff. The plaintiff is not suing in his capacity as partner, nor does he admit that he was a partner. His suit is entirely based on the promissory note which he holds and in which there is no mention of partnership. I am therefore of opinion that the principle embodied in O. XXX, r. 9, Civil P. C., does not apply to the facts of this case. In *Maung Kyan Nga v. Arunachalam Pillai* (5), it was held by Brown, J. that:

"Where the defendant pleaded that he had given the on-demand promissory note in suit to the plaintiff not for a loan, but for an advanced account of a partnership to be accounted for when the partnership account was gone into, that such a defence cannot be allowed, and that was not a defence of no consideration or a condition precedent to the attaching of an obligation; but an attempt to set off an unliquidated claim against a claim on a promissory note, which is not permissible."

In *Vishnu v. Ganesh* (6), it was held by Macleod, C. J. who stated (pp. 489-91*):

"The question before us is whether the defendant having passed a promissory note payable on demand in favour of the plaintiff, can be allowed to lead evidence to prove a contemporaneous oral agreement whereby the plaintiff is said to have agreed that he would not present the note, although it was payable on demand, until he had discharged certain incumbrances on the property he had sold to the defendant's brother-in-law."

This question came before the High Court of Calcutta in *Ramjibun Serowgy v. Oghore Nath Chatterjee* (7). There the defendant gave the plaintiff a promissory note for Rs. 7,000 in full discharge of his debts and all other claims of the plaintiff against him up to that time. It was further agreed, according to the defendant's case, that the plaintiff should not bring any suit on the promissory note until the defendant's share in certain compensation money had been received by him. Sale, J. in giving judgment said (pp. 403, 404†):

"Under the promissory note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement, the effect of which is to qualify or restrict that engagement. The case in *Moseley v. Hanford* (8) is clear authority to the effect that

(5) 5 R 320; 105 Ind. Cas. 476; A I R 1927 Rang. 327.

(6) 23 Bom. L R 488; 63 Ind. Cas. 673; A I R 1921 Bom. 449; 45 E 1155.

(7) 25 O 401; 2 O W N 188.

(8) (1830) 10 B & C 729; 8 L J (O S) K B 261.

*Pages of 23 Bom. L. R.—[Ed.]

†Pages of 25 O.—[Ed.]

in England the evidence of such an oral agreement would be inadmissible..... There are numerous other English authorities to the same effect to which I need not refer, inasmuch as the argument for the defendant is not so much that under the English Law the evidence is admissible, but that Proviso 3 to s. 92, Evi. Act, has the effect of altering the English Law.....

Those remarks apply equally well to the case before us."

The facts of the present case are by no means dissimilar, and I am therefore unable to hold that the learned trial Judge was wrong in coming to the conclusion that it was not open to the defendants to lead evidence to prove the arrangement alleged. Besides it is obvious, even if such an arrangement as alleged ever existed, it must have been some time before the execution of the promissory note for it is said that it was passed in pursuance of it. The subsequent written promissory note cannot be altered by any such prior arrangement. The appeal will therefore be dismissed and the words "and the firm of Ohhaganlal Kalyandas" will be deleted from the decree of the lower Court. In view of the fact that most of the trouble has been caused by the ill-considered amendment made by the plaintiff in his plaint, we think he is entitled only to half his cost in this appeal.

N. J. Wadia, J.—I agree.

D. *Appeal dismissed.*

RANGOON HIGH COURT
Insolvency Case No. 14 of 1930
April 24, 1939

DUNKLEY, J.

In re T. S. N. CHETTYAR FIRM.

Presidency Towns Insolvency Act (III of 1909) (Rangoon), s. 7, Proviso—S. 7, scope—If limited only to matters where Official Assignee claims higher title than insolvent—Proviso to s. 7, scope and application.

Section 7, Rang. Insol. Act, is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than that which the insolvent himself would have had. [p. 46, col. 2.]

Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency Law than the bankrupt himself, seeks to recover a debt which is not admitted, it is a matter of discretion for the Judge sitting in insolvency whether in any given case he should deal with such a claim in the Insolvency Court, or refer it to the machinery of the ordinary Court. 93 Ind. Cas. 834 (1) and 118 Ind. Cas. 506 (2), relied on. [p. 46, col. 1.]

There is nothing in Proviso to s. 7 limiting its application only when the third party has been actually examined under s. 36. But its application

is restricted to the two matters arising under sub-s. (4) and (5) of s. 36, that is, under sub-s. (4) the question whether the third party is indebted to the insolvent, or under sub-s. (5) the question whether the third party is in possession of property belonging to the insolvent. Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the Insolvency Court to try the matter is, wholly excluded, and it does not matter whether the denial has been made in the course of examination under s. 36 or at any other time. But sub-s. (5) of s. 36 has in view only the case of property admittedly belonging to the insolvent, and the object of the sub-section is to enable the Official Assignee to discover its whereabouts; it relates to possession only and not to title. Where the ownership of, or title to the property, is in dispute this sub-section has no application, and consequently the jurisdiction of the Insolvency Court under s. 7 is not barred in such cases by the proviso to the section. 118 Ind. Cas. 506 (2), dissented from. 135 Ind. Cas. 585 (3) and 172 Ind. Cas. 346 (4), referred to. [p. 47, col. 1.]

Mr. Clark, for the Official Assignee.

Mr. P. K. Basu, for the Respondent (Palaniappa).

Mr. Foucar, (in Petition No. 11)—for Respondents Nos. 1 and 2.

Judgment.—In connexion with the insolvency of the T. S. N. Firm twenty petitions have been filed by the Official Assignee for setting aside certain transfers on various grounds, and declarations that certain immovable properties vest in the Official Assignee as being properties of the insolvent firm divisible among the creditors. These petitions have been numbered serially. In petitions Nos. 1, 8, 9, 11, 12, 15, 19, 4, 5, 14 and 16, Mr. P. K. Basu for A. P. L. Palaniappa Chettiar, and Mr. Foucar for respondents Nos. 1 and 2 in petition No. 11, have taken the objection that either the Insolvency Court has no jurisdiction to hear and decide these petitions, or if it has jurisdiction, then the exercise of that jurisdiction is discretionary and on the facts alleged in the petitions the Insolvency Court ought to decline to exercise jurisdiction and to direct the Official Assignee to prosecute his claims by instituting regular suits in the ordinary Civil Courts having jurisdiction in respect of the questions in dispute in the several petitions, in regard to which objection has been taken to jurisdiction. The jurisdiction of the Insolvency Court in matters of this kind is conferred by the provisions of s. 7, Rang. Insol. Act, (formerly the Presi. Towns Insol. Act), and the extent of the jurisdiction conferred by that section and the manner of its exercise have been considered in a number of

decisions of the High Courts of Calcutta and Madras, and there are numerous decisions of the English Courts under the similar provisions of the Bankruptcy Acts. I am well aware that, according to the English decisions, where the trustee in bankruptcy claims to the property in dispute as against a stranger to the bankruptcy no higher right by reason of the special provisions of the bankruptcy law than the insolvent himself had, the question at issue between the trustee and such third party cannot be tried within the jurisdiction of the Bankruptcy Court, and I consider it unnecessary to refer to the decisions on this point.

But it has been pointed out in many decisions that under the provisions of the Rang. Insol. Act the jurisdiction of the Insolvency Court in regard to claims by the Official Assignee against third persons is a discretionary jurisdiction; that conditions existing in India and Burma are entirely different to the conditions existing in England, and for this reason in India and Burma the discretion of the Insolvency Judge cannot be fettered by such rigid rules as those imposed by the English Bankruptcy law. The leading cases of the Calcutta and Madras High Courts on this subject are *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1) and *Official Assignee of Madras v. Narasimha Mudaliar* (2). Mr. Basu has argued that these decisions are opposed to one another and that in Calcutta the rigid rule of English Law has been adopted, but, in my opinion, that is not so. In my view, the principle of law laid down in both these cases is exactly the same and is correctly enunciated in the last paragraph of the head-note of the Madras case, which reads as follows:

"Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency Law than the bankrupt himself, seeks to recover a debt which is not admitted, it is a matter of discretion for the Judge sitting in insolvency whether in any given case he should deal with such a claim in the Insolvency Court, or refer it to the machinery of the ordinary Courts."

No doubt the application of this principle is divergent in the two Courts, and the Madras High Court in its insolvency jurisdiction is prepared to entertain and decide many disputes between the Official Assignee and strangers to the insolvency which would in the Calcutta High Court be referred to

the ordinary Courts for decision,* but this is nothing more than a divergence of practice. It is, as a matter of law, clear that s. 7, Rang. Insol. Act, is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than that which the insolvent himself would have had. So far as this Court is concerned I am, with the greatest respect, content to adopt and follow the practice of the Calcutta High Court. In *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1) Rankin, J. said (at pp. 258 and 259*):

"When the Official Assignee made up his mind as a result of his investigation to move the Court to declare that the lady was a mere *benamidar* for the insolvent and had been so for something like ten years, he had to choose what course he would take. The ordinary course, having regard to the subject-matter and the length of time over which the investigation might have to be carried, would have been to commence a suit against the lady for a declaration that she was a *benamidar* for the insolvent. But under s. 7, Pres. Towns Insolvency Act, this Court in its insolvency jurisdiction has jurisdiction to determine such a point as that; just in the same way as where a person who carried on a retail business becomes an insolvent in this Court, the Court would have jurisdiction by motion in insolvency to collect debts due to the business by third parties in Tipperah or somewhere else. As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction, and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably, would be refused as the learned Judge is in no way obliged in the insolvency jurisdiction to try such a question. I would guard myself from being supposed to lay down that the only proper subjects for such a motion are cases within ss. 55 and 56, Pres. Towns Insol. Act. There are many other cases. There may be cases, for example, where a property is claimed as having been taken by the opposite party from the insolvent after an available act of bankruptcy and it can be successfully claimed if the opposite party cannot bring himself within the protective sections. There may be cases where a transfer can be set aside if it is after an adjudication order. There are cases which come under s. 53, T. P. Act, where the right asserted by the Official Assignee is a right which belongs to creditors as such. It is important that it should be understood, first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvents is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case and, secondly, that it is not restricted only to ss. 55 and 56. But the rule is well-established if it is not rigid, and it is necessary in fairness to third parties who cannot help their creditors debtors or *cestuis qui trustent* going insolvent, who may live far from Calcutta, and whose right may be difficult to ascertain apart from a regular suit. It is necessary also in the interests of this Court which cannot undertake in its insolvency jurisdiction to collect

(1) 54 O 251; 93 Ind. Cas. 834; A I R 1926 Cal 597; 30 O W N 346.

(2) 52 M 717; 118 Ind. Cas. 506; A I R 1929 Mad. 705; 57 M L J 145; 30 L W 159; Ind. Rul. (1929) Mad. 826 (F B).

*Pages of 54 O.—[Ed.]

debts all over India or to decide on motion all classes of disputes merely because an insolvent or his estate is a party."

With the greatest respect, I am prepared to exercise my discretion in accordance with the rules laid down by Rankin, J. Since that judgment was delivered, a proviso has been added to s. 7, Rang. Insol. Act, in the following terms:

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under s. 36 be exercised only in a manner and to the extent provided in that section."

This proviso was considered by a Full Bench of the Madras High Court in *Official Assignee of Madras v. Narasimha Mudaliar* (1) and it was held that the proviso applied only when the respondent third party had been summoned and examined under the provisions of s. 36 of the Act. With the greatest respect, I find myself unable, to accept such a narrow interpretation of the proviso. The provisions of the proviso have again been considered by the Madras High Court in *Chinnappa Mudali v. Official Assignee of Madras* (3) and very recently in *Evelyn Popaly v. Official Assignee of Madras* (4) and the original decision in *Official Assignee of Madras v. Narasimha Mudaliar* (2) appears to have been considerably modified. With the greatest respect, I am unable to agree that the proviso applies only when the third party has been actually examined under s. 36, for, I can find nothing in the proviso limiting its application in this manner. But I agree with the decision in *Chinnappa Mudali v. Official Assignee of Madras* (3) that the application of the proviso is restricted to the two matters arising under sub-ss. (4) and (5) of s. 36, that is, under sub-s. (4) the question whether the third party is indebted to the insolvent, or under sub-s. (5) the question whether the third party is in possession of property belonging to the insolvent. Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the Insolvency Court to try the matter is, in my opinion, wholly excluded, and it does not matter whether the denial has been made in the course of examination under s. 36 or at any other time. But sub-s. 5 of s. 36 has in view only the case of

property admittedly belonging to the insolvent, and the object of the sub-section is to enable the Official Assignee to discover its whereabouts; it relates to possession only and not to title. Where the ownership of, or title to the property, is in dispute this sub-section has no application, and consequently the jurisdiction of the Insolvency Court under s. 7 is not barred in such cases by the proviso to the section.

Applying these principles to the facts of the present petitions, the insolvent firm is the T. S. N. Firm. The partners of the T. S. M. R. K. R. M. Firm of Pyapon were also partners of the T. S. N. Firm, and hence all the assets of the T. S. M. R. K. R. M. Firm have vested in the Official Assignee. A. P. L. Palaniappa, who has sought to disguise his identity under various Vilasams was at all material times the agent of T. S. M. R. K. R. M. Firm. Both immediately before and after the adjudication of the T. S. N. Firm, he in his capacity as agent of the T. S. M. R. K. R. M. Firm has dealt in the most extraordinary way with the assets of the T. S. M. R. K. R. M. Firm. A one-man firm, which adopted the Vilasam of M. R. M. S. was brought into existence for the purpose of receiving transfers of the assets of T. S. M. R. K. R. M. from Palaniappa and then re-transferring them to nominees of Palaniappa, with the object of disguising the real nature of the transactions. These facts have already been found in previous judgments of this Court and the Court of Appeal on appeal from this Court. In all the petitions now under consideration, Palaniappa is a respondent. In all except four he is the only respondent. In two of these four the other respondent is his brother-in-law and in one the other respondent is his wife. In the remaining petition (No. 11) there are three other respondents. One is Palaniappa's son and one is his brother-in-law; the third has not come forward to defend his interest. Palaniappa is intimately connected with this insolvency, and although the other respondents are not directly connected with it, their near relationship to Palaniappa shows that they were not, in fact, strangers to the insolvency, and in all these four petitions the affidavits supporting the petitions state that Palaniappa has remained throughout in possession of the properties in question, and this allegation has not been denied, and therefore the inference arises that the other respondents are the mere nominees of Palaniappa.

It is unnecessary for me to set out speci-

(3) 55 M 385; 135 Ind. Cas. 585; A I R 1932 Mad 167; 62 M L J 103; 34 L W 819; (1931) M W N 1253; Ind. Rul. (1932) Mad. 169.

(4) I L R (1938) Mad. 78; 172 Ind. Cas. 346; A I R 1937 Mad. 775; (1938) 2 M L J 377; 46 L W 327; 10 R M 450.

fically the averments of each of the petitions now under consideration. I have considered each one separately and have satisfied myself that in no case is the jurisdiction of this Court barred by the provisions of the proviso to s. 7. In only two cases, namely petitions Nos. 8 and 15, is there any possibility of doubt on this point. Petition No. 8 is a simple claim that Palaniappa is in possession of property belonging to the T. S. M. R. K. R. M. Firm. Palaniappa admits possession of the property but denies that it has ever belonged to the T. S. M. R. K. R. M. Firm. Hence the dispute is as to the title to this property, and therefore does not come within sub-s. (5) of s. 36 of the Act. In Petition No. 15, it is averred that Palaniappa purchased certain property at a court-sale in execution of a personal decree obtained on a mortgage and that this mortgage was the property of the T. S. M. R. K. R. M. Firm. Palaniappa has stated in his objection that he purchased the property in revenue recovery proceedings and that appears to be the case. The Official Assignee should consider whether he ought not to amend this petition in this sense before it comes on for trial. However the question at issue is whether Palaniappa's purchase, either at an auction-sale conducted in execution of a decree or at an auction conducted for the recovery of land revenue does not enure for the benefit of the estate of T. S. M. R. K. R. M. Firm and therefore it is not a matter arising under sub-s. (5) of s. 36. Hence it is clear that this Insolvency Court has jurisdiction in respect of all the petitions and the point for decision is whether in the exercise of my discretion I should try and decide the issues raised by the several petitions or whether I should direct that all or any of them should be tried and decided by the ordinary Courts.

On one general ground I have no doubt as to what the answer to this question ought to be. Palaniappa as agent of the T. S. M. R. K. R. M. Firm was acting in a fiduciary capacity towards the firm and was bound to account to the firm with the utmost strictness for all his dealings with the firm's property. He is bound to account to the Official Assignee with equal strictness as the Official Assignee has become vested with all the assets of the firm, and he must account in these insolvency proceedings and nowhere else. It would be monstrous if the Official Assignee in order to obtain a proper accounting from the agent of an

insolvent and to investigate his dealings with his principal's property, were obliged to undergo the extreme inconvenience and incur the great expense of filing a series of suits against the agent in various Civil Courts. Clearly such an account can be taken and such an investigation can be made most conveniently and expeditiously in the Insolvency Court and ought to be done here. In my opinion, these petitions afford striking examples of the kind of exceptions to the ordinary rule which *Raukin, J.* must have had in mind when in *Jnanendra Bala Debi v. Official Assignee of Calcutta* (1), he said (at p. 259*):

"It is important that it should be understood first, that the rule that the Official Assignee should have recourse to this jurisdiction only when he has a higher title than the insolvent's, is not a rule of law in the sense that the Insolvency Court has not the jurisdiction to entertain such a case and secondly, that it is not restricted only to ss. 55 and 56."

In four of the petitions now under consideration, there are of course other respondents, but they are so intimately connected with A. P. L. Palaniappa as to raise the inference that they are his nominees and as it appears that even in these four cases Palaniappa is in possession of the properties concerned, the insertion of their names in certain transfers cannot be a sufficient ground for the exercise of my discretion in a different way. A further point has been raised on behalf of A. P. L. Palaniappa in connection with petitions Nos. 4, 5, 14 and 16; and that is that the properties concerned in these petitions originally belonged to the T. S. Firm, and that the original transfers by the T. S. Firm have been set aside by this Court, in previous judgments in this insolvency, only to the extent of the interest of the partners of T. S. M. R. K. R. M. in the T. S. Firm, and on this foundation an elaborate argument based on the law of partnership has been constructed. This point has, in my opinion, already been dealt with and answered in the judgment of my brother Braund, dated December 15, 1937 and in the judgment of the Court of Appeal on appeal therefrom (*Miscellaneous Appeal No. 5 of 1938*). In the course of his judgment Braund, J. said:

"The T. S. N. Firm took over from the T. S. Firm all those assets relating to that part of its business which was conducted in Rangoon, India, and Malay States, while the new Pyapon firm took over all the other assets of the T. S. Firm with one exception. It was in short a splitting up of the T. S. Firm into two parts and an apportionment of the assets between the two groups which emerged out of the T. S. Firm."

In his evidence in connection with the matters then before the Court Palaniappa said :

"I was connected with T. S. Firm of Pyapon for five or six years. After I was in T. S. Firm for three years it became T. S. M. R. K. R. M. T. S. business continued until it became T. S. M. R. K. R. M. T. S. was carrying on and T. S. M. R. K. R. M. was also carrying on; one did not replace the other. T. S. only existed for the purpose of winding up."

It is common ground that Palaniappa was the duly constituted agent of both firms. Later in his evidence he said "I renewed the mortgages in favour of T. S. Firm in the name of T. S. M. R. K. R. M. and put them in T. S. M. R. K. R. M. Firm." I myself was a member of the Appellate Bench which heard the appeal from the judgment of my brother Braund, and in the course of my judgment I said :

"The T. S. M. R. K. R. M. Firm took over as a going concern the T. S. business at Pyapon, and all the assets of the latter business were shown as assets in the books of T. S. M. R. K. R. M. Firm. The agent who, as I have said, had a full power of attorney from the T. S. Firm, was obliged to deal with the properties remaining in the name of the T. S. Firm in accordance with the orders of the partners of the T. S. M. R. K. R. M. Firm. The T. S. Firm ceased to have any beneficial interest in these properties, the beneficial interest in which was vested in the T. S. M. R. K. R. M. Firm; they in fact, constituted the assets of the latter firm."

It is therefore clear that when the T. S. M. R. K. R. M. came into existence the T. S. Firm ceased to exist except in name. In regard to the properties of which the T. S. Firm still continued to hold the legal title, that firm held such title as bare trustees for the T. S. M. R. K. R. M. Firm. The beneficial interest in all such properties belonged to the latter firm and has vested in the Official Assignee. Hence the whole of the interest originally held by the T. S. Firm in these properties has vested in the Official Assignee, and therefore, in my opinion, on this ground there is no substance in the point which has been raised. The plea in bar of jurisdiction of this Insolvency Court therefore fails in respect of all the petitions and the petitions will now be heard and decided on the merits by this Court in due course. The costs of the trial of this issue in regard to jurisdiction, which has been raised by A. P. L. Palaniappa, must in any event be paid by him to the Official Assignee; Advocate's fee twenty gold mohurs.

s.

Order accordingly.

PATNA HIGH COURT

Civil Appeal No. 124 of 1939

November 8, 1939

ROWLAND, J.

JANKI RAI AND OTHERS—APPELLANTS

versus

Maharaja Bahadur RAM RAN

BIJAYA PRASAD SINGH—RESPONDENT

Civil Procedure Code (Act V of 1908), O. I, r. 9—Multifarious suit resulting in decree—Defect is considered to have been waived—Bihar Tenancy Act (VIII of 1934), Sch. III, Art. 6—Execution held governed by Art. 6—"Decree under this Act"—Suit if should be framed in accordance with provisions of Act.

Under O. I, r. 9, Civil P. C., suits are not to be dismissed for misjoinder or non-joinder of parties and in case of misjoinder of causes, of action the Court can in proper cases call on the plaintiff to amend his plaint by limiting the relief claimed to what he is entitled to in respect of one cause of action so as to avoid embarrassment. When this procedure is followed the plaintiff can of course bring a separate suit in respect of the other cause or causes of action. But when this course is not taken nothing turns on the fact that it might have been taken. Once a multifarious suit has been allowed to proceed and has resulted in a decree, the defect is considered to have been waived and is irrelevant.

Sixteen annas proprietor instituted a suit for sixteen annas rents of two tenures recorded under different *khewats* held by different persons. The suit was decreed separately in respect of each of the *khewats* and separate decree for less than Rs. 500 was passed in respect of each *khewat* :

Held, that the decree-holder held two separate decrees each of them for amounts less than Rs. 500 and therefore execution in respect of either of them was governed by Art. 6, Sch. III, Bihar Ten. Act. *Hriday Nath Das v. Krishna Prasad* (1), 36 Ind. Cas. 3-8 (2) and 119 Ind. Cas. 618 (3), explained.

A suit need not at its institution be framed in accordance with the provisions of the Bihar Ten. Act, so that it could result in a decree under that Act. 91 Ind. Cas. 478 (4), distinguished.

At from the appellate order of the Additional Sub-Judge, Arrah, dated March 27, 1939.

Mr. D. N. Varma, for the Appellants.

Messrs. Mahabir Prasad and A. B. N. Sinha, for the Respondent.

Judgment.—This is an appeal by the judgment-debtors against whom execution was taken. In the Munsif's Court they objected that the execution was barred by Art. 6 of Sch. III, Bihar Ten. Act, and this objection succeeded, the application to execute having been presented more than three years after the passing of the decree. On appeal the Subordinate Judge thought that limitation was governed not by Art. 6 of the said schedule but by Art. 182 of the Schedule to the Lim. Act. He, on this view, considered that the ques-

tion whether the execution was time-barred would depend on whether there had been an intermediate application to execute the decree at a date which would save limitation under Art. 182.

Against that order this appeal is presented, and it is contended that the limitation for this application to execute the decree is that prescribed by Art. 6, Sch. III to the Bihar Ten. Act which cannot be extended beyond the period of three years in consequence of the presentation of an intermediate application to execute the decree. It is necessary to state the particulars of the suit and of the decree passed. The plaintiff, who is the sixteen annas proprietor of the estate, instituted a suit claiming the sixteen annas rents of two tenures for four years. These tenures are those recorded in *khewats* Nos. 2 and 4 of the Record of Rights, *khewat* No. 2 bearing an annual rent of about Rs. 47 and *khewat* No. 4 the annual rent of Rs. 69. The persons interested in *khewat* No. 2 were not identical with those interested in *khewat* No. 4, for the holders of *khewat* No. 2 were defendants Nos. 1 to 12 of the suit and the holders of *khewat* No. 4 were defendants Nos. 1 to 9 only. There was also a claim in respect of some *jagir* and *balagan* lands. The suit was defended and an objection taken on the ground of multifariousness. By compromise between the parties it was settled that the suit be dismissed as regards the *jagir* and other miscellaneous items claimed but be decreed separately in respect of each of the two *khewats* with the result that the decree-holder was given a decree for Rs. 204-4-6 against the defendants Nos. 1 to 12 in respect of *khewat* No. 2 and another decree for Rs. 309-11-9 against defendants Nos. 1 to 9 in respect of *khewat* No. 4. The Munsif thought that the judgment-creditor should be deemed to hold two separate decrees, each of them for amounts less than Rs. 500, so that Art. 6 was applicable. The Subordinate Judge thought that the decrees were money decrees and not rent decrees and also that they are to be treated as a single decree. In my opinion, the Subordinate Judge was in error in both these points. He has drawn a wrong inference from *Hriday Nath Das v. Krishna Prasad* (1) the true effect of which decision can best be gathered by reading it in connexion with subsequent decision of the same High Court and of

the Privy Council in *Dhirendra Nath v. Nischintapore Co.*, 36 Ind. Cas. 398 (2) and *Prafulla Nath Tagore v. Satya Bhusan Das* (3) respectively. The case in *Hriday Nath v. Krishna Prasad* (1) decided this, that if a single decree is obtained against more tenancies than one, and if those tenancies are put up to sale in execution of such a decree, the sale will not carry the special consequences which the Ten. Act attaches to the sale of a tenancy in execution of a decree for its own arrears. The consequences of the sale will be as against incumbrancers nothing more than the consequences of a sale in execution of a money decree. The Subordinate Judge appears to have read into this decision more than the Judges decided.

In the next case, *Dhirendra Nath v. Nischintapore Co.*, 36 Ind. Cas. 398, (2) a single suit had been instituted by the plaintiffs for rent claimed from the defendants in respect of three distinct tenancies held under three separate contracts. It is clear that in such a suit if a decree was obtained for the entire sum due, such decree could not be executed as a decree for rent against any of the tenures. This is in accordance with what was settled by the case I have previously cited. So at the instance of the plaintiffs a decree was drawn up which specified the amount realizable by the sale of each of the three tenancies respectively. It was held that the position resulting was precisely the same as if the plaintiffs had brought three distinct suits for rent against the defendants, one in respect of each tenancy, and it was said to make no difference that instead of being drawn up on three different sheets of paper the three separate decrees had been drawn up on one sheet of paper. Each decree, it was said, carried the consequence that it could be executed as a rent decree against the tenancy in default, and it was further held that for the purpose of limitation also it was to be considered that there were three separate decrees. In the Privy Council case in *Prafulla Nath Tagore v. Satya Bhusan Das* (3) their Lordships had to consider the effect of a sale of a number of separate tenures in execution of a single decree with particular reference to the right of the auction-purchaser to annul incumbrances

(2) 36 Ind. Cas. 398; A I R 1918 Cal. 929; 26 O L J 118; 22 O W N 192.

(3) 56 I A 238; 119 Ind. Cas. 618; A I R 1929 PO 171; 10 P L T 829; 33 O W N 822; 57 M L J 132; 30 L W 310; Ind. Rul. (1929) P O 322; 57 O 205.

(1) 11 O W N 497; 34 O 298; 6 O L J 153.

consisting of sub-tenures. Their Lordships held that it could not be said that each of the tenures had been sold for its own arrears, that the sub-tenure-holders were entitled each to save from sale the tenure under which he held by paying up the arrears of that tenure, and it would defeat the objects of the Act if several tenures could be lumped together in one order for sale. Thus, in deciding the case before them the decision of their Lordships was in agreement with that in *Hridoy Nath Das v. Krishna Prasad* (1) and other decisions of the Calcutta High Court. But their Lordships went on to comment on a view that had been expressed in this country that when a plaintiff has joined in one suit claims in respect of more than one tenure such a suit cannot result in a decree or decrees to sell the tenures separately so as to give the purchaser power to annul the incumbrances on each separate tenure. Their Lordships did not accept this view and pointed out that there was nothing in the Civil P. C. or the Ten. Act to prevent the decrees and orders from being so moulded as to enable their provisions to apply distributively to the separate holdings in respect of which the suit is brought. "It would be a misfortune," said their Lordships,

"to find a system of procedure so rigid as to lead to an illogical and inconvenient result and their Lordships are not prepared to hold that this difficulty exists. But obviously if the original suit is brought in respect of separate tenures the plaintiff must see that the subsequent process takes such a form that the tenures are in fact sold separately."

Reading these three decisions together, it is clear that the result of what was done in the original suit was to bring into existence two separate decrees, one against defendants Nos. 1 to 12 for the rent due to the plaintiff in respect of *khewat* No. 2 and another against defendants Nos. 1 to 9 for the rent due in respect of *khewat* No. 4. Each of these decrees was executable as a rent decree in accordance with the provisions of the Ten. Act; each of them is for a sum of less than Rs. 500; and I have no doubt that execution of either of them is governed by Art. 6 of Sch. III to the Ten. Act. It has been argued for the respondent that the nature of the decree depends on the frame of the suit and that this having been a suit for the rent of more than one tenure was a suit in which only a money decree could be passed. Indeed, it has been said that the suit was multifarious and was liable to be dismissed on this ground. As to that I must observe that under O. I,

r. 9, Civil P. C., suits are not to be dismissed for misjoinder or non-joinder of parties and that in case of misjoinder of causes of action the Court can in proper cases call on the plaintiff to amend his plaint by limiting the relief claimed to what he is entitled to in respect of one cause of action so as to avoid embarrassment. When this procedure is followed the plaintiff can of course bring a separate suit in respect of the other cause or causes of action. But when this course was not taken nothing turns on the fact that it might have been taken. Once a multifarious suit has been allowed to proceed and has resulted in a decree, the defect is considered to have been waived and is irrelevant.

Mr. Mahabir Prasad also invited me to hold that unless a suit was at its institution framed in accordance with the provisions of the Ben. Ten. Act, it could not result in a decree under that Act. He relied on *Mahendra Nath v. Ashutosh Pradhan*, 91 Ind. Cas. 478 (4) but the decision was on facts very different from those before me and does not seem to be applicable here. If it were applicable, I would point out that it was pronounced before the decision of the Judicial Committee of the Privy Council in *Prafulla Nath Tagore v. Satya Bhusan Das* (3), and in so far as it might lead to results at variance with the decision of their Lordships it could not be regarded as good law. The decision of the Munsif was correct and that of the Subordinate Judge erroneous. The appeal is allowed and the decision of the Munsif restored. The appellants will have their costs.

D.

Appeal allowed.

(4) 91 Ind. Cas. 478; A I R 1926 Cal. 545.

CALCUTTA HIGH COURT

Civil Rule No. 126 of 1939

March 3, 1939

EDGLEY, J.

SAURISH CHANDRA ROY—DEFENDANT—
PETITIONER

versus

Sheikh GOPAL OSTAGAR AND OTHERS—
OPPOSITE PARTY

Court Fees Act (VII of 1870), s. 8 (c) as amended in Bengal—Suit for declaration that plaintiffs were entitled to perform religious ceremonies every year in court-yards of defendant's palace—Enquiry under s. 8 (c), if justified.

The plaintiffs instituted a suit against a Ruling Chief for a declaration to the effect that they were entitled to perform certain religious ceremonies on

the occasion of the Moharrum every year in one of the court-yards attached to the defendant's palace and they also asked for a perpetual injunction prohibiting the defendant from interfering with the plaintiffs by alleging his own title:

Held, that there was no difficulty in forming an estimate as to the extent of the loss which would be incurred by the defendant if the plaintiffs succeeded in their suit. Obviously in a case of this sort the extent to which the defendant's property will be depreciated should be taken to correspond to the value of the benefit which the plaintiffs seek to obtain if they succeed in their suit. From this point of view, therefore, there was objective standard of valuation which would justify the Court in holding an enquiry under s. 8 (c), Court Fees Act. *Gahar Ali Sikdar v. Nesar Ali Sikdar* (1), referred to.

C. Rule issued from an order of the Second Court of Munsif, and First Court of Munsif at Krishnagar (Nadia), dated January 16, 1939.

Dr. Basak, Dr. Pal and Mr. Shyamapada Majumdar, for the Petitioner.

Messrs. Abdul Ali and C. F. Ali, for the Opposite Party.

Order.—In this case the plaintiffs instituted a suit against the Maharaja Kumar of Nadia for a declaration to the effect that they were entitled to perform certain religious ceremonies on the occasion of the Moharrum every year in one of the court-yards attached to the defendant's palace at Krishnagar and they also asked for a perpetual injunction prohibiting the defendant from interfering with the plaintiffs by alleging his own title. The suit appears to have been one under ss. 74 (O) and (D), Court Fees Act, and the relief sought by the plaintiffs was valued by them at Rs. 165. The defendant contended that the suit had been grossly undervalued and he maintained that, according to a proper valuation, the relief sought by the plaintiffs should have been valued at more than ten thousand rupees. The question was considered by the learned Munsif as to whether or not he should hold an enquiry under s. 8 (C), Court Fees Act, but he decided not to adopt this course as he considered that there was no objective standard by which the requisite valuation could be made. In support of his conclusion he relied on a decision of this Court in *Gahar Ali Sikdar v. Nesar Ali Sikdar* (1). In that case it was held that ordinarily the objective standard of valuation should be regarded as the value of the benefit which the plaintiff sought to obtain if he succeeded in his suit. Having regard

however, to the circumstances of that particular case, it was decided that no useful purpose would be served by holding an enquiry under s. 8 (C), Court Fees Act. The case with which we are now dealing however appears to be essentially one in which an enquiry under s. 8 (C), Court Fees Act, might be usefully held. In this case there can be no possible doubt that if the plaintiffs succeed in their suit, the value of a considerable portion of the Maharaja Kumar's palace at Krishnagar will seriously depreciate. It should be possible to estimate the extent of this depreciation by taking expert evidence of valuers or of other persons acquainted with the value of property at Krishnagar, and there should therefore be no difficulty in forming an estimate as to the extent of the loss which would be incurred by the Maharaja Kumar if the plaintiffs succeeded in their suit. Obviously in a case of this sort the extent to which the defendant's property will be depreciated should be taken to correspond to the value of the benefit which the plaintiffs seek to obtain if they succeed in their suit. From this point of view therefore I do not consider that the learned Munsif is correct in holding that there was no objective standard of valuation which would justify him in holding an enquiry under s. 8 (C), Court Fees Act.

Having regard to the considerations mentioned above, this Rule must be made absolute with costs. The order of the learned Munsif dated January 6, 1939 is set aside and it is directed that he should hold the requisite enquiry under s. 8 (C), Court Fees Act. The hearing-fee of this Rule is assessed at two gold mohurs.

s.

Rule made absolute.

PATNA HIGH COURT

Civil Appeal No. 71 of 1939

August 16, 1939

ROWLAND AND CHATTERJI, JJ.
MAZHARUL HAQ AND OTHERS—
APPELLANTS

versus

RAGHUBER SINGH AND OTHERS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Judgment-debtor dying after issue of sale proclamation—Execution, if can be continued—Legal representatives entering appearance—Notice to them under r. 22, necessity of.

When in execution of a money decree after the issue of the sale proclamation the judgment-debtor dies, the decree-holder is not at liberty to proceed with the execution against a dead man. Execution cannot be continued against the estate of a dead person without bringing on the record his legal representatives. While substituting them the Court should issue notice under O. XXI, r. 22 against them, and their objections, whatever they may have to urge, should be heard before the execution proceeding can be further continued against them. 162 Ind. Cas. 156 (1), relied on.

And the fact that the legal representatives enter appearance and file objections will not obviate the necessity of the notice because their appearance is in their personal capacity as owner of property sought to be taken in execution of a decree not passed against them and they could not be held to be judgment-debtors until the decree-holder has obtained a substitution of their names in his execution petition. 24 Ind. Cas. 304 (3) and 138 Ind. Cas. 99 (4), relied on, 117 Ind. Cas. 648 (2), distinguished.

O. A. from the appellate order of the District Judge, Saran, dated November 30, 1938.

Messrs. *S. K. Mitra* and *M. Rahman*, for the Appellants.

Messrs. *S. M. Mullick*, *Jaleshwar Prasad* and *Thakur A. D. Sinha*, for the Respondents.

Chatterji, J.—The respondents obtained a money decree against one Zafarullah. In execution of that decree in Execution Case No. 54 of 1935, Zafarullah was arrested. When brought to Court he intimated that he would file an application for adjudication as an insolvent and in accordance with the provisions of s. 55 (4), Civil P. O., one Razaq Mian stood surety for him. In the surety bond Razaq hypothecated certain properties belonging to him. Zafarullah did file an application for insolvency, but it was dismissed by the District Judge. On appeal to the High Court, the order was confirmed. Soon after the disposal of that insolvency case by the District Judge, the decree-holder filed on March 5, 1937 an application for execution of the decree against Razaq, the surety. On April 5, 1937, notice under O. XXI, r. 22, was issued on Razaq fixing April 26, 1937 for his appearance. On April 26, 1937, Razaq appeared and filed an objection mainly on the ground that the application for execution was not maintainable against him as the provisions of law had not been complied with. On the same day the Court issued a notice against Razaq calling upon him to produce the judgment-debtor and also to show cause why the execution should not proceed against him. On May 22, 1937,

the date fixed in the notice, Razaq neither produced the judgment-debtor nor showed cause; but he filed an application for time and it appears that time was allowed and the case was adjourned to June 12, 1937.

On June 12, the Court issued an order of attachment of the properties mentioned in the security bond. In the meantime, the execution proceedings were stayed pending the disposal of the High Court appeal arising out of the insolvency proceeding. As the execution proceeding was stayed, Razaq did not want to proceed with his objection which was dismissed for non-prosecution on September 21, 1937. After the High Court appeal was disposed of, the decree-holder made an application to continue the execution proceeding which was allowed. On May 4, 1938, after the sale proclamation had been issued Razaq died. Thereafter, on May 17, 1938 his legal representatives appeared and filed an objection stating that the execution could not proceed against them. This objection was allowed by the Subordinate Judge on June 24, 1938. He held that there were certain irregularities in the execution proceeding and in face of them he would not continue the execution. Against that order the decree-holder filed an appeal to the District Judge who allowed it. He took the view that the liability of Razaq under the surety bond having been admittedly incurred, the decree-holder was entitled to proceed in execution against his properties. He further held that it was not necessary in the execution proceeding to substitute the heirs of Razaq or to issue any notice against them. Against this decision this miscellaneous second appeal has been preferred by the heirs of Razaq.

Three points are urged in this appeal; first, that the execution which was started on March 5, 1937 against Razaq was not maintainable; because the requisite notices were not served on him; second, that the decree-holder should have, after the death of Razaq, substituted his legal representatives under s. 50, Civil P. O., and issued notices against them under O. XXI, r. 22; third, that the decree-holder could not proceed at the same time both against the surety and the judgment-debtor. In connexion with this last point, I ought to have mentioned that when the Subordinate Judge allowed the objection of these appellants, the decree-holder prayed for arrest of the judgment-debtor which was granted.

I will deal with the second point first.

Indeed the execution proceeding had already reached the stage of the sale proclamation having been issued when Razaq died; but it by no means follows that the decree-holder was at liberty to proceed with the execution against a dead man. The learned District Judge seems to be of opinion that in the circumstances the execution proceeding can be continued without substituting the heirs of Razaq. I am unable to support this view of the law. Suppose, in an execution proceeding, the judgment-debtor dies after attachment and issue of sale proclamation and the property is sold without substituting his heirs, who in that case will exercise the statutory right conferred by O. XXI, r. 89, Civil P. C., and make the necessary application? A dead man is on the record and his legal representatives may have no knowledge of the proceedings. On principle, I do not think the Court can sell the property of a dead man. I am therefore of opinion that the decree-holder before he could proceed with the execution should have substituted the heirs of Razaq. In this connexion reference may be made to the Full Bench decision of the Madras High Court in *Kanchamalai Pathar v. Shahaji Rajah Sahib* (1) where though the facts were dissimilar, the principle was laid down that execution proceeding could not be continued against the estate of a dead man without bringing on the record his legal representatives. What happened there was that after the sale proclamation the judgment-debtor died and the sale was held without substituting his legal representatives. Subsequently they made an application to set aside the sale. It was held by their Lordships that the sale was void and was liable to be set aside at the instance of the legal representatives. The proper order therefore to be passed in the present case is that the decree-holder should, in order that he may continue the execution proceeding, substitute in the place of deceased Razaq his legal representatives. While substituting them the Court should issue notice under O. XXI, r. 22 against them, and their objections, whatever they may have to urge, should be heard before the execution proceeding can be further continued against them.

On behalf of the respondents, Mr. Jaleshwar Prasad contends that inasmuch as the legal representatives already entered

appearance in the execution proceeding, there was no necessity of issuing a notice under O. XXI, r. 22. He has relied on a decision of this Court in *Fakhrul Islam v. Bhubaneshwari Kuer* (2) where a notice under O. XXI, r. 22 was in fact issued but not served and the legal representatives entered appearance and filed objections. It was held that no fresh notice under O. XXI, r. 23 was necessary. That case is quite distinguishable from the facts of the present case. It has been held by the Privy Council in *Raghunath Das v. Sundar Das* (3) and also by this Court in *Smith v. Kailash Chandra* (4) that the issue of a notice under O. XXI, r. 22 unless the Court dispenses with it, is necessary to give jurisdiction to the Court to execute the decree.

In this view it is not necessary to deal with the other objections because when the legal representatives, the appellants, have been substituted and been served with notices they will be at liberty to urge their objections and they will be dealt with according to law. I would therefore allow the appeal, set aside the order of the District Judge and direct that the Subordinate Judge do proceed with the execution in accordance with law giving opportunity to the decree-holder to substitute in the place of the deceased Razaq his legal representatives, the present appellants. In the circumstances the parties should bear their own costs throughout. I may mention that the attachment that has already been effected of the properties of Razaq should continue so long as the present execution proceeding is to last.

Rowland, J.—I agree. The case illustrates the difficulties that arise out of attempts to take short cuts in matters of procedure. The correct procedure for the initiation of proceedings against the surety was first to call on him to produce the judgment-debtor; next on his failure to do so to call on him to show cause against forfeiture and execution; next on failure to show cause to the satisfaction of the Court to obtain an order of the Court directing execution to proceed against the person and properties of the surety. The correct

(2) 7 Pat. 790; 117 Ind. Cas. 648; A I R 1929 Pat. 79; Ind. Rul. (1929) Pat. 456.

(3) 42 C 72; 24 Ind. Cas. 304; A I R 1914 P O 129; 41 I A 251; 18 O W N 1058; 1 L W 567; 27 M L J 150; 16 M L T 253; (1914) M W N 747; 16 Bom. L R 814; 20 C L J 555; 13 A L J 154 (P O).

(4) 11 Pat. 241; 138 Ind. Cas. 99; A I R 1932 Pat. 199; 13 P L T 323; Ind. Rul. (1932) Pat. 166.

(1) 59 M 461; 162 Ind. Cas. 156; A I R 1936 Mad. 205; 70 M L J 162; (1936) M W N 60; 43 L W 238; 8 R M 946 (F B).

procedure after the death of Razaq was to substitute his heirs in the execution proceeding and obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under O. XXI, r. 22 and on their appearance the Court after hearing and determining any objections that they might make, would permit or disallow the continuance of the execution. When the heirs of Razaq appeared in this case they seem to have appeared in their personal capacity as owners of property sought to be taken in execution of a decree not passed against them. They were not yet persons who had taken Razaq's place as judgment-debtors, a position which would not be theirs until the decree-holder had obtained substitution of their names in his execution petition. The Subordinate Judge's order seems to have been understood by the parties as meaning that the execution could not proceed against the heirs of Razaq though the point he had to decide was that the sale could not be held so long as no representative of Razaq was on the record. In that view he was certainly right and the District Judge was in error. Some colour is lent to the view of law taken by the District Judge by a decision in *Doraiswami v. Chidambaram Pillai* (5) where it seems to have been held that a sale of the effects of a deceased judgment-debtor was merely irregular and not illegal. But this decision was overruled by the Full Bench of the same Court in *Kanchamalai Pathar v. Shahaji Rajah Sahib* (1) a decision based on the Privy Council authority in *Raghunath Das v. Sundar Das* (3) which was interpreted in a similar sense in this Court in *Smith v. Kailash Chandra* (4). The view taken by the Full Bench of the Madras High Court was that such a sale was void and not merely voidable. Such a sale cannot proceed.

When the execution case is properly constituted by bringing heirs of Razaq on the record, the time will come for them as his representatives to raise objections, if any, as to the result of the departure from the regular order of procedure in the matter of the initiation of execution proceedings against Razaq, and for the Court to consider those objections.

D.

Appeal allowed.

(5) 47 M 63; 75 Ind. Cas. 46; A I R 1924 Mad. 130; 45 M L J 413; 18 L W 577; 33 M L T 25; (1923) M W N 817.

SIND JUDICIAL COMMISSIONER'S COURT.

Foreign Court Decree No. 501 and

Ex. Application No. 1274 of 1938

September 29, 1939

TYABJI, J.

MESSRS. NUSSEERWANJI AND Co.

—CREDITORS

versus

MESSRS. ROYAL TOYLAND—DEBTORS

Civil Procedure Code (Act V of 1908), s. 73—Goods of judgment-debtor attached and kept in premises occupied by judgment-debtor as lessee, in possession of Nazir—Lessor, if can claim rent for period during which goods were in his premises as part of costs of realization out of sale proceeds.

Where the goods attached by the creditors have continued to remain in possession of the Nazir in the premises which were in the occupation of the judgment-debtors as lessees, and the lease has not been terminated, the relationship between the lessor and the judgment-debtors as lessor and lessees continues unaffected and there is no privity either of contract or of estate between the lessor and the Nazir. The lessor, however, is entitled to claim rent for the period during which the attached goods were kept on the premises as part of the costs of the realization to be deducted from the sale proceeds before distribution to the judgment-creditors is made under s. 73, Civil P. O. It is claimed that this amount is payable to the applicants under s. 73, Civil P. O.

Mr. Dingomal Narainsing, for the Creditors.

Mr. Balkrishen H. Lulla, for the Debtors.

Order.—This is an application by Messrs. Nusserwanjee & Co. for an order of this Court directing payment to them of a sum of Rs. 981 as rent for the occupation of their premises during the period August 4, 1938 to June 9, 1939 out of the sale proceeds of the judgment-debtors' goods now in Court. The rent for this period during which the attached goods of the judgment-debtors were kept after the attachment in the premises, is claimed as part of the costs of the realization to be deducted from the sale proceeds before distribution to the judgment-creditors is made under s. 73, Civil P. O. It is claimed that this amount is payable to the applicants under s. 73 and under Chap. VIII, r. 11 (p. 132) of the Rules of this Court. I have also been referred to the order passed by me in Misc. No. 82 of 1938 which was subsequently upheld in appeal.

It may be mentioned that there are numerous decrees and execution applications against these same judgment-debtors the proprietors of a concern known as the

Royal Toyland which consisted of a toy shop in occupation of certain premises, leased from the applicants. The goods in this shop in their entirety were first attached on August 4, 1938. These goods continued to remain in the same premises, in the possession of the Nazir until they were sold by the Court in execution, and vacant possession of these premises was handed over by the Nazir to the applicants on June 7, 1939. It may further be mentioned that no steps were taken by the judgment-debtors or by the applicants at any time before June 7, 1939 to terminate the existing lease. The applicants had however addressed certain letters to the Nazirs of the attaching Courts demanding rent from them for the occupation of the premises. This claim of the applicants is objected to by Mr. Lulla who appears on behalf of some of the judgment-creditors. He contends that this payment cannot be properly ordered under r 11 or s. 73 and an elaborate and somewhat subtle argument has been addressed to me on the point.

Mr. Lulla admits that in cases where the Nazir acting under the orders of the Court engages any premises for the custody of property attached the rent for the premises so engaged by him would be payable as costs of realization out of the sale proceeds of the property attached before distribution could take place. In such cases, he argues the liability to pay the rent to the landlord could properly be said to have been incurred by the Nazir, and the landlord could properly be said to be entitled to receive the rent from the Nazir. He points out that in such a case there would be a privity of contract as well as of estate between the Nazir and the landlord. But, he argues, the position was a very different one in the present case, where the goods attached continued to remain in the premises which were in the occupation of the judgment-debtors as lessees, and as this lease had not been terminated the relationship between the applicants and the judgment-debtors as lessors and lessees continued unaffected. He contends therefore that the obligation to pay the rent to the applicants lay throughout exclusively on the judgment-debtors. There was no privity either of contract or of estate between the applicants and the Nazir and the applicants did not at any time acquire any legally enforceable claim against the Nazir. As the applicants therefore had no claim which they could

enforce against the Nazir, it is argued that the Nazir could not be said to have incurred any liability to the applicants; and in the absence of any such liability being incurred in law, the rent could not be said to be a part of the costs actually incurred by the Nazir; nor could the applicants be held to be entitled to receive the amount from the Nazir as costs incurred by him.

In reply to this argument, Mr. Dingomal for the applicants insists that there was in this case a privity both of contract and of estate between the Nazir and the applicants. He argues that from the date of the attachment the actual possession of the premises was not that of the judgment-debtors but of the Nazir. This, he argues, was not the result of an act of trespass, but occurred admittedly with the knowledge and continued with the permission of the applicants. Relying on the cases, *Gobindram Uttamchand v. Mohamad Hussain* (1) and *Kunhanujan v. Anjeli* (2) Mr. Dingomal argues that persons in actual occupation were liable to owners of premises for rent, and further that such occupation created a privity of estate between the landlord and the occupier. He further argues that from the circumstances and the conduct of the parties this Court ought to infer that there existed an implied contract under which the Nazir from the date of the attachment was to be liable to the landlord for rent. He also argued that under such circumstances the parties should be regarded as having assented to an assignment of the lease to the Nazir from the date of attachment, and then the law admittedly was that an assignment of a lease resulted in a privity of estate vesting in the assignee.

I am not able to accept Mr. Dingomal's argument that in this case there was a privity between the applicants and the Nazir. The attachment did not in any manner affect the existing relationship between the applicants and the judgment-debtors as lessors and lessees. The Nazir had no authority in law either to disclaim or to adopt the lease granted to the judgment-debtors and had done neither, and the privities of the judgment-debtors did not by the act of attachment, carried out by the Nazir vest in the Nazir in the manner in which such rights and obligations vest in the Official Receiver by a

(1) A I R 1925 Sind 296; 87 Ind. Cas. 802.

(2) 17 M 296.

vesting order under the Insol. Act. On the other hand, although I am unable to accept Mr. Dingomal's argument, and although I am prepared for the purposes of this application to assume that there was no privity of any kind between the applicants and the Nazir, I do not think that the decision of this application in any way depends upon this conclusion or that this conclusion prevents me from granting the applicant's application.

Section 73, Civil P. C. permits costs of realization to be deducted from assets held by a Court before such assets are distributed among judgment-creditors and r. 11 empowers the Court to require judgment-creditors to pay such sums as in its opinion are necessary for the custody of attached property at any place either at the place where the property was attached or elsewhere. The simple question here is therefore whether the sum claimed by the applicants was or was not necessary for the custody of the property while it was attached. There can be no question in this case that it was. Although under the terms of the lease the judgment-debtors remained liable to the applicants, the rent for the period in question, nonetheless was a sum which had in fact necessarily been incurred for the custody of the property during the period it was attached by the Court and as such was a part of the costs of realization. It is obviously because attachments are made and subsist at the instance and for the benefit of judgment-creditors, and because it is equitable for all parties that such costs should be paid out of the proceeds of the goods attached, that Courts are empowered to direct payments of sums so incurred even when incurred by judgment-debtors out of the assets before distribution. It makes no difference whether the goods are kept at the premises in the occupation of the judgment-debtors, or whether they are placed for custody in other premises rented by the Nazir. Thus, although perhaps, apart from s. 73, only the judgment-debtors may be liable in law to pay the amount claimed to the applicants, and the Nazir may not have incurred any liability legally enforceable against him at all, the equitable course is that this sum should be ordered to be paid to the applicants, as can clearly be done under s. 73, out of the amount now in Court, and I order accordingly and grant this application.

s.

Application granted.

BOMBAY HIGH COURT
Second Appeal No. 513 of 1936
February 16, 1939

LOKUR, J.

GAJANAN SHESHADRI PANDHAR-
PURKAR AND OTHERS—PLAINTIFFS—

APPELLANTS

versus

SHANTABAI—DEFENDANT—

RESPONDENT

Civil Procedure Code (Act V of 1908), s. 13(a), (b).—Mortgage suit against minor daughter of deceased mortgagor in Osmanabad Court.—Daughter's husband appointed guardian ad litem but not appearing.—Court appointing its nazir as guardian ad litem and deciding case on merits.—Decree for sale passed giving right to mortgagee to apply for personal decree if sale proceeds were insufficient.—Suit by mortgagee for personal decree in Court in British India.—Defendant held, could get benefit of cl. (a) and not of cl. (b) of exceptions to s. 13.

The plaintiffs filed a mortgage suit against the minor daughter of the deceased mortgagor in the Osmanabad Court (Nizam's State) to recover the amount due under the mortgage deed by the sale of the mortgaged property and the balance out of the assets of the deceased mortgagor in the hands of the defendant. The defendant, was then living with her husband in the Sholapur District in British India. Her husband was appointed her guardian *ad litem*. The defendant's husband, however, did not appear to defend the suit, and the Osmanabad Court appointed its *nazir* as the defendant's guardian *ad litem*. The *nazir* put in a written statement denying the mortgage, and after recording the statement of the writer of the mortgage deed, the Osmanabad Court passed a mortgage decree, which further provided that if the decretal amount was not satisfied out of the sale proceeds of the mortgaged property the plaintiffs were at liberty to apply for a personal decree against the defendant to the extent of the assets of her father in her hands. The decree was executed by the Osmanabad Court, and as the sale proceeds of the mortgaged property, were not sufficient to discharge the decretal amount the plaintiff filed a suit in the Court at Sholapur on the judgment of the Osmanabad Court, for personal decree against the defendant:

Held, that as the Osmanabad Court considered the plaintiffs' claim on its merits, and after taking evidence, disposed of the suit on the merits the defendant could not get the benefit of the exception contained in cl. (b) of s. 13, Civil P. C. 105 Ind. Cas. 186 (1) and 128 Ind. Cas. 609 (2), relied on. [p. 19, col. 1.]

Held, also that that part of the decree passed by the Osmanabad Court against the defendant which was a personal decree against her must be regarded as a nullity. *Gurdial Singh v. Raja of Faridkot* (3), relied on. [p. 59, col. 2.]

Held, further that the Osmanabad Court acted beyond its jurisdiction in appointing its *nazir* as the defendant's guardian when her husband, who was her *de jure* and *de facto* guardian and had been appointed guardian *ad litem* by the Court itself, had never expressed his unwillingness to act as her guardian. In such circumstances the Court acted against the interests of the minor and against natural justice by indirectly compelling her to appear in the suit by appointing its own officer as her guardian *ad litem*. Moreover, it could not be

said that the officer of the Court who was thus appointed guardian *ad litem* voluntarily appeared to defend the suit. He was after all an officer of the Court and had to obey the orders passed by the Court. When the Court appointed its *nazir* as the guardian, he had to appear and say something. Thus his appearance could not be regarded as a voluntary submission to the jurisdiction of the Osmanabad Court. When such submission was not voluntary, then, it could not be said that the defendant rendered herself willingly amenable to the jurisdiction of the foreign. Hence, under the circumstances the personal decree passed against the defendant was an *ex parte* decree and the defendant did not voluntarily submit herself to the jurisdiction of the Osmanabad Court. She was, therefore, not bound by the personal decree against her; and the suit, based on such a personal decree passed by the foreign Court, was liable to be dismissed. 26 Ind. Cas. 287 (4), relied on. [p. 59, col. 2; p. 60, col. 1.]

S. A. against the decision of the Assistant Judge, Sholapur, in Appeal No. 49 of 1935.

Mr. D. A. Tulzapurkar, for the Appellants.

Mr. A. A. Adarkar, for the Respondent.

Judgment.—This second appeal arises out of a suit on a foreign judgment. The defendant's father Shankar Komti mortgaged his house within the jurisdiction of the Osmanabad Court to the plaintiffs, and after his death, his daughter, the defendant, inherited his property as his sole heir. The plaintiffs filed a suit against her in the Osmanabad Court (Nizam's State) to recover Rs. 1,300 due under the mortgage-deed by the sale of the mortgaged property and the balance out of the assets of the deceased mortgagor in the hands of the defendant. The defendant was then a minor and was living with her husband in the Sholapur District. Her husband was appointed her guardian *ad litem*, and notices were served both on the minor defendant and on her husband. The defendant's husband however did not appear to defend the suit, and the Osmanabad Court appointed its *nazir* as the defendant's guardian *ad litem*. The *nazir* put in a written statement denying the mortgage, and after recording the statement of the writer of the mortgage-deed, the Osmanabad Court passed a mortgage-decree, which further provided that if the decretal amount was not satisfied out of the sale proceeds of the mortgage property the plaintiffs were at liberty to apply for a personal decree against the defendant to the extent of the assets of her father in her hands. The decree was executed by the Osmanabad Court, and after the sale of the mortgaged property a sum of Rs. 598-11-9 still remained due to the plaintiffs. The plaintiffs therefore

filed this suit in the Additional Joint Second Class Subordinate Judge's Court at Sholapur, on the judgment of the Osmanabad Court, to recover Rs. 598-11-9, costs and future interest from the defendant out of her father's assets in her hands. Both the lower Courts dismissed the suit on the ground that the judgment of the Osmanabad Court was not binding on the defendant as the personal decree against her was passed *ex parte* and she had not submitted to the jurisdiction of that Court and as the suit had not been disposed of on its merits. The case is governed by s. 13, Civil P. C. which says that:

"A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title."

Then follow six exceptions, of which we are concerned only with exceptions, (a) and (b), which says: "(a) where it has not been pronounced by a Court of competent jurisdiction;" and "(b) where it has not been given on the merits of the case."

It is urged on behalf of the defendant that as her husband was her *de jure* and *de facto* guardian and was appointed by the Osmanabad Court to act as her guardian *ad litem* in the suit, the Court had no jurisdiction to appoint its own officer unless the defendant's husband refused to act as her guardian. It is clear from the notices (Ex. 36) served upon both the defendant and her husband that neither of them objected to her husband's appointment as her guardian *ad litem*. He did not refuse to act as her guardian for the suit. In these circumstances the Osmanabad Court should not have appointed its own officer as her guardian for the suit. Assuming this to be so, the most that can be said in favour of the defendant is that her guardian *ad litem*, viz., her husband, having remained absent, the suit was tried against her *ex parte*. Even then the judgment delivered by the Osmanabad Court (Ex. 33) shows that the suit was heard on its merits. From the *roznama* (Ex. 37) it appears that several adjournments were given to the plaintiffs to enable them to lead their evidence to prove the mortgage. Ultimately, the writer was examined, and on the strength of his evidence the plaintiffs were given a decree. As observed in *Ishri Prasad v. Sri Ram* (1), the question to be considered in such a case is whether the judgment is given on the merits or

(1) 50 A 270; 105 Ind. Cas. 186; A I R 1927 All. 510; 25 A L J 887.

whether it is only by way of penalty. The true test is whether the judgment has been given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiffs' case. The Osmanabad Court did not give a decree to the plaintiffs merely because the defendant was unrepresented or that the defendant did not raise any objection to the plaintiff's claim; but it considered the plaintiff's claim on its merits, and after taking evidence, it came to the conclusion that the claim was proved. In *Ephrayim H. Ephrayim v. Turner Morrison & Co.* (2), the defendant's Pleader did not defend the suit on its merits owing to absence of instructions from the defendant, and it was held that the decree did not on that account cease to be one passed on the merits. It is obvious that in this case the suit was disposed of on the merits and the defendant cannot get the benefit of the exception contained in cl. (b) of s. 13, Civil P. O.

But whether the defendant can claim the benefit of the exception contained in cl. (a) of s. 13, Civil P. O., is not so easy to decide. The claim made by the plaintiffs before the Osmanabad Court consisted of two different parts. They first claimed to recover the amount due under the mortgage by the sale of the mortgaged house. They also further claimed that if the amount realized by the sale of the mortgaged house was found to be insufficient, the deficit should be recovered from the defendant out of the assets of her deceased father in her hands. The wording of the judgment is not so clear since it merely says that the deficit should be recovered out of the assets of the deceased mortgagor, and it does not clearly say that so far as the deficit was concerned a personal decree was passed against the defendant; but the effect of the decree is obvious. After the sale of the mortgaged house, no property of the deceased was left within the jurisdiction of the Osmanabad Court and that Court had no jurisdiction to pass any decree against the property of the mortgagor situate outside its jurisdiction. That property was neither pledged nor mortgaged to the plaintiffs, and no decree against the property itself could be passed. But what the decree did actually say was that the deficit should be recovered from the defendant personally, but that her liability was limited to the extent of the value of her father's assets in her hands. That was purely a personal

decree against her though her personal liability was not unlimited. That personal decree could be made final only after the sale proceeds from the mortgaged property were found to be insufficient. Thus, the foreign judgment on which the present suit is based consists of two different parts, one of which the foreign Court had jurisdiction to pass and the other was purely a personal decree limited to a certain sum. If so, the principle laid down by the Privy Council in *Gurdial Singh v. Raja of Faridkot* (3), applies to the latter. In that case a suit was filed in the Native State of Faridkot to recover certain sums alleged to have been misappropriated by the defendant. The defendant did not appear at the hearing and an *ex parte* decree was passed against him. The defendant was a native of another Native State, and at the date of the suit he neither resided in the State in which the suit was filed nor was he a domicile of the State. On these facts, it was held that the Court in that Native State had on general principles of international law no jurisdiction to entertain the suit in respect of the claim which was a mere personal claim as distinguished from a claim relating to land, and that decree was therefore held to be a nullity. In the same way that part of the decree passed by the Osmanabad Court against the defendant which was a personal decree against her must be regarded as a nullity. But even the personal decree would be binding upon her if it is found that she submitted herself to the jurisdiction of that Court voluntarily. It is therefore urged on behalf of the plaintiffs that the appointment of the *nazir* as her guardian *ad litem* was legal and valid, and that as he appeared on her behalf and put in a written statement contesting the plaintiffs' claim, it must be held that the defendant submitted herself to the jurisdiction of the Osmanabad Court.

If this contention be upheld, it follows that even the personal decree against her is not a nullity and is conclusive in a British Court under s. 13, Civil P. O. But, as I have already pointed out, the Osmanabad Court acted beyond its jurisdiction in appointing its *nazir* as the defendant's guardian when her husband, who was her *de jure* and *de facto* guardian and had been appointed guardian *ad litem* by the Court itself, had never expressed his unwillingness to act as her guardian. Order XXXII, r. 4, Civil P. O., which enables a Court to

(2) 32 Bom. L.R. 1178; 128 Ind. Cas. 609; A.I.R. 1930 Bom. 511; Ind. Rul. (1931) Bom. 65.

(3) 22 O. 222; 21 I.A. 171; 6 Sar. 503 (P.O.).

appoint any of its officers to be the guardian *ad litem* for a minor defendant, specifically provides that this power can be exercised when there is no other person fit and willing to act as the guardian for the suit. It is not suggested that the defendant's husband was not a fit person to be her guardian for the suit. His endorsement on the notice served on him shows that he was not unwilling to act as her guardian for the suit. The mere fact that he did not appear in the Court and put in a written statement on behalf of the defendant does not lead to the presumption that he was not willing to act as her guardian. It was open to him in her interests to refrain from submitting himself to the jurisdiction of the Osmanabad Court and thereby laying the minor defendant open to a personal decree against her. If the defendant herself was then a major, she could have refrained from submitting herself to the jurisdiction of the Osmanabad Court and thereby saved herself from a personal decree against her. She could not have been compelled to submit herself to the jurisdiction of the Osmanabad Court. If so, the mere fact that she was a minor should not put her to a disadvantage when her guardian who was interested in her took the same attitude and refrained from submitting himself, that is to say the minor, to the jurisdiction of the foreign Court. In such circumstances the Court acted against the interests of the minor and against natural justice by indirectly compelling her to appear in the suit by appointing its own officer as her guardian *ad litem*. Moreover, it cannot be said that the officer of the Court who was thus appointed guardian *ad litem* voluntarily appeared to defend the suit. He was after all an officer of the Court and had to obey the orders passed by the Court. When the Court appointed its *nazir* as the guardian, he had to appear and say something. Thus his appearance cannot be regarded as a voluntary submission to the jurisdiction of the Osmanabad Court. When such submission is not voluntary, then, it cannot be said that the defendant rendered herself willingly amenable to the jurisdiction of the foreign Court: *Veeraraghava Ayyar v. Muga Sait* (4). Hence, under the circumstances of the present case, it must be held that the personal decree passed against the defendant was an *ex parte* decree and that the defendant did not voluntarily sub-

mit herself to the jurisdiction of the Osmanabad Court. She is therefore not bound by the personal decree against her, and the present suit, which is based on such a personal decree passed by the foreign Court, was rightly thrown out. For these reasons I confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

S.

Appeal dismissed.

NAGPUR HIGH COURT

Second Appeal No. 309 of 1936

August 9, 1939

STONE, C. J. AND BOSE, J.

Seth BHUDARSAO—DEFENDANT

—APPELLANT

versus

Seth SAMARATHMAL—PLAINTIFF—

RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—Three persons entering into contract for joint purchase of land about to be auctioned—Each providing money—Land purchased on behalf of them by agent of one of them—Sale certificate in name of principal alone—Others held could file suit for their shares and possession.

Where three persons entered into a contract to the effect that they would jointly put up the money (though in different shares) necessary to purchase a certain village that was about to be put up to auction, and the village was purchased by the agent of one of them acting on behalf of all the three, but the sale certificate was issued in the name of the principal alone and the other two filed suits for their share and for possession:

Held, that s. 66, Civil P. C., was no bar to the suit [p. 61, col 1.]

[Case-law reviewed.]

S. A. from the appellate decree of the Court of the District Judge, Ohhindwara, dated February, 7, 1936.

Mr. R. N. Padhye, with Mr. T. B. Pendharkar, for the Appellant.

Mr. M. R. Bobde, for the Respondent.

Judgment.—In this second appeal two points of law, apart from the hopeless one under O. II, r. 2 which was only very faintly argued before us and which we do not propose further to consider, were taken. Before they can be understood a few facts are necessary.

In 1923 the plaintiff, another person who has assigned to the plaintiff his rights, and the defendant entered into a contract to the effect that they would jointly put up the money (though in different shares) necessary to purchase a certain village that was about to be put up to auction. The

(4) 39 M 24; 526 Ind. Cas. 287; A I R 1915 Mad. 486; 27 M L J 535; 16 M L T 479; 1 L W 887; (1915) M W N 102 (F B).

village was sold to a person who attended and who was the agent of defendant but who was acting, or should have been, on behalf of all three. As soon as the sale was over, or rather next day time being given, the 25 per cent. which has to be paid at the time of sale was paid. The purchase price was Rs. 32,000. The 25 per cent. was Rs. 8,000 and the plaintiff and his transferor Bakhtawarmal contributed their respective shares. They also contributed their respective shares in payment of the balance which balance was paid in time.

The sale certificate however was taken in the name of the defendant and upon the defendant (who was the largest shareholder) fell the burden of fighting a litigation that arose out of this sale. That litigation he won but it cost him money. Then he obtained mutation in his sole name and so far as we can see he has been enjoying the property ever since.

Naturally after this transaction had been gone through plaintiff and Bakhtawarmal wanted their share and asked to be put in possession. They were told that there were other expenses which they had first to pay. As a result they brought a suit founding not on the contract above mentioned but on the fact that the defendant had bought at the auction and had then sold to them. In that litigation the present defendant denied that contract and alleged the one above set forth but said that the others had to pay their share of the litigation expenses. In the result the plaintiff's suit was dismissed on the ground that the contract was not as stated by the plaintiff but as stated by the defendant.

Thereupon this suit was brought.

In this suit there are 37 typewritten pages of pleadings which lasted over 3½ years. It is now not disputed that the contract above stated now found for constitutes these persons partners in a single adventure. The claim is for possession not for distribution of assets as upon a dissolution with consequential taking of accounts. No particular point is made as to the form of the action but the defendant says the relief asked for should only be granted if at all on his being recouped all his losses not only in respect of the litigation over the sale but also in respect of managing the village.

Even before the lower Appellate Court the defence had narrowed down to the points under O. II, r. 2, and under s. 66, Civil P. O. As above stated the point under O. II, r. 2 was only faintly argued and the

argument on that branch of the case was turned into one based on s. 11, Civil P. O., Expl. IV. It was urged that as the plaintiff could, in the earlier litigation, have sought the remedy he is now seeking he must be deemed to have litigated the present matter and, as he lost, had it decided against him. In other words constructive *res judicata* is urged. We consider there are two answers: (1) The cause of action is not the same. (2) The matter now in dispute was in dispute in that case and was decided not against the plaintiff but against the defendant. This point accordingly, in our opinion, fails.

That leaves the question under s. 66, Civil P. O. Section 66 provides as follows:

"(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

It is clear from the pleadings that the agent who bought acted as agent for all three when buying. At one point the defendant alleged that the agent bought for him alone but later he corrected that and said that he bid for all three.

Our attention has been drawn to a number of cases *Harendra Chandra Roy v. Ram Kumar Roy* (1) being the nearest to the present. In that case (which would appear to contain a number of slips which make it difficult to follow) the facts would seem to be that the plaintiff (singular—there is only one) had many decrees against X and in execution X's property was being brought to sale. It is not stated in the report but may reasonably be inferred that the plaintiff did not get leave to bid. He made an arrangement whereby the properties were to be purchased (by whose act is not clear) in the name of his brother (apparently) who would have a half interest, the plaintiff was to have one quarter and another brother (apparently) a quarter. Who the decree holders were is not clear some of the decrees being apparently in favour of the brothers other than the plaintiff. The brother in whose

(1) 35 O W N 940; 136 Ind. Cas. 538; A I R 1932 Cal. 170; 54 O L J 147; Ind. Rul. (1932) Cal. 218.

name the property was bought undertook to execute a "deed of relinquishment" in favour of the other brothers after purchase. He refused to execute any such deed and was sued. Apparently without any pleadings s. 66 was held to be a bar. It is unnecessary for us to express our opinion on that case. The facts were different. It would appear there to have been established or admitted that the arrangement was that one should purchase in his sole name and hold on behalf of others. Here an agent was to buy on behalf of a firm and got instead of the firm's name his master's name put in the sale certificate. It has not been established that this was any part of the arrangement. We are also of opinion that in *Harendra Chandra Roy v. Ram Kumar Roy* (1) (owing it may be to the fact that s. 66 was raised so late) it was not considered what had to be established before s. 66 applies. In *Harendra Chandra Roy v. Ram Kumar Roy* (1) *obiter dicta* in *Vadivelu Mudaliar v. Peria Manicka Mudaliar* (2) were relied upon. Their Lordships at p. 649 observe :

"The object of s. 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale."

Their Lordships then consider the subsequent agreements and approve *Venkatappa v. Jalayya* (3). Here, however, those observations have no relevance. This is not a case of A buying in the name of B but of A, B, and C instructing X to buy for A, B and C and X buying in the name of A either through some fraud or, more probably, mere error.

In *Iswar Chandra Pal v. Kabirud-Din Ahmad* (4) the facts were that A, B, C, D agreed that the property would be purchased in the names of A, B, A to have $\frac{1}{4}$, B $\frac{1}{4}$, C $\frac{2}{8}$ and D $\frac{1}{8}$ share respectively. This therefore would appear to be a case of a partnership the partners agreeing to buy in the name of two of the partners. Mallik, J., however observed at p. 375* (founding on

the definition of partnership in s. 239 of the Contract Act) "there can be no manner of doubt that the present case was not a case of partnership". However that may be no one has suggested that there was no partnership in the present case. This is stronger than *Vishwanath Dhondiraj v. Pandharinath Ganesh* (5). There the facts were that A purchased in A's name but it appeared that B supplied half the consideration and that the purchase was really a joint venture in which A and B were partners. The suit was to obtain by partition half the subject-matter purchased. There was there, as here, no proof that it was agreed that the certificate should be taken in the name of A. Macleod, C. J., at p. 604* observes (relying on observations made by Richards, J., in *Achhaibar Dube v. Tapasi Dube* (6) :

"I do not think there is any difference between the case where one of the partners in a partnership, which is in existence for other purposes, buys property from the joint funds in his own name, and the case where there is a partnership in a single adventure in which two or more persons agree to unite their funds for the purpose of purchasing the property. There is no intention then of a secret purchase by one person in the name of another. It is a joint transaction. The fact that it is conducted by one partner on behalf of himself and as agent of the other partner or partners, takes it out of the range altogether of *benami* transactions."

As the Judicial Committee observe in *Ganga Sahai v. Keshi* (7) :

"In their Lordships' opinion the provisions of that section have no application to the present case. They were designed to create some check on the practice of making what are called *benami* purchases at the execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase."

In that case A and B were joint holders of a mortgage decree for sale. B died leaving X, Y, Z. A applied for execution reserving the rights of X, Y, Z. A purchased. X, Y, Z claimed that he had purchased for the benefit of heirs of B. It was urged that the old section (which s. 66 replaces) was a bar to any such claim. Their Lordships disposed of the matter as above stated adding:

"The Courts in India were perfectly right in refusing to allow (A) to perpetrate a fraud against his co-decree-holders under cover of this section."

(2) 43 M 643 (649); 56 Ind. Cas. 395; A I R 1920 P O 30; 47 I A 108; 24 O W N 699; 18 A L J 584; 28 M L T 13; 39 M L J 11; 12 L W 1; (1920) M W N 389; 2 U P L R (P O) 90 (P O).

(3) 42 M 615; 51 Ind. Cas. 111; A I R 1919 Mad. 94; 37 M L J 98; 9 L W 598; 26 M L T 46; (1919) M W N 355 (F B).

(4) 61 O 371; 150 Ind. Cas. 77; A I R 1934 Cal. 322; 6 R O 752.

*Page of 61 C.—[Ed.]

(5) 50 B 600; 97 Ind. Cas. 688; A I R 1926 Bom. 525; 28 Bom. L R 997.

(6) 29 A 557; A W N 1907, 166.

(7) 37 A 545 (554, 555); 30 Ind. Cas. 265; A I R 1915 P C 81; 42 I A 177; 19 O W N 1175; 18 M L T 203; 29 M L J 329; 2 L W 837; 13 A L J 999; 17 Bom. L R 998; 22 O L J 508; (1915) M W N 713 (P O).

*Page of 50 B.—[Ed.]

Chin Ah On v. Chin Ah Foo (8) is a case of a *benami* transaction apparently. It is chiefly useful for the observations on the desirability of pleading fraud with particularity. It appears to overlook the fact that absence of consent attracts the provisions of s. 66 (2).

In *Govind Singh v. Mungaji* (9) Macnair, A. J. C. held that s. 66 applies where the ostensible purchaser is the real purchaser to the extent of a fraction. The learned Judge, however, quotes *Achhaibar Dube v. Tapasi Dube* (6) and distinguishes it on the ground that there was no question of partnership in the case before him.

In *Bishan Dayal v. Kesho Prasad* (10) it was held that s. 66 does not apply to the case of those persons who by operation of law and not by virtue of any private agreement or understanding are entitled to treat as joint property an acquisition made by the use of joint funds, e. g., members of a joint Hindu family (see the Privy Council decision in *Bodh Singh v. Gunesh Chunder Sen* (11)), or members of a partnership firm, or joint decree-holders. The Bench of the Allahabad High Court limit *Vishwanath Dhondiraj v. Pendharinath Ganesh* (5) as follows : (see p. 123*)

"With great respect, we are unable to agree with the view expressed....that if two persons privately enter into an agreement to purchase property in the name of one at auction s. 66 of the Civil P. C. would have no application."

Thakur Das Nath v. Keshab Chandra (12) does not carry the matter any further. As Sulaiman, C. J., observed in *Lal Singh v. Chotey Beti* (13).

"...There is plenty of authority for the proposition that where there is a fund belonging jointly to several persons and one of such persons makes a purchase of land with that fund the purchase enures for the benefit of the persons entitled to share in the fund."

In the light of the above and bearing in mind the purpose and wording of the section we are of opinion that it is no bar to this suit. This is not a case of some agreement secret or otherwise whereby A bought in B's name. The plaintiff's rights spring out of the fact that this purchase

(8) A I R 1939 Rang. 122; 181 Ind. Cas. 94; 11 R. Rang. 451.

(9) 57 Ind. Cas. 684; A I R 1920 Nag. 147.

(10) I L R (1937) All. 113; 167 Ind. Cas. 683; A I R 1937 All. 176; (1937) A L J 52; 1937 A L R 232; 9 R A 572.

(11) 12 Beng. L R 317; 19 W R 356; 3 Sar. 253 (P. O.).

(12) 42 O W N 497.

(13) A I R 1933 All. 854 (855); 148 Ind. Cas. 502; (1934) A L J 107; 6 R A 696.

*Page of I L R (1937) All.—[Ed.]

was made out of a joint fund, contributed to by three persons who formed a partnership having for its purpose the carrying out of this purchase transaction.

Section 14 of the Partnership Act provides:

"Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm."

This is a case where with partnership money an agent bought a village which became partnership property. The partnership will become dissolved under s. 42 (b) (which reproduces the old law) when the adventure for which it was constituted is completed. In the meantime the defendant does not and never has claimed title under the purchase certificate. He has been saying all along that the purchase was on behalf of all and the others ought to contribute their share of the expenses as well as their share of the cost. Moreover here there is nothing to show that the consent of the partners was given to the sale certificate being made out in one name and it is common ground as above stated that the agent bid, not on behalf of the defendant, not on behalf of the plaintiff, but on behalf of the partnership. The plaintiff is not here suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims". Here the plaintiff is claiming his share in a partnership adventure and the defendant is not disputing that it was bought for the partnership. In such circumstances, in our opinion, s. 66 has no application.

The appeal is accordingly dismissed with costs.

D.

Appeal dismissed.

PATNA HIGH COURT

Second Appeal No. 315 of 1938

September 21, 1939

HARRIES, C. J. AND FAZL ALI, J.

KHUB LAL CHAUDHURI AND OTHERS—

APPELLANTS

versus

BECHAN MANDAL AND OTHERS—

RESPONDENTS

Evidence Act (I of 1872), s. 92, Proviso (4)—Mortgage deed registered—Deed containing express term that payment to be made in a certain way and discharge to be endorsed therein—Subsequent oral agreement varying terms of deed to prove discharge, admissibility.

It is always open to a mortgagor to prove that on a certain day he discharged the mortgage. But when in a registered mortgage deed there is an express term that payment should be made in a certain

way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage.

S. A. from the appellate decree of the Sub-Judge, Purnea, dated January 29, 1938.

Messrs. Hareshwar Prasad Sinha and R. K. Chaudhuri, for the Appellants.

Mr. Harihar Prasad Sinha for Mr. Saiyid Hasan, for the Respondents.

Harries, C. J.—This is a plaintiffs' appeal against concurrent decrees of the Courts below passed in favour of the defendants. It appears that defendant No. 1 and his cousin Zalim owed a sum of Rs. 400 to one Darsan Mandal. To pay off this sum each of them borrowed Rs. 200 from the plaintiffs, and on October 21, 1928, defendant No. 1 and Zalim each executed mortgage bonds in favour of the plaintiffs. By these bonds they mortgaged their respective shares in certain holdings. The landlord of defendant No. 1 and Zalim obtained a rent decree against both of them and in due course put the property to sale. This was part of the property covered by the mortgages executed by defendant No. 1 and Zalim. On May 8, 1935, the property was to be put up for sale in satisfaction of the rent decree, the decretal amount being Rs. 93. On that day defendant No. 1 paid Rs. 45 in part satisfaction of the decree and obtained an adjournment of the sale to June 3, 1935. On June 3, 1935, the property was put up for sale and purchased by one Ramnath, a relation of the plaintiff, for Rs. 70. In August 1935 Ramnath took delivery of possession of the property. In the year 1936 the plaintiff brought two mortgage suits, one against Zalim and the other out of which this appeal arises against defendant No. 1. Zalim did not contest the suit and allowed it to be decreed *ex parte*. Defendant No. 1 however hotly contested the suit brought against him and alleged that the mortgage had been fully satisfied and discharged.

According to defendant No. 1, the mortgage was discharged by an arrangement entered into between the parties. As I have stated earlier, the holding in question in the present case was being put up for sale by the landlord in execution of a rent decree. Part of that decree had been satisfied and adjournment of the sale obtained. Defendant No. 1 had until June 3, 1935, to pay the balance of the decree amounting to some Rs. 48; but it is said

by arrangement between the plaintiff and defendant No. 1 the latter refrained from paying the balance of the decretal amount bidding at the sale and allowed the property which was worth, according to defendant No. 1, about Rs. 1,500 to go to Ramnath as *benamidar* of the plaintiff for Rs. 70. It was agreed that the mortgage should be regarded as a complete discharge on the part of defendant No. 1. Both the Courts below have accepted the defendant's case and have held that the mortgage was discharged. In second appeal it has been urged that no evidence was admissible of this agreement which led to the discharge of the mortgage. Reliance has been placed upon s. 92, Proviso (4), Evidence Act, that proviso is in these terms:

"The existence of any distinct subsequent agreement to rescind or modify any contract or disposition of property may be proved in cases in which such contract or disposition of property is by law required to be in writing, or has been registered under the law in force for the time being as to the registration of documents."

The plaintiffs contend that defendant No. 1 in this case has sought to prove the mortgage agreement rescinding or modifying the original agreement or contract between the parties. The mortgage was a contract required by law to be in writing and was in fact registered. That being so it is urged that no oral agreement can be proved varying the terms of that contract. On the other hand, it is argued by the respondents that it is always open to a mortgagor to prove discharge of a mortgage by oral evidence. It is always open to a mortgagor to prove on a certain day he paid the sum due under the mortgage. Such is not evidence of a subsequent oral agreement varying the terms of the mortgage. In the present case however defendant No. 1 cannot prove discharge of this mortgage without an oral agreement varying the express terms of this contract. The mortgage itself there is a stipulation for payment and discharge and that is the substance of these words:

"And whatever money or interest I owe on this bond will be first set off towards the principal and after this set off towards compound interest and after this set off towards interest the remainder will be set off towards principal, that is to say, the principal shall be paid and the interest shall remain unpaid. The payment (that is to say) I will at once write and get it written on this bond. I will not raise any

(regarding payment) without its being endorsed on the back of the bond. That is to say I will not produce any receipt or evidence of witnesses regarding plea of payment. If I produce it, it will be deemed useless and incorrect."

In short there is an express term in this mortgage that payment towards either principal or interest could only be made in a certain way, and unless endorsed on the mortgage it should not be regarded as a payment at all. In these circumstances is it open to the mortgagor to attempt to prove discharge or satisfaction in any other manner? As long as this term remains payment can only be proved by endorsements on the mortgage bond. What defendant No. 1 now seeks to do is to establish that the mortgage has been discharged by reason of a verbal agreement which is in conflict with the express terms of the mortgage. Until the term as to payment in the mortgage is varied, a transaction such as is put forward by defendant No. 1 can never amount to a discharge. In my view the whole case of defendant No. 1 depends on a verbal agreement which modifies and varies the terms of this written and registered document. No such variation or modification is admissible in evidence unless it has been made by a written and registered document. In my judgment the Courts below should not have admitted oral evidence in this case to prove the agreement alleged by defendant No. 1 which amounted to satisfaction of the mortgage. Once any evidence of this agreement is excluded, then there is nothing to establish satisfaction of the mortgage. All that remains is the fact that Ramnath purchased the property and that defendant No. 1 neither paid the small balance of the decree nor bid for the property nor interfered in any way with Ramnath's purchase. There is even nothing to show that Ramnath was in any way *benamidar* of the plaintiffs. Unless the evidence which I hold is inadmissible, is admitted the case made by defendant No. 1 that he has discharged the mortgage wholly fails.

The result therefore is that this appeal must be allowed and the decrees of the lower Courts set aside. I would pass a mortgage decree in favour of the plaintiffs for the principal amount together with interest at the rate of nine per cent. per annum simple from the date of the mortgage to the end of the period of grace. Three months is given to defendant No. 1 to pay the sum due. After the expiry of the period of grace the amount due will

carry interest at the rate of six per cent. per annum simple. I would direct that each party pay their own costs here and in the Courts below.

Fazl Ali, J.—I agree.

D.

Appeal allowed.

ALLAHABAD HIGH COURT Civil Miscellaneous No. 7 of 1939

October 3, 1939

BENNET AND VERMA, JJ.

BALDEO SAHAI AND ANOTHER—

APPLICANTS

versus

SHIVA DATT SHARMA AND ANOTHER

—OPPOSITE PARTY

Contempt of Court—Defendant's written statement containing defamatory matter regarding plaintiff's son—Plaintiff applying to Court for striking out these matters—Notice on defendant, by plaintiff's son, demanding payment of damages within certain time or else he would institute action for defamation—Application and notice held no contempt of Court.

Where in a suit the defendant files a written statement describing the plaintiff's son with a defamatory and abusive epithet, and the plaintiff makes an application to the Court for striking out the defamatory epithet and his son serves a notice on the defendant demanding payment of damages for defamation within certain time or that an action would be brought for defamation, the application and the notice do not amount to contempt of Court. 159 Ind Cas. 193 (1), distinguished.

Mr. Brij Lal Gupta, for the Applicants.

Mr. N. U. A. Siddiqi, for the Opposite Party.

The Government Advocate, for the Crown.

Bennet, J.—This is an application, purporting to be under the Contempt of Courts Act, brought by Baldeo Sahai and Sumat Prasad against Shiva Datt and his father Ram Swarup. Pt. Ram Swarup, opposite party No. 2, has brought a suit for possession of certain land and removal of constructions against the applicant Baldeo Sahai. The applicant filed a written statement in which he alleged that the suit had been brought at the instance of Bhagwan Das, brother of the plaintiff, and of Shiva Datt, opposite party No. 1, son and *pairokar* of the plaintiff, and he described Shiva Datt as *awara*. On March 27, 1939, Ram Swarup, opposite party No. 2, filed an application for this word *awara* to be struck out and asking for an apology and stating that on failure of an apology proceedings would be taken. On April 5, 1939, the

Munsif passed an order stating :

"The defendant's Vakil has stated that the word *awara* be substituted by the word *awaragard*, which simply means an aimless wanderer while *awara* might also mean a vagabond. Let the amendment be made and filed."

On April 14, 1939, Shiva Datt Sharma, opposite party No. 1, sent a notice to applicant No. 2 who is the Counsel for applicant No. 1 in the civil suit. This notice is to the effect that the use of the word *awara* in the written statement filed by applicant No. 2 was without justification and defamatory, that Shiva Datt was an Insurance Agent of the Hindustan Co-operative Insurance Society Ltd. at Calcutta and that the words would affect him in his business. The notice ended by stating :

"Therefore I hereby inform you to pay me Rs. 1,000 as damages for defamation within a week otherwise I will take action against you in law."

The present application claims that both the application to strike out the word *awara* made in the Court of the Munsif and the notice constitute contempt of Court in regard to the civil suit. Now as regards the application to the Munsif, the Munsif is empowered under O. VI, r. 16, Civil P. C., to strike out anything in the pleadings which is unnecessary or scandalous. The Munsif was clearly acting within his jurisdiction in this matter and the application was made to the Munsif within the jurisdiction of the Munsif. We do not think that any Contempt of Court arises from such an application to the Munsif. In regard to the notice, learned Counsel stated that he had one authority for the proposition, that is, *Rajendra Singh v. Uma Prasad* (1). Now this ruling was in a very different case. There was a suit on a mortgage executed by the deceased father of the minor defendant in favour of the deceased father of the plaintiff. The usual plea was taken in para. 9 of the written statement that the mortgage was not binding on the minor because it was tainted with immorality. After the issues had been settled and the plaintiff's evidence had closed and the defendant's evidence had begun, a notice was sent by the plaintiff to the defendant's guardian. The notice quoted para. 9 of the written statement in full and stated that this was defamatory of the plaintiff's deceased father and lowered his reputation in the estimation of his fellow-men and stated that, unless an unqualified apology and withdrawal was sent within a week and Rs. 10,000 was paid as damages, action would be taken in the Civil and Criminal Courts. It is clear that a distinction is to be drawn between that case and the present case because the notice in the ruling required that the plea of the mortgage being invalid because of immoral consideration was to be withdrawn. In the present case there is nothing in the notice asking that any action should be taken in the conduct of the civil suit. The present notice is merely the usual notice which is given as a preliminary to filing a suit for damages for libel. The ruling itself on p. 32 distinguishes the case in the ruling from such cases;

"Learned Counsel for Dr. Misra has cited before us some English cases in which it has been held that in cases of libel or defamation it is not objectionable to serve notice on the offending party giving him an opportunity to withdraw the defamatory words and threatening to take legal steps against him if he fails to do so. Such cases obviously stand on quite a different footing. We are not here dealing with the case of a private defamation. The present case is one where an attempt was made to put pressure on the defendant to withdraw a plea which had been taken in the written statement, duly filed in Court, which was the subject of consideration by the Subordinate Judge of Dehra Dun. We think there can be no doubt that such an action amounted to a direct interference with the administration of justice in preventing the defendant from pressing his defence and putting forward the plea which might, if established, prove fatal to the suit; and in that way an indirect attempt was made to exclude the plea taken on behalf of the minor from the consideration of the Court."

As the ruling itself clearly distinguishes a case like the present from the cases in the ruling we do not think that the ruling can be cited for a case like the present. It appears to us that in the present case the notice did not require any action to be taken in regard to the civil suit. On the other hand, the ruling did require the withdrawal of a plea which was a most material plea in the civil suit. To put pressure on a party to withdraw a plea in a civil suit is quite a different matter from a notice stating that a suit for defamation or libel will be brought. The notice in fact had been given after the Munsif had passed his order directing the substitution of the word *awara*. Learned Counsel for the applicant admits that the opposite party would be within their rights in bringing this suit for libel and that the bringing of such a suit for libel would not amount to contempt of Court. He is not able to explain how the notice for such a suit could amount to contempt of Court if the filing of the suit itself would not amount to contempt of Court.

Learned Counsel asks us to draw the presumption that the notice was not *bona fide* and that the suit for libel would not be filed.

(1) A. I. R. 1935. All. 117; 159 Ind. Cas. 193; 57 A. 573; (1935) A. L. J. 29; 1935 A. L. R. 1083; 8 R. A. 404.

for any other motive except to bring pressure on the applicant in the present civil suit. There is no reason why such a presumption should be drawn. Where a word has been used which the user himself has withdrawn in the Court of the Munsif there is no reason to suppose that a suit for defamation in regard to that word is inspired by any other motives than the usual motives for a suit for defamation. We consider that no case has been made out under the Contempt of Courts Act and accordingly we dismiss this application with costs.

Verma, J.—I entirely agree. A Hindu son is entitled to impugn alienations made by the father, and one of the grounds on which he can impugn such alienation is the ground that the consideration for the alienation was tainted with immorality. Such a plea, if established, is fatal to the case of the alienee, and is thus a material plea. The plea taken in para. 9 of the written statement in *Rufendra Singh v. Uma Prasad* (1), was a plea of that nature. But a statement that the plaintiff's suit, which according to the defendant is false, has been instigated by the plaintiff's son, and the use of abusive epithets about the plaintiff's son, do not in my opinion constitute a "plea" recognized in law.

D. Application dismissed.

CALCUTTA HIGH COURT

Civil Appeal No. 261 of 1938

July 4, 1939

R. C. MITTER AND MOHAMMAD AKRAM, JJ.
MANMATHA PAL CHOUDHURY AND
OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

SARADA PRASAD NATH, DECREE-HOLDER
AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 39—Application for transfer of decree, if falls under s. 47—Objection opposing such application, whether comes under s. 47—Order on such objection—Appealability—Objections under s. 47, if can be taken at any stage—Discretion under s. 39 to be exercised judicially.

An application for transfer of a decree, to the Court which passed the decree, is one relating to the execution of the decree and comes under s. 47, Civil P. O., and an objection by a judgment-debtor to such an application is an objection which can come within the purview of s. 47. The words "relating to execution of the decree" used in s. 47, are wide enough to cover such a case. The order passed by the Court on such objection is an order coming within the scope of s. 47 and the appeal from such order is competent: 132 Ind. Cas. 149 (1) and *Bhabani Charan Dutt v. Pratap Chandra Ghose* (2), relied on. [p. 69, col. 2; p. 70, col. 1.]

A judgment-debtor can prefer objections under s. 47, Civil P. O., at any stage of the execution proceedings. Those objections have to be determined on their merits, unless a particular objection had been adjudicated upon by the Court earlier, or unless the judgment-debtor is debarred from agitating the particular objection. Where the objection, that the decree ought not to have been transferred to other Court as the judgment-debtors, had properties within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree, had not been adjudicated upon at a previous stage of the proceedings, and the order of transfer was made *ex parte*, and without giving the judgment-debtors an opportunity to contest the decree-holder's prayer for transfer, the Court ought to consider the objection on its merits. [p. 70, col. 1.]

The whole of s. 39, Civil P. O., gives a discretion to the Court in the matter of transfer. That discretion must be judicially exercised. [p. 70, col. 2.]

O. A. against the order of the Sub-Judge, Nadia, dated July 5, 1938.

Messrs. A. N. Bose and Hemanta Kumar Bose, for the Appellants.

Messrs. B. Bagchi and Binayak Nath Banerjee, for the Respondents.

Judgment—This appeal has been preferred by three of the judgment-debtors, namely Manmatha Pal Choudhury, Amiya Pal Choudhury and Ranjit Pal Choudhury, and is directed against an order of the Subordinate Judge of Nadia, dated July 5, 1938. A preliminary objection has been taken that no appeal lies against the order complained of. A rule however in the alternative was issued by this Court. In order to decide not only the question as to whether the appeal is competent or not, but also the appeal on the merits, the following facts are necessary.

One Jagannath Khan and others, whom we shall hereafter call the Khans, took a loan of Rs. 1,80,000 from the Faridpur Loan office in the year 1924. They executed a mortgage bond by which *touzies* Nos. $\frac{336}{6}$ and $\frac{441}{6}$ of the Nadia Collectorate as also other properties were hypothecated. In 1931 the said Loan Office instituted a suit on their mortgage in the Original Side of this Court. A preliminary decree was passed on July 5, 1931 and the final decree on January 9, 1933. This decree was put into execution, and at the execution stage the judgment-debtors wanted time to pay up the decretal amount. There was an agreement between them, and the Loan Office by which time was given to the former to pay up the decretal amount on their giving as further security for the decretal amount three decrees for rent which they had already obtained

against their tenants as also the growing rents. This agreement was given effect to by the order of the Court dated December 5, 1934 and the sale of the mortgage properties was postponed. The judgment-debtors however could not pay up the decretal amount within the extended period with the result that the sale was held. At the sale which was held on February 27, 1937 the respondent Sarada Prosad Nath purchased the properties. It is not disputed that he purchased *touzies* Nos. $\frac{368}{6}$ and $\frac{441}{6}$ of the Nadia Collectorate, but at one stage there was the question as to whether he had purchased the rights of the Khans to the rents which accrued in their favour up to that date from their tenants who held lands in the said two *touzies*. For the rents which accrued up to the year 1936, the Khans instituted a suit against their tenants who are ten in number, three of them are the Pal Choudhuris, the appellants before us. The rent suit was decreed on April 15, 1936 for a sum of Rs. 26,8c4. Sarada Prosad Nath claims that by reason of his auction purchase on February 27, 1937 the right to this rent decree has also vested in him. This rent decree was obtained in the Court of the Additional Subordinate Judge of Nadia, in respect of a *patni* tenure situated in the District of Nadia, which was held by the defendants in the rent suit, under the proprietors of the aforesaid *touzies*. The respondent Sarada made an application before the Court of the Additional Subordinate Judge of Nadia who had passed the decree for being substituted in place of the decree-holders, the Khans. This application was granted by the learned Subordinate Judge. An application for review was made by the judgment-debtors but that application has been dismissed. The question whether Sarada is entitled to be substituted in place of the original decree-holders, namely the Khans, is now finally concluded between the parties to this appeal. It is accordingly, as has been conceded by Mr. Bose for the appellants, no longer open to the parties to raise the said question.

The question involved in this appeal rests on the following facts. On March 10, 1938 Sarada Prosad Nath made an application for execution of the said rent decree in a tabular form before the Additional Subordinate Judge, Nadia. This was numbered as Rent Execution Case No. 5 of 1938. In column 2 he gave the names of the

judgment-debtors, ten in number. In column 7, the amount due to him under the aforesaid rent decree is stated. In column 9 he stated that he wanted to proceed against seven out of the ten judgment-debtors, the last three being the appellants before us. In column 11 he prayed that

"orders may be passed for transmission of a certificate of non-satisfaction to the Subordinate Judge's Court, Alipur, District 24-Perganas for realization of the amount due on this decree."

In this tabular statement the place of residence of the three judgment-debtors-appellants is stated to be within the District of Nadia. With regard to some of the other judgment-debtors, it is distinctly stated that they reside within the jurisdiction of the Nadia Court, but with regard to some others their places of residence are not given. It is, however, not stated in the application that any of other judgment-debtors resides within the jurisdiction of the Alipur Court. On the same day, March 10, 1938, the Court registered the said application, and directed the matter to be put up on March 12, "for the preparation of the certificate and for orders." On 12th an order was passed transferring the decree to the Court of the Subordinate Judge Alipur, for execution.

These proceedings were *ex parte* proceedings. No notice was issued to the judgment-debtors when the order for transfer was made, and the judgment-debtors had accordingly no opportunity to come and contest those proceedings for transfer. On April 5, 1938, the judgment-debtors appellants before us, however, filed an application before the Additional Subordinate Judge, in the Rent Execution Case No. 5 of 1938 which was the case in which the order for transfer was made. This application was headed, as an application under O. XXI, r. 16 and s. 47, Civil P. O. In this application the facts are stated in some detail, and the Court was asked, amongst other things, in para. 25 of the said application, to recall the order transferring the decree for execution to the Alipur Court. This part of the case was placed upon two grounds which are grounds Nos. 5 and 9 namely that the decree-holder got the order for transfer and the certificate of non-satisfaction from the Court fraudulently and without any notice on the judgment-debtors, and that in any event, the order of transfer ought not to have been made, as there was property of the judgment-debtors within the jurisdiction of the Nadia

Court, which was sufficient to satisfy the said rent decree.

The scope of this application was however wider. By the application the judgment-debtors wanted the Court to revise its previous order by which the respondent Sarada was substituted as the decree-holder in the place of the original decree-holders, namely the Khans, and for this reason the application was headed as one under O. XXI, r. 16 also. Another ground runs thus: "for that the application for execution is bad in law and is otherwise not maintainable." Analyzing this application it comes to this: The judgment-debtors said firstly, that the respondent ought not to have been substituted in place of the original decree-holders, their ground apparently being that he had not purchased the said rent decree; secondly, that the order of transfer which had been made by the Court on March 12, 1938 was not a good order, ought to be set aside by the Court itself, and the decree recalled from the Alipur Court and thirdly that the execution should not be allowed to be proceeded with as the application for execution was defective and otherwise bad. After this application was filed, the learned Additional Subordinate Judge in whose Court this was filed, registered it as a miscellaneous case and directed notice to be issued on the respondent. Thereafter the Additional Court of the Subordinate Judge, Nadia, was abolished and the business of that Court was taken over by the permanent Subordinate Judge of that place. The permanent Subordinate Judge dealt with this application finally by his order dated July 5, 1938. He held (1) that the question relating to the substitution of the respondent cannot be re-opened, (2) that as the application filed by the appellants on April 5, 1938 purported to be under s. 47, Civil P. O. that application was not entertainable by him, and it could only be entertained by the Alipur Court which was then executing the decree, it having been already transferred to that Court, and (3) that even if that part of the said application which asked for reconsideration of the order of the Additional Subordinate Judge dated March 12, 1938 be considered as an application for review, he could not entertain the same as no notice under the provisions of O. XLVII, r. 4 of the Code had been issued by the Additional Subordinate Judge who had passed the original order. He accordingly rejected the said application.

This appeal has been confined only to that part of the said order dated July 5, 1938 by which the learned Subordinate Judge refused to reconsider the order of transfer made by the Additional Subordinate Judge on March 12, 1938. A preliminary objection has been raised by the respondent to the effect that no appeal lies to this Court. The objection is founded on the ground that the learned Subordinate Judge refused the application which, in essence, was an application for review. The argument is that the appellants, in essence, asked for a review of the order dated March 12, 1938. So far as this part of the case is concerned, it was treated by the Subordinate Judge as an application for review and was refused by him on the footing that it was not entertainable by him. We will have to consider whether this contention is correct. In the first place the application in question does not purport to be an application under O. XLVII, r. 1. The judgment-debtors said in this application that the said order was passed *ex parte* and it was a wrong order on the ground amongst other that the order for transfer was made not in compliance with the provisions of cl. (b) of s. 39, Civil P. O. The question therefore depends upon the question whether an application for transfer of a decree, to the Court which passed the decree, can be regarded as an application relating to the execution of the decree, and secondly whether an objection by a judgment-debtor to such an application is an objection which can come within the purview of s. 47 of the Code. In our judgment, the application comes under s. 47 of the Code and the judgment-debtors rightly headed their application as an application under s. 47. When an application for transfer is made to the Court which passed the decree

"that Court does not function merely as a sort post office for receiving the application for transfer of the decree and for transmitting them to the Court, within whose jurisdiction immovable property sought to be sold is situate, for execution; *Greenath Chakravarty v. Priya Nath* (1), at p. 846."

An application for transfer of a decree passed by a Muffasal Court is a step-in-aid of execution. By that application, the decree-holder asks the Court which passed the decree to assist him for the purposes of carrying further proceedings to realize his decree. An application for transfer is accordingly an application relating to execu-

(1) 58 C 832 (846); 132 Ind. Cas. 149; A I R 1931 Cal. 312; 52 O L J 569; 35 O W N 77; Ind. Rul. (1931) Cal. 573.

tion of a decree. The Court to which the application for transfer is made does not merely function as a post office but it has judicial duties to perform. It is required by statute to exercise judicial discretion. An objection raised by a judgment-debtor opposing the transfer will be an objection relating to execution of the decree. The words "relating to execution of the decree" used in s. 47, are wide enough to cover the case. We accordingly hold that the order which has been passed by the Court is an order coming within the scope of s. 47 of the Code, and the appeal before us is competent. The view which we are taking is supported by the decision in *Bhabani Charan Dutt v. Pratap Chandra Ghosh* (2). In this view of the matter the rule issued by this Court is discharged on the ground that an appeal lies to this Court.

We will now deal with the merits of the appeal. We have already held that that part of the objection raised by the appellants which relates to the transfer of the decree is an objection which comes within the purview of s. 47. It is an established principle that a judgment-debtor can prefer objections under s. 47 at any stage of the execution proceedings. These objections have to be determined on their merits, unless a particular objection had been adjudicated upon by the Court earlier, or unless the judgment-debtor is debarred from agitating the particular objection by reason of the principles laid down in *Mungal Pershad Dichit v. Girija Kanta Lahiri* (3). The particular objection, namely that the decree ought not to have been transferred to the Alipur Court as the judgment-debtors had properties within the jurisdiction of the Nadia Court, sufficient to satisfy the decree, had not been adjudicated upon at a previous stage of the proceedings, nor can the principles formulated in *Mungal Pershad Dichit v. Girija Kanta Lahiri* (3), be applied, for the order of transfer made on March 12, 1938, was made *ex parte*, and without giving the judgment-debtors an opportunity to contest the decree-holder's prayer for transfer. The learned Subordinate Judge ought to have, accordingly considered the said objection on its merits.

We have already stated that in the tabular statement on the basis of which the order for transfer was made, it was not stated that any of the judgment-debtors resided within the jurisdiction of the Alipur

Court. The application for transfer accordingly did not purport to be on the ground mentioned in cl. (a), s. 39, Civil P. C. The application for transfer was apparently made under cl. (b) of the said section. But the whole of s. 39 gives a discretion to the Court in the matter of transfer. That discretion must be judicially exercised. If the application for transfer is under cl. (b), the Court must be satisfied that the judgment-debtor has not property within its jurisdiction sufficient to satisfy the decree. If the Court comes to the conclusion that the judgment-debtor has property within its jurisdiction sufficient to satisfy the decree, ordinarily it ought not to transfer the decree for execution by another Court. Even if the Court comes to the conclusion that the properties within its jurisdiction are sufficient to satisfy the decree, in special circumstances notwithstanding that fact, the Court may transfer the decree for execution to another jurisdiction for. cl. (d) of s. 39 is sufficiently comprehensive; but in the last mentioned case the Court should record its reasons for making the order of transfer. In any view of the matter, s. 39 indicates that the Court which passed the decree must apply its mind to the matter when an application has been made by the decree-holder for transfer of the decree to another jurisdiction for execution, and exercise its discretion vested in it by that section in a judicial manner. From the orders of the Court below as recorded on March 10, 1938 and March 12, 1938, it appears that the Court in this case did not apply its mind to the matter at all and did not consider at all that it had a discretion to exercise. We accordingly set aside that part of the order dated July 5, 1938, which deals with the question as to whether the order dated March 12, 1938, ought to be recalled or not.

The order which we propose to pass is this that the case should go back to the Subordinate Judge at Nadia to allow the parties to lead evidence bearing on the question as to whether the judgment-debtors against whom the decree-holder wants to proceed have or have not properties within the jurisdiction of the Nadia Court sufficient to satisfy the decree. If the Court finds that there are properties within the jurisdiction of the Nadia Court sufficient to satisfy the decree, it will consider whether a case has been made out for transfer in view of the provisions of cl. (d) of s. 39, Civil P. C. If it comes to the conclusion

(2) 8 C W N 575.

(3) 8 O 51; 8 I A 123; 11 O L R 113; 4 Sar. 248 (P. C.).

that the properties within its jurisdiction, are sufficient to satisfy the decree, or no other reason exists for granting the application for transfer, it will recall its order dated March 12, 1938, and in that event recall the decree from the Court of the Subordinate Judge at Alipur where execution proceedings are pending. Pending this enquiry by the Court of the Subordinate Judge, Nadia, the attachment effected by the Alipur Court will remain in force. But further proceedings in the Alipur Court are stayed pending the final determination of the question for which we remand the matter to the lower Court. The appeal is allowed, the order of the lower Court is set aside and the case remanded to that Court. Costs of this appeal will abide the result, hearing-fees three gold mohurs.

s.

*Case remanded.***BOMBAY HIGH COURT**

First Appeal No. 109 of 1936

January 19, 1939

BEAUMONT, O. J. AND LOKUR, J.

RAGHUNATH RAMCHANDRA JERE—**PLAINTIFF—APPELLANT***versus***RAMCHANDRA NARAYAN JERE AND****OTHERS—DEFENDANTS—RESPONDENTS**

Hindu Law—Debts—Antecedent—Alienation of ancestral property by father for antecedent debts—Son impugning alienation—Burden lies upon him to prove that debts were for immoral purpose—Such burden not discharged—Whether it must be shown that debt was for legal necessity or family benefit—Effect of alienation upon son's liability when it is sale and mortgage, explained.

A son is under a pious obligation to pay his father's debt which is not immoral, illegal or Ayyavaharika. But this does not empower the father to alienate his son's share in the ancestral property except for a legal necessity or for the benefit of the family or for the payment of an antecedent debt not incurred for immoral or illegal purposes. Once it is proved that there was an antecedent debt, genuinely independent of the subsequent transaction of alienation, or that the alienee inquired and believed in good faith that such a debt existed, and that the alienation was made for satisfying that debt, then the burden of proving that the antecedent debt was incurred for immoral or illegal purposes lies on the son who impugns the alienation. That burden is not discharged by merely showing that the father was leading an extravagant and dissolute life, but it must be proved that the particular antecedent debt was incurred for immoral purposes or was connected with some act of immorality. If this is not proved by the son, then it is not necessary to consider whether the antecedent debt was incurred for any legal necessity or for the benefit of the family. If the alienation challenged be a sale, it would not be set aside if a substantial portion of its considera-

tion was required for a legal necessity or for the benefit of the family or to pay off an antecedent debt which was not immoral or illegal, although the remaining portion was not so required. The material question to be considered in such cases is whether the sale itself was justified. If so, the sale will be upheld as a whole. But the case of a mortgage stands on a different footing. If a part of its consideration is for legal necessity or for the benefit of the family or for the payment of such an antecedent debt as to justify the alienation, and the other part is not so, yet not being borrowed for an immoral or illegal purpose, is such that the son is under a pious obligation to pay it, then the former alone will be a charge on the son's interest in the property, while the latter is not binding on the son as a mortgage debt, but only as an unsecured debt of the father. [p. 72, cols. 1 & 2.] [Case-law relied on.]

F. A. from the decision of the First Class Sub-Judge, Satara, in C. S. No. 21 of 1933.

Messrs. S. A. Desai, K. A. Padhye and R. R. Sabnis, for the Appellant

Messrs. S. R. Parulekar and J. S. Savant, for Respondents Nos. 4 and 13, and 5 to 7 and 9 to 12, respectively.

Lokur, J.—This is an appeal from a decree of the First Class Subordinate Judge of Satara dismissing the plaintiff's suit for partition against his father, defendant No. 1, his grandmother, defendant No. 14, and twelve others to whom the ancestral properties were alienated by his father. He claimed to have those alienations set aside on the ground that they were not supported by any legal necessity nor were they for the benefit of the family and that they were due to the immorality of his father. A preliminary objection was raised in the lower Court that the suit was bad for misjoinder of parties and causes of action, but that objection was overruled and the suit was tried on its merits. As the alleged misjoinder has not affected the merits of the case or the jurisdiction of the Court, the decree of the lower Court cannot be reversed or altered in appeal on that ground by reason of the provisions of s. 99, Civil P. O., and the appeal has to be disposed of on the merits.

Defendant No. 1 was born in 1895 and he married the mother of the plaintiff in 1910 when he was about 15 years of age. Thereafter he went to live with his father-in-law, Govind Ganesh Riswadkar, who was serving in the Police Department. In his absence and during his minority, the family property was managed by his mother, defendant No. 14, with the help of her brother, defendant No. 2. Defendant No. 1 lived with his father-in-law till 1914, when he was transferred to Goghav. Thereafter he began

to visit his village Ped off and on, and being dissatisfied with the management of the estate carried on by his mother and her brother (defendant No. 2), he filed a suit against them to recover possession of his property (Suit No. 109 of 1914). The suit was eventually compromised on November 5, 1914, and by the consent decree (Ex. 78) two lands were given by way of gift to defendant No. 2 as remuneration for his having managed his property during his minority. Two other properties had already been sold to defendant No. 2 and that sale also was confirmed by the consent decree. Two lands and a portion of the ancestral house were given to defendant No. 14 for her maintenance and residence. Even thereafter defendant No. 1 lived for some time with his father-in-law at Goghav, and finally returned to his village Ped in 1917. It is alleged that he then fell into bad company and began to dissipate the property. It appears that between the years 1917 and 1930 he alienated the bulk of his ancestral property. The plaintiff was born on February 2, 1918, and this suit was filed during his minority by his mother's father, Govind Ganesh Riswadkar, as his next friend, who has challenged all the alienations effected by defendant No. 1 both before and after the birth of the plaintiff. The major portion of the moneys realized by defendant No. 1 from the sale or mortgage of the ancestral lands is said to have been taken by him for building a house constructing wells in two fields called Bhutoba's field and Palashacha Mali, for purchasing an engine for pumping water, and for domestic needs. Though a good deal of oral evidence is adduced on behalf of the plaintiff to prove that his father was leading a dissolute life, was addicted to drink, *ganja* and women, and was dissipating the property, no attempt has been made to connect any of the alienations directly with his acts of immorality. An attempt is made to prove that as a matter of fact no house was built by defendant No. 1 nor was any engine for pumping water actually purchased. It is also pointed out that so much money must not have been spent in sinking or constructing the wells.

The principles of Hindu Law as to how far a son is bound by his father's alienations of the ancestral property are well settled. A son is under a pious obligation to pay his father's debt which is not immoral, illegal or *Avyavaharika*. But this does not empower the father to alienate his son's share in the ancestral property except for

a legal necessity or for the benefit of the family or for the payment of an antecedent debt not incurred for immoral or illegal purposes: *Asman Vaman Yadav v. Ganpat Tuka Ram* (1). Once it is proved that there was an antecedent debt, genuinely independent of the subsequent transaction of alienation, or that the alienee inquired and believed in good faith that such a debt existed, and that the alienation was made for satisfying that debt, then the burden of proving that the antecedent debt was incurred for immoral or illegal purposes lies on the son who impugns the alienation. That burden is not discharged by merely showing that the father was leading an extravagant and dissolute life, but it must be proved that the particular antecedent debt was incurred for immoral purposes or was connected with some act of immorality: *Bal v. Maneklal* (2) at p. 69 and *Shyam Narayan v. Suraj Narain* (3). If this is not proved by the son, then it is not necessary to consider whether the antecedent debt was incurred for any legal necessity or for the benefit of the family: *Shankar Narayan v. Tukaram* (4). If the alienation challenged be a sale, it would not be set aside if a substantial portion of its consideration was required for a legal necessity or for the benefit of the family or to pay off an antecedent debt which was not immoral or illegal, although the remaining portion was not so required. As observed by the Privy Council in *Ram Sundar Lal v. Lachmi Narain* (5) the material question to be considered in such cases is whether the sale itself was justified. If so, the sale will be upheld as a whole. But the case of a mortgage stands on a different footing. If a part of its consideration is for legal necessity or for the benefit of the family or for the payment of such an antecedent debt as to justify the alienation, and the other part is not so, yet not being borrowed for an immoral or illegal purpose, is such that the son is under a pious obligation to pay it, then the former alone will

(1) 40 Bom. L R 946; 178 Ind. Cas. 401; A I R 1938 Bom. 443; 11 R B 180.

(2) 34 Bom. L R 55, (69); 137 Ind. Cas. 717; A I R 1932 Bom. 136; 56 B 36; Ind. Rul. (1932) Bom. 323.

(3) 35 Bom. L R 301; 141 Ind. Cas. 509; A I R 1933 P O 38; Ind. Rul. (1933) P O 19; 37 O W N 293; 64 M L J 148; 10 O W N 137; 37 L W 277; (1933) M W N 138; 57 O L J 49; 34 P L R 175 (P O).

(4) 34 Bom. L R 808; 140 Ind. Cas. 256; A I R 1932 Bom. 438; Ind. Rul. (1932) Bom. 595.

(5) 31 Bom. L R 803; 116 Ind. Cas. 605; A I R 1929 P O 143; 51 A 430; 33 O W N 699; 6 O W N 510; (1929) A L J 561; 30 L W 24; 57 M L J 7; (1929) M W N 463; Ind. Rul. (1929) P O 213 (P O).

be a charge on the son's interest in the property, while the latter is not binding on the son as a mortgage debt, but only as an unsecured debt of the father: *Mahomed Ibrahim v. Shivalal* (6). I will now proceed to consider the different alienations in this suit in the light of these principles.

The property in suit in which the plaintiff claims a half share by partition consists of twenty-three lands and one house described in the schedule attached to the plaint. It is not disputed that the plaintiff is entitled to one-half share in the joint family property. The lower Court has inadvertently dismissed the entire suit in spite of the fact that the first five lands described in the schedule are not alleged to have been alienated to anybody and are presumably still in the possession of defendant No. 1. The land at serial No. 7 (survey No. 494) and a portion of the ancestral house described at serial No. 24 are given to defendant No. 1's mother (defendant No. 14) for her maintenance and residence by the consent decree in Suit No. 109 of 1914 (Ex. 78). The plaintiff is entitled to his half share in these properties subject to the rights of defendant No. 14. Certain lands were alienated before the birth of the plaintiff and it is conceded in this Court that he is not entitled to challenge those alienations. Thus the only transactions which are impugned in this Court are those represented by Exs. 80, 83, 89, 95, 97, 99 and 88 and I will now consider how far each of them is binding on the plaintiff. (After considering the evidence in respect of these transactions his Lordship proceeded.) The other alienations mentioned in the plaint are not now challenged, and the result is that the appeal will have to be partially allowed and the plaintiff awarded his share in the light of the above findings.

For these reasons we partially allow the appeal and declare that the plaintiff-appellant is not bound by the alienations effected by defendant No. 1 in favour of defendant No. 2 under the sale deed, Ex. 80, dated April 8, 1922, in favour of defendants Nos. 5 and 6 under the sale deed, Ex. 83, dated February 6, 1918, and in favour of defendants Nos. 11 and 12 under the sale deed, Ex. 88, dated April 1, 1924. The lands alienated by these documents and the lands described at serial Nos. 1 to 5 in the schedule attached to the plaint should be partitioned by metes and bounds and the plaintiff-appellant should recover possession of

(6) 40 Bom. L.R. 381; 175 Ind. Cas. 939; A.I.R. 1938 Bom. 295; 11 R.B.1 (2).

his one-half share in them. The plaintiff-appellant is also entitled to his one-half share in survey No. 494 described at serial No. 7 in the schedule attached to the plaint and the ancestral house described at serial No. 24 in the said schedule, subject to the rights of defendant No. 14 under the consent decree in Suit No. 109 of 1914. As regards the mortgage in favour of defendant No. 13 under Ex. 89, dated August 1, 1930, we declare that the plaintiff-appellant is bound by the mortgage to the extent of Rs. 4,900 but the remaining consideration of Rs. 1,100 will not be a charge on the plaintiff-appellant's share in the mortgaged property. We declare that the plaintiff-appellant is entitled to one-half share in the equity of redemption in respect of that property. The rest of the plaintiff-appellant's claim is rejected. A preliminary decree for partition should be drawn up accordingly. The plaintiff-appellant shall pay the costs in both the Courts of defendants Nos. 2, 3, 4, 7, 8, 9, 10, 12 and 13 in proportion to the claim disallowed, and recover his costs in both the Courts from defendants Nos. 2, 5, 6 and 11 in proportion to the claim awarded. Defendants Nos. 1 and 14 shall bear their own costs, if any.

s.

Appeal partially allowed.

ALLAHABAD HIGH COURT

First Appeal No. 375 of 1937

October 3, 1939

BENNET AND VERMA, JJ.

MUNNA LAL—PLAINTIFF—APPELLANT

versus

CHATAN PRAKASH AND OTHERS—

DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 84, 83—Amendment of s. 84, if retrospective—Subsequent mortgagee depositing amount of earlier mortgage in Court to be paid to rightful owner—Dispute regarding estate of earlier mortgagee—Proceedings under s. 83 terminated—Withdrawal and redeposit of deposit by subsequent mortgagee—Interest held ceased to run after date of first deposit.

An amendment will not in general have any retrospective effect unless it is specifically provided that the amendment is to have a retrospective effect. There is nothing in the amendment of s. 84, T. P. Act, which enacts that that amendment is in any way to be retrospective. [p. 75, col. 2.]

A mortgagor executed a subsequent mortgage of the same property in favour of another. The subsequent mortgagee deposited the amount of the earlier mortgage in Court to be payable to the party entitled to it. After this deposit there was a dispute between rival claimants regarding the title to the estate of the earlier mortgagee. One of the claimants made an application showing his willingness to hand over deposit to the depositor pending the litigation

regarding title to the estate of the earlier mortgagee. When the proceedings under s. 83, T. P. Act, came to an end, the depositor (subsequent mortgagee) withdrew the deposit but subsequently redeposited it in the Court in which litigation regarding title to the estate of the earlier mortgagee was instituted:

Held, that interest ceased to run from the date of the first deposit.

F. A. from the decision of the Additional Judge, Bulandshahr, dated February 24, 1937.

Messrs. S. K. Dar and Hazari Lal Kapoor, for the Appellant.

Sir Tej Bahadur Sapru and Messrs. N. U. A. Siddiqui, Shiva Prasad, Sinha, K. C. Mital, Jagnandan Lal and R. N. Mukerji, for the Respondents.

Bennet, J.—This is a first appeal by the sole plaintiff Munna Lal whose suit has been dismissed by the learned Civil Judge. The mortgage in suit was dated June 4, 1918 executed by *Mst. Kirpa Devi*, widow of *Raghunath Prasad*, in favour of *Shambhu Nath*, mortgagee. The amount was Rs. 40,650 at eleven annas per mensem with six monthly rests. The document is printed on p. 43 *et seq.* The main defence was that there had been a tender under s. 83, T. P. Act, by *Shib Charan Das*, defendant No. 6, on September 5, 1921 of Rs. 50,237-8-6 for payment, but that sum had not been withdrawn by the mortgagee. Subsequently there was payment of the amount which was withdrawn by the present plaintiff. The present plaintiff claims however that interest did not cease to run by the tender of September 5, 1921 under s. 83, T. P. Act, as the money was subsequently withdrawn by *Shib Charan Das*, defendant No. 6 and the claim is for various periods of interest after that tender. The claim has been disallowed in full by the Court below. The claim before it, was for Rs. 34,000. In appeal the amount has been reduced to Rs. 17,000.

The details are that on p. 49 there is a mortgage dated August 31, 1921 by *Mst. Kirpa Devi* for Rs. 64,250 in favour of defendant No. 6, *Shib Charan Das*, leaving with him Rs. 50,203 to be paid for the full satisfaction of the mortgage in the present suit. After the registration of that document, on September 5, 1921, defendant No. 6 made a deposit in the Court of the Subordinate Judge of Meerut adding a small sum of Rs. 34-8-6 for the interest on the intervening five days, the total deposit being Rs. 50,237-8-6. The original mortgagee *Shambhu Nath* died on May 12, 1919 and was succeeded by his widow

Bishun Devi. The deposit was made in the name of this lady, who was alive on the date of deposit, but it so happened that before she received notice and could withdraw the money she died. The exact date of her death is not given but these facts are admitted. It may be noted that on p. 55 of the paper book No. 13 in the array of the opposite parties in the application under s. 83, T. P. Act, was the present plaintiff *Munna Lal*. The other persons in that application Nos. 2 to 12 were trustees of a trust created of the property left by *L. Shambhu Nath* and the opposite party No. 1 was *Mst. Bishun Devi*. Therefore on her death the question was whether the plaintiff *Munna Lal* was entitled to withdraw the money or the trustees. On p. 59 there is an application by *Munna Lal* in the proceeding under s. 83, T. P. Act, claiming that he was entitled. On the other hand, the trustees claimed that they were entitled.

Some question arose as to whether the money would be placed in deposit in the Allahabad Bank at Meerut and there was no agreement on this point and eventually by an order Ex. 4 dated February 4, 1922 the Subordinate Judge stated that as the parties did not agree on the point the application should be filed. This means that the application under s. 83, T. P. Act, should be filed. A few days later, on February 8, 1922, defendant No. 6 withdrew the money as the proceedings under s. 83 had terminated. On November 29, 1922, *Munna Lal* brought a suit, No. 272 of 1922, against the trustees in the Court of the Senior Subordinate Judge of Ludhiana in the Punjab. In this suit there was an application made as shown on p. 73 by defendant No. 6, *Shib Charan Das*, on June 6, 1925 for the deposit of Rs. 50,000, which deposit was allowed with the consent of parties on June 16, 1925, and the amount was deposited in the bank as shown on p. 77. The plaintiff obtained a decree in his favour in this suit and eventually the plaintiff on p. 79 withdrew the money under an order dated December 13, 1926. The plaintiff has made in the present suit claims for interest for various periods between the dates September 5, 1921, of the original deposit and the date of his withdrawal under the order of December 13, 1926. The Court below has dismissed the suit on two grounds, one that the plaintiff was not entitled to obtain any interest after the deposit on September 5, 1921, by defendant No. 6, and secondly that the present suit

is time-barred. The T. P. Act, before the Amendment Act of 1929 was the Act in force at the time of these transactions. In s. 84 of this Act, there was no provision in regard to the withdrawal of a deposit by a person who had made the deposit. Such a provision no doubt is contained in the amended Act and is as follows :

"Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof, interest on the principal money shall be payable from the date of such withdrawal."

Learned Counsel for appellant argues that the spirit of this proviso should be applied to the unamended s. 84 in the Act. We do not think that we can apply the spirit of an amendment or the letter of an amendment in this manner. Learned Counsel points out that the amendment to s. 84 was contained in s. 45, Amendment Act XX of 1929 and that s. 45 is not one of the sections mentioned in s. 63. That is so, but all that s. 63 provides is that nothing in certain sections shall be deemed in any way to affect certain things that have previously happened. The section does not provide that the other sections not mentioned in that Act are to have any retrospective effect. An amendment will not in general have any retrospective effect unless it is specifically provided that the amendment is to have a retrospective effect. There is nothing in the amendment of s. 84, T. P. Act, which enacts that that amendment is in any way to be retrospective. To make such a proviso retrospective would involve certain difficulties and it would have to be definitely stated how far it was to be retrospective and with what effect. Clearly, as there is no provision on these points, the intention was that it should not be retrospective. We do not think therefore that the amendment can affect the case before us. The case-law on the point under the unamended Act is as follows :

In *Hukam Singh v. Babu Lal* (1) it was decided that where the full amount due under a mortgage had been paid into Court under s. 83, T. P. Act and the mortgagee who had received notice had refused to accept the deposit and the mortgagor subsequently withdrew the deposit then interest would not run and the withdrawal did not affect this provision that interest would not run. In arriving at this decision the Court followed the ruling in *Velayuda Naicker v.*

Hyder-Hussain Khan (2) and did not follow the ruling in *Krishnasami Chettiar v. Ramasami Chettiar* (3). This appears to be the only ruling of this High Court on the subject. The Madras rulings which had differed were the subject of a decision by a Full Bench of the Madras High Court in *Ramabhadra Thevar v. Arunachalam Pillai* (4). It was laid down that where a proper deposit had been made and the mortgagee after notice of the deposit refused to accept it and the mortgagor thereafter withdrew the deposit there was still a presumption that the mortgagor continued ready and willing to pay and this presumption cast the onus of proof on the mortgagee to prove the contrary. Therefore in such a case the interest would not run after the deposit, and the withdrawal would not affect this provision. The case-law therefore under the unamended Act was, so far as this Court and the Madras Court are concerned, against the appellant. We find that no case has been made out for the claim of the appellant to interest. As we do not accept the case for the appellant on this point learned Counsel did not argue the case in regard to limitation. We, therefore, dismiss this first appeal. In regard to costs we follow the procedure of the Court below as there are two sets of defendants-respondents and we allow separate costs of each set of defendants-respondents.

Verma, J.—I agree that the appeal is without force and should be dismissed. The only point urged before us is that interest did not cease to run after the deposit under s. 83, T. P. Act, because Shib Charan Das subsequently withdrew the money after the proceedings under s. 83 had terminated. It is argued that Shib Charan Das ought to have left the money in Court even after the termination of the proceeding and that as he did not do so, he is liable to pay interest. It seems to me that this argument is not open to the plaintiff Munna Lal. The material facts bearing on this point are these. As will appear from the judgment delivered by my learned brother the mortgage in suit was executed by one *Mst. Kripa Devi* in favour of one *Shambhu Nath* on June 4, 1918. *Shambhu Nath* died shortly afterwards and his widow *Mst. Bishun Devi* succeeded to

(2) 33 M 100; 3 Ind. Cas. 729; 19 M L J 648; 6 M L T 262.

(3) 35 M 44; 8 Ind. Cas. 763; (1911) 1 M W N 89; 9 M L T 131.

(4) 49 M 609; 95 Ind. Cas. 108; A I R 1926 Mad. 601; 50 M L J 468; (1926) M W N 423; 24 L W 167 (F B).

(1) 44 A 193; 64 Ind. Cas. 971; A I R 1922 All. 181; 20 A L J 7.

his estate for life by right of inheritance as a Hindu widow. She executed a deed of trust in respect of the property that she had inherited from her deceased husband and appointed trustees. In the meantime, the mortgagor *Mst. Kirpa Devi* had on August 31, 1921 executed another deed of mortgage in favour of the present defendant No. 6, *Shib Charan Das*, for Rs. 64,250 and out of the mortgage money had left the sum of Rs. 50,203 in the hands of *Shib Charan Das* for payment to the prior mortgagee, *Mst. Bishun Devi*.

On September 5, 1921 *Shib Charan Das* made an application under s. 83, T. P. Act, and deposited Rs. 50,237-8-6 the excess representing the interest for the intervening five days. He impleaded as opposite parties to this application *Mst. Bishun Devi* and the trustees and prayed that the money may be paid over to the party who may be entitled to it and the mortgage 'may be caused to be redeemed.' *Mst. Bishun Devi* died within a few days of the presentation of this application and the plaintiff-appellant *Munna Lal* then appeared on the scene. He was impleaded as an opposite party to the application under s. 83. He made an application (Ex. B-6, p. 59 of the paper-book) stating that he was the reversionary heir to the estate, of *Shambhu Nath* and that he had applied to the District Judge in respect of that estate under Act XIX of 1841 and praying that the money deposited by *Shib Charan Das* be given to him or may be kept in deposit in the Court till the determination of his rights. The trustees, on the other hand, filed an application asserting that they were entitled to the money and they also filed the mortgage-deed along with their application (*vide* Ex. B-1 dated November 9, 1921). Certain discussions as to whether the money should or should not be deposited in a bank followed. On January 13, 1922 *Munna Lal* made an application (Ex. 1-6, p. 69 of the paper-book) in which he stated that he had been directed by the Court of the District Judge to bring a regular suit to establish his title to the estate of *Shambhu Nath*, deceased, and that he proposed to do so shortly. He prayed that

"either the parties may under order dated January 7, 1922 be directed to obtain succession certificate, or the money may be returned to *L. Shib Charan Das* from whom it can be realized again; otherwise the opposite party, the trustees who are not entitled to get the same under any law, would squander it away..."

He also prayed that he be granted more than one month's time to enable him to

bring a regular suit for declaration of his title and made the further suggestion that till the disposal of the case

"the sale amount might remain in deposit in the Court or it might be deposited in some bank to the credit of the Court."

On February 4, 1922 the Court ordered *Shib Charan Das*'s application to be "filed". The proceedings thus came to an end. A few days later *Shib Charan Das* withdrew the amount and subsequently tendered it again in the Court in which *Munna Lal* filed his suit for declaration of title. As has already been mentioned by my learned brother, this suit was subsequently decreed in favour of *Munna Lal* and it was under the orders of that Court that *Munna Lal* withdrew the money which had been deposited by *Shib Charan Das* in that Court. In my judgment *Munna Lal* having himself expressed in his application dated January 13, 1922 his willingness to the money being given back to *Shib Charan Das* and to its remaining in deposit with him until the settlement of the dispute among those who claimed title to the estate of *Shambhu Nath*, the argument now advanced by learned Counsel cannot be accepted.

I entirely agree with the Court below in holding that *Shib Charan Das* did all that could possibly be done to tender the mortgage money to whomsoever who might be entitled to it. That there was dispute among those who claimed title to it was no fault of his. He took proceedings under s. 83, T. P. Act, almost immediately after the execution of the mortgage-deed in his favour by *Mst. Kripa Devi*. Those proceedings proved infructuous as *Mst. Bishun Devi* died and there arose a dispute between the trustees appointed by her and *Munna Lal*. When those proceedings came to an end, he withdrew the money which he had deposited in that Court, but he tendered it again in the Court at *Ludhiana* where *Munna Lal* had filed his suit against the trustees. I am of opinion that, in the circumstances mentioned above, interest ceased from September 5, 1921.

D.

Appeal dismissed.

RANGOON HIGH COURT
Criminal Appeal No. 643 of 1939
October 24, 1939

MOSELY, J.

T. M. MOHAMED CASSIM—APPELLANT

versus

G. S. T. SHAIK THUMBY SAHIB

—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 164—Statement recorded under s. 164—Its return to witness or Pleader is illegal—Merchandise Marks Act (IV of 1889), s. 14—Costs to be awarded under s. 14 and not under s. 546-A, Criminal Procedure Code (Act V of 1898)—Such costs include Advocate's fees.

Under sub-s. (2) of s. 164, Criminal P. C., statements or confessions recorded are to be forwarded to the Magistrate by whom the case is to be tried or inquired into. Returning of statements recorded under s. 164 either to witnesses or to the Pleader is wholly illegal.

On any prosecution mentioned in s. 13, or for an offence under the relevant sections of the I. P. C., the Court should award costs under s. 14, Merchandise Marks Act and not under s. 546-A, Criminal P. C. These costs include the Advocate's fees.

Cr. A. from an order of the Second Additional Magistrate, Rangoon, dated July 26, 1939.

Mr. Munshi, for the Appellant.

Dr. Ba Han, for the Respondent.

Judgment.—As to the merits of this appeal, there is little to be said. The complainant adduced satisfactory proof of his claim that this trade-mark, which he had registered in 1930, was his property, and that he has used it since before then, in 1928. There is his own evidence, his registration, his vouchers supported by the voucher books themselves, his conduct in 1934, as evinced by the co-respondence, the evidence of the tinsmith, Sayed Mohammad, (P. W. No. 5), and the evidence of Venkataraman (P. W. No. 2), though the latter can only give evidence as to the complainant using the mark in the last four years.

The evidence for the defence is more voluminous, it is true, but the Magistrate thought that it was all concocted and false. I have gone through it very carefully, and I agree with the Magistrate. This defence, which is the only matter argued before me is that the mark was common to the trade long before the complainant registered it in 1930. I note that this defence was only put to the complainant at a very late stage in his examination. L. C. Madhani's business in this line has been wound up. The vouchers filed (Nos. 26, 29 and 30) purport to show that he sold oil and grease mixture

described as "101." The appellant himself admits the case with which these vouchers can be manufactured from old voucher books; but Madhani was not even questioned about these, and they were not proved. He claims that his father used this trade-mark from 1915 up to 1930 as his father's own, and that after 1930 many traders adopted it. He had no documentary evidence, and admitted that though his father registered many other trade-marks, he did not register this one. (His Lordship further examined the defence evidence and continued). The only defence offered by the appellant as regards his correspondence with the complainant in 1934, (Exs. C and D) is a mere denial that he received any letter or sent any reply. It is suggested that this prosecution was instituted through malice. This is evidently not so from the several attempts made towards settlement, and I would note, on the other hand, that the accused was trying to harass the complainant from the very beginning by irrelevant and prolix cross-examination on such subjects as to the nature of the groundnut-oil which he used in his mixture, the firm from which he bought it, his account books relating to salaries paid to his employees and so on. This should have been much more rigorously stopped at the outset by the Magistrate. All sorts of delaying tactics were employed by the accused, and there were no less than thirty different adjournments for hearing in the case, which lasted over a year. I see no reason to interfere with the appeal against the conviction and sentence.

As regards costs, the trial Court awarded Rs. 37-8-0 costs, to the complainant, professing to act under s. 546-A, Criminal P. C. The Court should have awarded costs under s. 14, Merchandise Marks Act, which reads that on any prosecution mentioned in s. 13, or for an offence under the relevant sections of the I. P. C., a Court may order costs to be paid by one party to the other having regard to the information given by, and the conduct of, the parties; such costs, on application, to be recoverable as if they were a fine. These costs, of course, include the Advocate's fee. Section 546-A is limited in terms to process and petition-writers' fees. Another section, s. 148, however, specifically allows Pleader's fees in applications under s. 145 and this is the practice in maintenance cases, s. 488 (7). This appeal will be dismissed, and the appellant will pay the costs of this appeal, including Advocate's fee, ten gold *mohurs*, as the

hearing has lasted nearly six hours spread over three days.

Note.—The only section of the Criminal P. C. under which the Magistrates are authorized to take such sworn statements is s. 164. I am informed that the accused and his Pleader took these witnesses to one of the Honorary Magistrates (I presume a First Class Magistrate or one specially empowered in this respect), and that the statement after being recorded was returned either to the witness, or, more probably, to the Pleader. This is wholly illegal. Under sub-s. (2) of s. 164, statements or confessions recorded shall be forwarded to the Magistrate by whom the case is to be tried or inquired into. The District Magistrate should warn Magistrates subordinate to him accordingly.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 22 of 1939.

May 31, 1939

DAVIS, J. C.

BHAGWANDAS GHANSHAMDAS—

APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Bombay Prevention of Gambling Act (IV of 1887), ss. 3, 4, 5, 6, 7, 8—Person caught actually taking bets over telephone—Conviction under s. 5—Conviction of accused under ss. 4 and 5 on same facts and acts—There should be only one punishment—Money found in coat pocket of accused convicted of gaming—Seizure of, under s. 6.

Section 3, Bom. Prevention of Gambling Act makes "gaming" within the meaning of the Act the collection or soliciting of bets, and it makes no difference if these bets are brought by a messenger or person or sent by telephone or sent and received by telephone. It is gaming within the definition of s. 3, and in s. 7 the word "persons," includes "person" the plural includes the singular. Therefore, a person caught actually in the act of taking bets over the telephone can be rightly convicted of gaming, under s. 5.

Where the prosecution have relied upon the same facts and upon the same acts of the accused to prove that the offences, under ss. 4 and 5 were committed, the accused may be convicted under both sections but there should be one punishment for both.

It was not, the intention of the Legislature that moneys should be forfeited when there is no reason to believe that these moneys were connected with the gaming. The power of forfeiture exercisable by the Magistrate under s. 8 is discretionary. Where the money seized was found in the coat pocket of the accused, it cannot be said, in the absence of any satisfactory explanation by him that this money was not rightly seized under s. 6 and was not connected with the gaming of which he has been convicted.

Cr. A. against the conviction and sentences passed by the Second Additional City Magistrate, Karachi, dated February 20, 1939.

Mr. Gopaldas N. Lala, for the Appellant.
Mirza Nadirbeg, for the Crown.

Judgment.—The appellant in this case, one Bhagwandās, has been convicted by the Second Additional City Magistrate, Karachi, of offences under ss. 4 and 5, Prevention of Gambling Act, and sentenced to a fine of Rs. 500 under s. 4 and to a fine of Rs. 200 under s. 5. I admitted this appeal because, though I thought it clearly proved from the evidence that the appellant was rightly convicted under s. 4, it did appear from the evidence that he was the only person gaming when he was arrested in the house on the night of August 12, and it was arguable that under s. 7 of the Act a person could not be convicted of gaming with himself, and the word "persons" is used in the plural in that section and not the singular. Further, it is argued that the acts of which the accused has been found guilty, and which brought him within the ambit of s. 4, also were relied on by the prosecution to bring him within the ambit of s. 5, and that though an accused person can be convicted of two separate offences constituted of the same acts, he cannot be punished twice over. Further, it is argued that the Magistrate was wrong in forfeiting money found in the house as it was not proved that the moneys forfeited were instruments of gaming within the meaning of ss. 3 and 8 of the Act.

So far as the offence under s. 5 is concerned, it is true that s. 7 refers to "persons" and not "person," and that ordinarily it might be said that a person cannot be convicted of gaming with himself, but in this case the evidence of the Sub-Inspector and the *mashirs* is to the effect that the applicant was caught actually in the act of taking bets over the telephone. The Sub-Inspector got information from one Behari-an informant, who was called as a witness, Ex. 1, and after having got a warrant in proper form from the District Superintendent of Police raided the house at about midnight. He actually took the telephone receiver from the appellant's hand and got into conversation with one Sadhusing who appears one of the appellant's best customers or agents, and whose name appears in the accounts, Exs. 9-A to 9-I and Ex. 10. The Sub-Inspector found two slips, Exhibits 4 and 5, on the table, and Ex. 6 on

which the appellant was actually writing whole telephoning. These exhibits clearly show that the appellant was receiving bets in American Futures and are instruments of gaming. The evidence of the Sub-Inspector is sufficiently corroborated by the evidence of the *mashirs* and the *mashirnama*. But it is said that even so, only one person was found there, and there is no presumption that he was gaming; a person cannot game alone; but s. 3 makes "gaming" within the meaning of the Act the collection or soliciting of bets, and it appears to me it makes no difference if these bets are brought by a messenger or person or sent by telephone or sent and received by telephone. It is gaming within the definition of s. 3, and in s. 7 the word "persons" includes "person," the plural includes the singular. Therefore it appears to me that the appellant was rightly convicted of gaming, an offence under s. 5.

But it is said that upon these very acts upon which the appellant has been convicted of gaming, he has also been convicted of keeping a common gaming-house and that therefore he is being punished twice for the same acts, and reference is made to a Bombay case, *Emperor v. Pyarilal Gokulprasad* (1); in which, upon like facts, an accused was convicted under s. 4 only. It appears to me that each case must be considered upon its own facts. Facts proved may show an accused was committing an offence under s. 4; other facts proved may show he was committing an offence under s. 5. It depends upon the facts of each case, but in this case it appears to me that the prosecution rely upon the same facts to constitute the two different offences, Exs. 4, 5, 6 and 7. The accounts, Exs. 9-B to 9-I, do not appear to show dealings in American Futures but ordinary business; and it does appear that the appellant did two kinds of business, one the betting in American Futures, and the other the ordinary Teji Mandi business or speculation in cotton. This is no offence, so it does appear that the prosecution have relied upon the same facts and upon the same acts of the appellant to prove that the offences under ss. 4 and 5 were committed, and therefore it appears to me that while the convictions under both sections should be confirmed, there should be one punishment for both, the fine of Rs. 500 for the more serious offence, so that the fine of Rs. 200 for the

lesser offence under s. 5 should be refunded, and I order accordingly.

On the question of the forfeiture of the money, I think however the appellant has no case. Mr. Gopaldas argues that money can only be forfeited if it is shown to be instrument of gaming, but that only refers to money found on the person of the accused and not in the house. "Therein" in s. 8 refers to the house and moneys may be seized under s. 6 (d) which are not instruments of gaming within the meaning of s. 3; but it was not, I think, the intention of the Legislature that moneys should be forfeited when there was no reason to believe that these moneys were connected with the gaming. The power of forfeiture exercisable by the Magistrate under s. 8 is discretionary. In this case, the money was found in the coat pocket of the appellant. I do not think it can be said, in the absence of any satisfactory explanation by the appellant, that this money was not rightly seized under s. 6 and was not connected with the gaming of which the appellant has been convicted. The Magistrate's order of forfeiture was, in my opinion, correct. Therefore I think the fine of Rs. 200 for the conviction under s. 5 should be remitted. Otherwise, the order of the Magistrate is proper and should be confirmed and the appeal dismissed accordingly. The balance of fine must be paid by tomorrow or the proportionate period of the sentence of imprisonment passed by the Magistrate in default must be served.

s.

Appeal dismissed..

PATNA HIGH COURT

Appeal No. 36 of 1938

August 3, 1939

DHAVLE AND MURDITH, JJ.

MAHESH SINGH AND OTHERS—

APPELLANTS

versus

GAJADHAR SINGH AND OTHERS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, s. 22—Decree amended—Limitation to be counted from date of amended decree.

The decree contemplated in O. XXI, r. 22, Civil P. C., must be the decree to be executed, not only when it is an appellate decree dealt with in cl. (2) but also when it is a decree which has been reviewed or amended as dealt with in cls. (3) and (4) of Art. 182, Lim. Act. Where, therefore, a decree is amended, the period of one year is to be counted from the date of the amended decree and not the original decree.

(1) 56 B. 192; 137 Ind. Cas. 181; A.I.R. 1932 Bom. 194; (1932) Cr. Cas. 298; 33 Cr. L. J. 385; 34 Bom. L. R. 278; Ind. Rul. (1932) Bom. 238.

A. from original order of the Sub-Judge, Gaya, dated December 23, 1937.

Messrs. S. M. Mullick and Harinandan Singh, for the Appellants.

Sir M. N. Mukharji, Messrs. G. C. Das and M. N. Pal, for the Respondents.

Dhavlé, J.—This appeal arises out of an order dismissing an application under O. XXI, r. 90 for setting aside an execution sale. The only point urged before us is that the execution itself, which was based on an application of September 18, 1935, was incompetent because the decree under execution was passed on January 26, 1934, and no notice under O. XXI, r. 22 was either served or even taken out. It is however not disputed that the decree of January 26, 1934—it was a final decree in a partition suit—was amended after notice to the parties concerned on September 2, 1935. If limitation is counted from this date, no notice under O. XXI, r. 22 was at all necessary. The learned Advocate for the appellants has contended that the date of the decree contemplated in O. XXI, r. 22 must be the date of the decree as originally passed and cannot be the date of amendment of the decree; and in support of this contention he has referred to cl. (4) which was added in 1908 to Art. 182 (replacing old Art. 179), Lim. Act, and gives the starting point of limitation for the execution of a decree which has been amended as the date of the amendment. But that addition was only made in order to settle a conflict of views on the question whether the amendment of a decree did or did not come within the expression "a review of judgment" which occurred in cl. (3) and gave a fresh starting point. Unlike Art. 182 and unlike the Civil P. C. of 1882, O. XXI, r. 22 does not specifically deal with decrees which have been modified in appeal, and yet it is obvious that in such cases the period of one year will have to be counted from the date of the appellate decree which is the decree to be executed. The decree contemplated in O. XXI, r. 22 must, it seems to me be the decree to be executed, not only when it is an appellate decree dealt with in cl. (2) but also when it is a decree which has been reviewed or amended as dealt with in cls. (3) and (4) of Art. 182, Lim. Act. From the time the original decree was amended—I observe in passing that it was amended on notice and before it had become time-barred—the parties in the present case were all (as the case may be) bound by or entitled

to execute the amended decree instead of the original decree; and the starting point for limitation for execution was the date of the amendment. Why then must O. XXI, r. 22 be so construed as to count the period of one year from the date of the original unamended decree? And the respondents took their stand so much on the amendment that they not only specified it in their particulars against the heading "the date of the decree" prescribed by r. 11 (2) (c) of O. XXI but further sought execution (in part) by proceeding against property which only came to the appellants as a result of the amendment. In my opinion the lower Court was right in counting the period of one year from the date of the amended decree and therefore holding that no notice under O. XXI, r. 22 was necessary. The appeal fails and I would dismiss it with costs.

Meredith, J.—I agree.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 182 of 1938

May 30, 1939

DEBBYSHIRE, C. J. AND NASIM ALI, J.

RAGHUPATI DUTT AND OTHERS—

OBJECTORS—APPELLANTS

versus

RAM GOPAL DUTT AND OTHERS

—RESPONDENTS

Civil Procedure Code (Act V of 1908), Sch. II, Para. 17—Power of guardian to refer dispute arising inside family, to arbitration—Arbitration—Award—Interference on ground that arbitrators have erred in law—Wrong construction of will by arbitrators—If binding on parties.

The guardian mother of minor has authority to agree to refer the disputes arising inside the family to the decision of arbitrators under Para. 17 (1), where she finds that it is for the benefit of the minor.

Where the parties have chosen the arbitrators to decide their disputes outside the Courts, considering that the knowledge of law of the arbitrators is sound the Courts would be very reluctant to interfere with the decision of the tribunal and would only do so in cases mentioned in Sch. II, Paras. 14, 15 and 16 of the Civil P. C. The mere fact that the tribunal has erred in law would be no ground for interference. *Ghulam Jilani v. Muhammad Hussain* (1), relied on.

If the arbitrators have made any mistake in construing a will the parties are bound by the decision of the arbitrators as the latter are not only Judges of fact but also Judges of law.

Messrs. Kanaidhan Dutt, Phanindra Nath Dey and Mritunjoy De, for the Appellants.

Messrs. Gopendra Nath Das and Kshetra Mohan Chatterjee, for the Respondents.

Mr. *Pt. Anindra Mohan Dutt*, for Respondent No. 3.

Derbyshire, C. J.—The facts of this matter are set out very fully in the judgment which is appealed from. At one time it appeared that there were difficulties in this case, but that was before our attention had been drawn to the fact that the submission to arbitration here was made under Para. 17(1), Sch. II, Civil P. C. When that was realized it became clear—and indeed the learned Advocate for the appellants did not contend otherwise—that the guardian mother of the minor appellant in this case had authority to agree to refer the disputes that had arisen inside the family to the decision of arbitrators under Para. 17 (1). Those arbitrators who were a Barrister and a Pleader had made their award. It was contended first that the award was invalid because the guardian mother had no authority to agree to refer the disputes to arbitration. That contention has gone and with it the argument that the submission and the award were both invalid.

Next it was contended that the award was not in accordance with law. Now, the award itself in its operative parts is a simple and straightforward award which gives certain items of property and money to different people. On the face of the award there is no error in law. But it is said by the appellants that the arbitrators have acted on wrong legal principles in making those various items of award. It is not clear that they have: they may or may not have taken an erroneous view of the law on some of the items; it is impossible for us to say, although we may surmise. But if they have taken erroneous views of the law in certain parts of the case, it must be remembered that they were requested by all the parties to deal with the matters in dispute and decide them. In this particular instance they were both lawyers—one was a Barrister and the other was a Pleader—and so had a knowledge of the law which doubtless the parties intended that they should use. Doubtless the parties considered that their knowledge of law was sound and having chosen their tribunal to decide these matters outside the Courts, the Courts are very reluctant to interfere with the decision of the tribunal and will only do so in cases mentioned in Sch. II, Paras. 14, 15 and 16 of the Code. It is not contended that there has been corruption or misconduct of the arbitrators, or fraudulent concealment, or wilful misleading of the arbitrators, or that the award was

made at a time when the tribunal had no jurisdiction. It is simply said that the tribunal has erred in law. I would recite here a passage from the judgment of Lord Macnaghten in *Ghulam Jilani v. Muhammad Hussain* (1), at p. 58, which deals with the position under an award made pursuant to the Code.

"The principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country shewed any disposition to sit as a Court of Appeal on award in respect of matters of fact or in respect of matters of law."

Whether there has been any error of law made by the arbitrators in coming to their decision, we cannot say. There is nothing apparent on the face of it, but in accordance with the principle of law enunciated we do not see our way to interfere. The result is that in my view, the judgment of the District Judge appealed from must stand and this appeal must be dismissed with costs, the hearing-fee in this Court being assessed at three gold *mohurs*. For the said reasons which Lord Macnaghten gave in the case cited above where there was an application in revision we refuse the application as made in the present case.

Nasim Ali, J.—I agree with my Lord the Chief Justice, that the appeal should be dismissed and the application in revision under s. 115, Civil P. C. should also be dismissed. The learned Advocate appearing for the appellants attacked the award of the arbitrators on two grounds: (1) that the submission to arbitration was invalid in law, (2) that the decision of the arbitrators was 'otherwise invalid' within the meaning of Para. 15 (c) of Sch. II, Civil P. C. As regards the first objection it appears that the reference in this case was made under Para. (17) of Sch. II and not under Para. (1) of Sch. II. The natural guardian of the minors was under the law entitled to enter into an agreement to refer the matters in dispute to arbitration if she found that it was for the benefit of the minors. There was no suggestion in this case that the settlement of the disputes by arbitration was not for the benefit of the minors.

It was contended on behalf of the appellants that the submission was bad inasmuch as it included matters which were not the subject-matter of the proceedings for letters of administration *de bonis non* under the Succession Act. It has been al-

^{*}(1) 29 I A 51 (58); 29 C 167; 4 Bom. L R 161; 12 M L J 77; 6 C W N 228; 8 Sar. 151; 25 P R 1902 (P O).

ready pointed out that this reference was under Para. (17) of the Code and not in any suit or proceedings under Para. (1) of the Code. It was also argued on behalf of the appellants that the District Judge had no jurisdiction over the subject-matter of the agreement as only the Subordinate Judge in view of s. 15, Civil P. C., would have jurisdiction over the subject-matter. It appears however from s. 18, Ben. Civil Courts Act, that the District Judge as well as the Subordinate Judge are Courts of ordinary original civil jurisdiction. It is true that the Subordinate Judge would ordinarily have jurisdiction to entertain suits relating to the disputes referred to arbitration, but as the value of the subject-matter referred to arbitration was over Rs. 5,000 there could have been no prejudice to any of the parties as the appeal would not lie to the District Judge but to this Court. The reference to arbitration by the District Judge even if it was not in accordance with the provisions of s. 15, Civil P. C. would be mere irregularity and it could be cured by s. 99, Civil P. C. The submission in this case was therefore perfectly legal and valid.

As regards the second contention the argument of the appellants is that the decision of the arbitrators was not in accordance with the reference. The learned Advocate for the appellants said that in the agreement the arbitrators were asked to divide the properties according to the terms of the will but they have not done so. Now from the agreement it appears that the dispute between the parties was about the partition of the properties according to the provisions of the will but in the operative portion of the document it is not stated that the arbitrators were to divide the properties according to the provisions of the will. Even if it be assumed that the agreement taken as a whole was that the arbitrators were required to divide the properties according to the terms of the will the award of the arbitrators cannot be said to be invalid inasmuch as it appears from the award that they have considered the terms of the will and have put their own interpretation upon the will. If the arbitrators have made any mistake in construing the will the parties are bound by the decision of the arbitrators as the latter are not only Judges of fact but also Judges of law.

s.

*Appeal dismissed.***MADRAS HIGH COURT**

Criminal Revision Case No. 407 and

Petition No. 376 of 1939

October 10, 1939

LAKSHMANA RAO, J.

THANAMMAL AND OTHERS—PETITIONERS

versus

ALAMELU AMMAL—RESPONDENT

Madras City Police Act (III of 1888), s. 75—Conviction under, if bar to prosecution under ss. 323 and 352, Penal Code (Act XLV of 1860).

The conviction under s. 75, Mad. City Police Act, is no bar to the trial for an offence under ss. 323 and 352, I. P. C.

Or. R. Case and P. to revise the judgment of the Special Honorary Presidency Magistrate, Egmore, Madras, in C. C. No. 1637 of 1938.

Facts.—A-1 was charged under s. 352, I. P. C., for assaulting P. W. No. 1. A-2 and A-3 under s. 323 causing hurt to P. W. No. 1. P. W. No. 1 and accused No. 1. live in different rooms in the same house. A-2 is accused No. 1's son and A-3 is A-1's brother-in-law. P. W. No. 1 was cleaning her vessels at the top and accused No. 2 who was cleaning his face spat near the vessels. P. W. No. 1 protested. A-2 abused her in return and accused also joined in the abuse. Accused caught P. W. No. 1 by her hair and accused No. 2 struck P. W. No. 1 on the face. P. W. No. 1's lower lip was split and bled. A-3 turned up and cut P. W. No. 1 on the back of her wrists with the knife causing bleeding wound. In the meanwhile the Police arrived on the scene and charged P. W. No. 1, her husband and brother and all accused Nos. 1 to 3 under s. 75, Mad. City Police Act. In the case under s. 75, Mad. City Police Act, A-1, A-2 and A-3 were convicted and the others were acquitted. Accused Nos. 1, 2 and 3 again convicted under ss. 352 and 323, I. P. C., respectively. In the revision it was contended that as the accused were already convicted under s. 75, Mad. City Police Act, a second conviction under ss. 352 and 323, I. P. C., was barred.

Messrs. K. V. Rajagopalan and S. V. Rama Ayyangar, for the Petitioner.

Mr. K. M. Balasubramaniam, for the Respondent.

The Public Prosecutor, for the Crown.

Order.—The conviction under s. 75, City Police Act, is no bar to the trial for an offence under ss. 323 and 352, I. P. C., and the evidence justifies the conviction of the petitioners. The fines are not excessive and the revision is dismissed.

N.S.

Revision dismissed.

ODH CHIEF COURT

Second Civil Appeal No. 313 of 1938

and

Miscellaneous Application No. 882 of 1938

February 29, 1940

RADHA KRISHNA, J.

MAHMUD ALI KHAN—DEFENDANT—

APPELLANT

versus

WAJID ALI KHAN AND ANOTHER—

PLAINTIFFS AND OTHERS—DEFENDANTS—

RESPONDENTS

Limitation Act (IX of 1908), s. 5—Sufficient cause—Time taken by review application, if can be deducted—Civil Procedure Code (Act V of 1908), s. 35—Costs—Discretion of Court.

Section 5 of the Lim. Act gives the Court discretion to excuse the delay in filing an appeal. An appellant who desires to be excused the delay must satisfy the Court that there were sufficient circumstances existing in the case to account for the delay and, therefore, the appellant must satisfy the Court that there were reasonable grounds for review. Mere presentation of an application for review does not entitle a litigant as of right to

deduct the period during which the application for review remains pending from the period of limitation required for filing an appeal specially when the grounds for review were really grounds of appeal. 42 Ind. Cas. 43(1), distinguished, *Ahsanullah v. The Collector of Dacca* (2) and 90 Ind. Cas. 610 (3), relied on.

Costs are always in discretion of the Court.

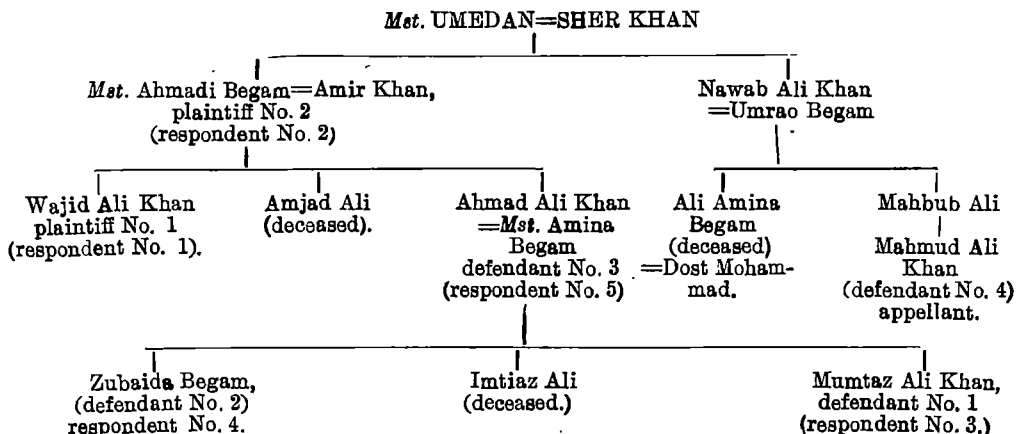
Held, that the Appellate Court exercised a sound discretion in the matter of the award of costs.

S. C. A. against the order of the Additional Civil Judge of Bahraich, dated November 8, 1937.

Mr. Mohd. Hafeez, for the Appellant.

Mr. M. H. Kidwai, for Respondents Nos. 1 and 2.

Judgment.—This second appeal and the connected miscellaneous application arise out of a suit for possession by partition and mesne profits instituted in the Court of the Munsif, Kaisarganj, District Bahraich, by plaintiffs-respondents Nos. 1 and 2. The relationship of the parties will appear from the following pedigree:—



There were two sets of properties in the suit, viz. some *zamindari* detailed in list A and two houses mentioned in list B attached to the plaint. The plaintiffs claimed 7 annas 8 pies share of the *zamindari* on the ground that they were entitled to 5 annas 8 pies out of the 8 annas share of Amir Khan and 2 annas out of 8 annas share of Nawab Ali Khan. As regards the two houses the plaintiffs alleged that they belonged to Amir Khan alone and their share, therefore, came to 11 annas 4 pies which they claimed.

The defendants contested the shares claimed by the plaintiffs, the main contest being on behalf of the appellant, who was defendant No. 4 in the Court of first instance. The main pleas in defence

were that the entire properties belonged to Mst. Umedan who had gifted them to Ahmad Ali Khan (husband of defendant No. 3 and father of defendants Nos. 1 and 2) and Mahbub Ali, father of defendant No. 4; that there was a suit in 1919 in which the present plaintiffs (respondents) and Ahmad Ali, predecessor-in-interest of defendants Nos. 1 to 3 and the heirs of Nawab Ali Khan, including defendant No. 4 (appellant) were parties; and this suit ended in a compromise decree, which the defendants alleged operated as *res judicata*. The plea of adverse possession also was taken.

The trial Court held that the *zamindari* belonged to Amir Khan and Nawab Ali; that the compromise in the suit of 1919 was binding and the decree passed

thereon operated as *res judicata* and that the plaintiffs were entitled to 5 annas 8 pies share only out of Amir Khan's share. As regards the claim to share in the two houses, the plaintiffs withdrew their claim to one and the trial Court held that the other house belonged exclusively to Amir Khan and the plaintiffs as his heirs were entitled to 11 annas 8 pies share therein. The plaintiffs' claim was, therefore, decreed in accordance with the finding.

Against this decree an appeal was filed on behalf of defendant No. 4. Mahmud Ali Khan, mainly on the grounds that (1) the principle of *res judicata* applied also to the house property and (2) that 5 annas 8 pies share of the *zamindari* decreed to the plaintiffs should not be out of the entire property but only out of 8 annas share of Amir Khan. The appeal was heard before Mr. Badri Prasad, Additional Civil Judge, Bahraich, on October 23, 1936. At the time of argument the defendant-appellant did not challenge the decree of the trial Court with respect to plaintiffs' share in the *zamindari* property and the plaintiffs-respondents also put in an application praying that they had no objection if the appeal was allowed with respect to the house. The result was that the lower Appellate Court by its order dated November 8, 1937, modified the decree of the trial Court by passing a decree in favour of the plaintiffs respondents for 5 annas 8 pies share of the *zamindari* properties and dismissing the plaintiffs-respondents' suit with respect to the houses and directing that

"the parties shall bear their own costs of the appeal and they shall pay and receive their costs of the suit in the trial Court in proportion to their success and failure in the case."

Thereafter on November 16, 1937, an application was filed on behalf of the defendant No. 4 appellant before the lower Appellate Court for review of the order in respect of costs as passed by the said Court. This application was dismissed on August 26, 1938.

The present appeal was filed in this Court on November 1, 1938, which is admittedly beyond the period of limitation. Together with the appeal the appellant has filed an application under s. 5 of the Indian Lim. Act (which is the connected Miscellaneous Application No. 882 of 1938). The appellant's contention is that the time taken by the review application, viz., from November 16, 1937, to August 26, 1938,

should be excluded in computing the period of appeal filed by him, as he did not file the appeal, because "he thought that the matter was so simple and small" that it could be easily corrected by the Court below, and there was no need for filing a second appeal.

After hearing the Counsel for the parties, I am of opinion that there is no force in the appeal and the application under s. 5 of the Indian Lim. Act. The appeal is admittedly against the decree of the lower Appellate Court dated November 8, 1937, and is thus clearly beyond time. The appellant seeks the benefit of s. 5 of the Indian Lim. Act. Section 5 lays down that an appeal may be admitted after the period of limitation, when the appellant satisfies the Court that he had sufficient cause for not preferring the appeal within time. The Counsel for the appellant has argued that prosecution of an application for review (infructuous though it was) was sufficient cause, and he was entitled to have that time deducted in his favour. I do not agree to this contention. Mere presentation of an application for review does not entitle a litigant as of right to deduct the period during which the application for review remains pending. The Privy Council decision in *Brij Indar Singh v. Kanshi Ram* (L. R. 44 I. A. p. 218) (1) cited by the Counsel for the appellant does not lend support to any such wide proposition of law. Section 5 of the Indian Lim. Act gives the Court discretion to excuse the delay in filing an appeal. An appellant who desires to be excused the delay must satisfy the Court that there were sufficient circumstances existing in the case to account for the delay and therefore the appellant must satisfy the Court that there were reasonable grounds for review. In this opinion of mine I am supported by the observations in the cases reported in *Ahsanullah v. The Collector of Dacca* (I. L. R. 15 Calcutta 242 at 243) (2), and *Mahadeo Govind Wadkar v. Lakshminarayan Ramnath Marwadi* (A. I. R. 1925 Bombay 521 at 522) (3). In this particular case I am not satisfied that the appellant had reasonable grounds for review. Strictly speaking the application dated November 16, 1937, does

(1) 44 I. A. 218; 42 Ind. Cas. 43; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 O. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. O.).

(2) 15 C. 242; (243).

(3) A. I. R. 1925 Bom. 521, (522); 90 Ind. Cas. 610; 27 Bom. L. R. 1150; 44 B. 839.

not come within the purview of conditions for review laid down in O. XLVII, r. 1, of the Civil P. C. His grounds for review were really grounds of appeal. That being so, I am of opinion that there was no sufficient cause for filing the application for review and therefore there was thus no sufficient cause for the delay in filing the appeal. Therefore the application under s. 5 of the Indian Lim. Act for excusing the delay must be dismissed, and in consequence the appeal must fail, as it has been filed long after the period of limitation expired.

On merits too, I am of opinion that the appellant has no case. Costs are always in discretion of the Court (*vide* s. 35 of the Civil P. C.). In this case I think the Appellate Court exercised a sound discretion in the matter of the award of costs. That being so there can be no appeal against the decree of the lower Appellate Court as to costs only.

I, therefore, dismiss the appeal as well as the Miscellaneous Application with costs.

D.

Appeal dismissed.

BOMBAY HIGH COURT
Second Appeals Nos. 413 and 425 of
1937

June 16, 1939

LOKUR, J.

BRIJMOHANDAS DAMODARDAS

—DECREE-HOLDER—APPELLANT

versus

SADASHIV LAXMAN NAIK

AND ANOTHER—JUDGMENT-DEBTORS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Decree transferred to another Court—Decree-holder dying before starting execution proceedings—Legal representative cannot institute execution proceeding there until he obtains from Court passing decree an order under O. XXI, r. 16—Legal representative, when is clothed with status of decree-holder—Limitation Act (IX of 1908), ss. 2 (?), 14—Proceedings contrary to express provision of law—Whether prosecution in good faith.

When a decree is transferred to another Court and the decree-holder dies before starting the execution proceedings in that Court, his legal representatives cannot institute the execution proceedings there until they obtain an order from the Court which passed the decree under O. XXI, r. 16, Civil P. C. Therefore the *darkhast* which was started by the legal representative without getting an order under r. 16, O. XXI, must be held to be bad from its inception, and cannot be legalized by any waiver on the part of the judgment-debtors or by the production of an order that may be subsequently obtained under O. XXI, r. 16, from the Court which passed the decree. Hence the transferee Court is not bound to stay the

proceedings in order to enable the legal representatives to obtain such an order from the Court which passed the decree. 75 Ind. Cas. 893 (5), followed. [p. 86, col. 2; p. 88, col. 1.]

If a decree is once transferred to another Court for execution and the decree-holder who obtains such a transfer dies, the proper remedy for his legal representatives is to seek an order under O. XXI, r. 16, from the Court which passed the decree, and have that order remitted to the Court to which the decree is transferred for execution under O. XXI, r. 6 (c). If the application under O. XXI, r. 16, is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred for execution. It is after such an order is passed that the legal representatives are clothed with the status of decree-holders and are then empowered to institute execution proceedings in the Court to which the decree is transferred. [p. 88, col. 2.]

Proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words "good faith" are defined in the Lim. Act. 120 Ind. Cas. 236 (10), relied on. [p. 89, col. 2.]

S. As. from the decision of the District Judge, Ahmednagar, in Appeal No. 33 of 1936.

Mr. J. G. Rele, for the Appellant.

Messrs. A. G. Desai and P. S. Joshi, for Respondents Nos. 1 and 2.

Judgment.—One Gopaldas Damodardas obtained a money decree against the respondents in the Court of the First Class Subordinate Judge at Ahmednagar on October 1, 1930. When the decretal amount fell due, he made an application to that Court on July 11, 1932, to have the decree transferred to the Court of the Second Class Subordinate Judge at Parner for execution. The order transferring the decree was passed on July 26, 1932, and the certificate of non-satisfaction was handed over to the decree-holder Gopaldas on August 8, 1932. Before Gopaldas presented an application for the execution of his decree in the Parner Court under O. XXI, r. 10, Civil P. C., he died on November 22, 1932. Nothing was done for nearly two years, and on August 18, 1934, the brother and sons of Gopaldas, claiming to be his legal representatives, presented *darkhast* No. 423 of 1934 in the Parner Court to recover the decretal amount in execution of the decree. The respondents were served with notices and they put in their written statement on March 30, 1935, contending that they were agriculturists and as such not liable to be arrested in execution of the decree. Before the question of their status was decided, they put in another application (Ex. 62) on August 24, 1935, contending that as the appellants had not

obtained an order from the Court which passed the decree recognizing them as the legal representatives of the deceased decree-holder, they had no right to execute the decree in the Parner Court.

Before this application was put in by the respondents, the appellants had made an application to the Court of the First Class Subordinate Judge at Ahmednagar on August 8, 1935, requesting that the certified copy of the decree and the certificate of transfer of the decree should be called back from the Parner Court and their names should be substituted as the legal representatives of the deceased decree-holder both in the decree and in the certificate. The Parner Court framed an issue as to whether it had jurisdiction to hear the appellants' application for execution, and holding that as the appellants had obtained no order under O. XXI, r. 16, from the Court which passed the decree, they had no right to institute the execution proceedings. It dismissed their *darkhast* with costs. That order was upheld in appeal by the learned District Judge of Ahmednagar on the same ground. The application under O. XXI, r. 16, was granted by the First Class Subordinate Judge of Ahmednagar, who ordered that the names of the appellants should be shown as the legal representatives of the deceased Gopaldas Damodardas in the decree. Against that order the judgment-debtors appealed and the learned District Judge held that the application made by the appellants was not in the proper form, that they should have made a proper application for execution of the decree and not merely for the substitution of their names as the legal representatives of the deceased, and that that application was incompetent. The appeal was therefore allowed and the order passed by the lower Court was set aside. These two second appeals are presented by the legal representatives of the decree-holder Gopaldas, one from the order passed by the learned District Judge confirming the order of the Second Class Subordinate Judge of Parner, and the other from the order of the learned District Judge setting aside the order passed by the First Class Subordinate Judge of Ahmednagar.

In the former appeal (S. A. No. 413 of 1937) it is urged that as the judgment-debtors did not object to the *darkhast* proceedings started by the appellants in their written statement (Ex. 7), they should be deemed to have waived their right to object to their names being brought on the record by

the Parner Court, and also that in any case the Parner Court should have stayed the proceedings in order to enable the appellants to obtain the necessary amended certificate from the Court of the First Class Subordinate Judge at Ahmednagar and should not have dismissed the *darkhast*. The procedure to be followed by the legal representatives of a deceased decree-holder is now well-settled. It is not disputed that a legal representative of a deceased decree-holder is to be deemed as a transferee of the decree by operation of law, and as such is entitled to apply for the execution of the decree to the Court which passed it under O. XXI, r. 16, Civil P. C. Order. XXI, r. 10, provides:

"Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent . . . to another Court then to such Court or to the proper officer thereof".

As held in *Jasoda Deye v. Kirtibash Das* (1), it is only the person appearing on the face of the decree as the decree-holder who is entitled to execution, unless it be shown by some other person under O. XXI, r. 16, that he has taken the place of the decree-holder. "Decree-holder," as defined in s. 2. sub-s. (3), means any person in whose favour a decree has been passed or an order capable of execution has been made. The definition in the Code of 1882 included a transferee of a decree. But now the transferee of a decree or the heir of a decree-holder cannot present an application for its execution unless he first obtains an order under O. XXI, r. 16, that he is the person entitled to execute the decree as the legal representative of the original decree-holder. It follows from this that when a decree is transferred to another Court and the decree-holder dies before starting the execution proceedings in that Court, his legal representatives cannot institute the execution proceedings there until they obtain an order from the Court which passed the decree under O. XXI, r. 16, Civil P. C. It was once thought that when a decree-holder dies during the pendency of the execution proceedings his legal representative cannot continue those proceedings, but must start fresh proceedings under O. XXI, r. 16: *Palaniappa Chettiar v. Valliammai Achi* (2). But that was overruled by the Full Bench of the Madras High Court in *Venkatachalam*

(1) 18 C 639.

(2) 50 M 1; 99 Ind. Cas. 627; A I R 1927 Mad. 184; 51 M L J 745; (1926) M W N 981; 25 L W 354.

Chetti v. Ramaswamy Servai (3), and it was held that it was open to the legal representative of a deceased decree-holder to continue the execution proceedings already started by him. The same view was taken by this Court in *Kacharabhai v. Kacharabhai* (4), where it was held that an application to execute a decree filed by the decree-holder can, on his death, be continued by his son and heir, provided the heir first obtained an order of the Court under O. XXI, r. 16, Civil P. C. In that case the legal representative of the deceased decree-holder had made an application to the Court to which the decree had been transferred for execution to be allowed to continue the *darkhast* proceedings after being brought on the record. The trial Court had rejected the application, but in appeal three months' time was granted to him to obtain an order under O. XXI, r. 16, from the Court which passed the decree and then to continue the *darkhast* which had been already filed by the deceased decree-holder.

It is urged that on the same principle in this case also the Parner Court should have stayed the execution proceedings and allowed the appellants time to obtain the necessary order under O. XXI, r. 16, from the Ahmednagar Court. But in that case the deceased decree-holder had already started the execution proceedings, and it was perfectly within the discretion of the executing Court to stay the proceedings and wait until the legal representative of the deceased came forward to proceed with the *darkhast*. But here the decree-holder Gopaldas did not take any steps to execute the decree after it was transferred to the Parner Court. It was after his death that the present appellants presented the *darkhast* in the Parner Court without obtaining any order under O. XXI, r. 16, from the Ahmednagar Court which had passed the decree. As observed by the learned Chief Justice in *Raghunath Govind v. Gangaram Jesu* (5) (p. 647):

"The assignee or transferee of the decree cannot continue any proceedings previously commenced nor can he institute any fresh proceedings for the execution of the decree, unless he makes an application under O. XXI, r. 16, to the Court which passed the decree. That application will be heard by the Court, not as a Court executing the decree, but as a Court which passed the decree, and it seems clear to me that until an order is made by the Court which

(3) 55 M 352; 135 Ind. Cas. 561; A I R 1932 Mad. 73; 62 M L J 1; 34 L W 866; (1931) M W N 1209; Ind. Rul. (1932) Mad. 145 (F B).

(4) 33 Bom. L R 818; 134 Ind. Cas. 720; A I R 1931 Bom. 423; Ind. Rul. (1931) Bom. 528.

(5) 47 B 643 (647); 75 Ind. Cas. 893; A I R 1923 Bom. 404; 25 Bom. L R 474.

passed the decree that execution may proceed at the instance of the transferee, it is not open to the transferee to execute the decree, nor is there any Court which is executing the decree."

At p. 651*, Crump, J. observed:

"It seems to me that where a Court has to deal with an application on the notice under O. XXI, r. 16, the question which arises is a preliminary question, that is to say, whether the person who comes forward as assignee is or is not entitled to execute the decree, and until that question has been disposed of, no question of execution can arise, and therefore there is no Court at that stage which can be termed 'the Court executing the decree'."

The principle laid down in this case was approved of and followed in *Gangaya Narappa v. Krishnappa* (6). The learned Advocate for the appellants relied upon *Shailendranath Ghosh v. Surendranath De* (7), and *Manorath Das v. Ambika Kant Bose* (8). The ruling in *Shailendranath Ghosh v. Surendranath De* (7), lays down that the legal representative of a deceased decree-holder must make an application under O. XXI, r. 16, to the Court which passed the decree before he can proceed with the execution of the decree, and that an order for substitution of the legal representative for the original decree-holder cannot be made by the executing Court to which the decree has been transferred by the Court which passed the decree. But it further says that if the Court to which the decree is transferred for execution makes an order substituting the legal representative for the deceased decree-holder, that is an irregularity which can be waived by acquiescence. In that case however the deceased decree-holder himself had presented a *darkhast* in the Court to which the decree had been transferred for execution. When he died during the pendency of the execution proceedings the legal representatives were brought on the record in spite of the objection of the judgment-debtors. They did not appeal against that order at that time. When subsequently the objection was repeated, it was held that they had waived their right. So in that case the *darkhast* proceedings were not bad from the inception. As I have said, it is open to the Court to which the decree is transferred to keep the *darkhast* pending until an order under O. XXI, r. 16, is obtained by the legal representatives. In the present case however the legal representatives

(6) 26 Bom. L R 491; 80 Ind. Cas. 422; A I R 1924 Bom. 394.

(7) 57 O 1137; 129 Ind. Cas. 572; A I R 1930 Cal. 614; 34 C W N 437; Ind. Rul. (1931) Cal. 220.

(8) 13 O W N 533; 1 Ind. Cas. 57; 9 O L J 443.

*Page of 47 B.—[Ed.]

themselves instituted the proceedings without obtaining such an order, and hence there is no question of waiver on the part of the judgment-debtors.

The ruling in *Manorath Das v. Ambika Kant Bose* (8) is more in point. But that ruling is apparently in conflict with the view taken by a Division Bench of this Court in *Raghunath Gorind v. Gangaram Yesu* (5). In *Manorath Das v. Ambika Kant Bose* (8) the executors under a will of the deceased had obtained a decree on behalf of the legatee. After the legatee attained majority he took over charge of the estate and presented a *darkhast* in the Court to which the decree had been already transferred at the instance of the executors. It was contended that, as the legal representative of the decree-holder, he should have first obtained an order under O. XXI, r. 16, from the Court which passed the decree. But he was allowed time to do so, and when he produced such an order when the *darkhast* was pending, it was held that the order related back to the date when he became entitled to execute the decree as the legal representative of the decree-holder and therefore the previous proceedings became legal on the production of the order. But the passage already quoted from *Raghunath Gorind v. Gangaram Yesu* (5) shows that unless an order under O. XXI, r. 16, is obtained by the legal representative he has no right to institute the execution proceedings. I am bound to follow this decision, and therefore the *darkhast* which was started by the appellants in the Parner Court must be held to be bad from its inception, and cannot be legalized by any waiver on the part of the judgment-debtors or by the production of an order that may be subsequently obtained under O. XXI, r. 16, from the Court which passed the decree. Hence the Parner Court was not bound to stay the proceedings in order to enable the appellants to obtain such an order from the Ahmednagar Court. The *darkhast* was rightly thrown out, and this appeal must be dismissed with costs.

As regards the other appeal (S. A. No. 425 of 1937), the lower Appellate Court has held that the application made by the appellants to the Court of the First Class Subordinate Judge at Ahmednagar should have been in the form of an application for execution under O. XXI, r. 16. This may not be absolutely necessary when a decree is transferred to another Court for execution, and the copy of the decree and

the certificate of non-satisfaction have already been sent to the transferee Court. The legal representatives of the deceased decree-holder have no intention to execute the decree in the Court which passed the decree, and yet the application under O. XXI, r. 16, must be made to that Court. It is not therefore right to say that they must make an application for execution even though the decree has already been sent to another Court for the purpose of execution. Under O. XXI, r. 6, the Court sending a decree for execution must send three documents, *viz.*, a copy of the decree a certificate of non-satisfaction or part satisfaction, and a copy of any order for the execution of the decree or, if no order has been made, a certificate to that effect. This last includes an order passed under O. XXI, r. 16. Hence if a decree is once transferred to another Court for execution and the decree-holder who obtains such a transfer dies, the proper remedy for his legal representatives is to seek an order under O. XXI, r. 16, from the Court which passed the decree, and have that order remitted to the Court to which the decree is transferred for execution under O. XXI, r. 6 (c). But the appellants made an application to the Ahmednagar Court to have the copy of the decree and the certificate of transfer amended. As observed in *Bhikaji v. Dattatraya* (9):

"the Civil P. C. contains no provision under which a representative of a deceased decree-holder can have his name entered on the record when nothing remains to be done under the decree beyond its execution."

If the application under O. XXI, r. 16, is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred for execution. It is after such an order is passed that the legal representatives are clothed with the status of decree-holders and are then empowered to institute execution proceedings in the Court to which the decree is transferred. Hence, technically speaking, the application made by the appellants to the Ahmednagar Court is not in the proper form. Assuming that they did really intend to ask for the relief to which they were entitled under O. XXI, r. 16, still it has to be considered whether the decree was executable on the date on which they made the application. That a question like this has to be con-

(9) 2 Bom. L. R 848.

sidered. Before an order is passed under O. XXI, r. 16, is clear from the ruling in *Raghunath Govind v. Gangaram Yesu* (5). In that case when the assignee of a decree made an application under O. XXI, r. 16, the judgment-debtor, contended that the decree had been satisfied as the decretal amount had been paid to the original decree-holder. The payment had not been certified to the Court as required by O. XXI, r. 2. Yet it was held that the Court hearing the application under O. XXI, r. 16, was a "Court which passed the decree" and not an executing Court, that it was open to the judgment-debtors to contend and prove in those proceedings that the amount due under the decree had been paid out of Court, and that if the decree was proved to have been already satisfied, then the assignee was not entitled to any order in his favour under O. XXI, r. 16. Similarly, if the decree sought to be executed has ceased to be capable of execution by being time-barred, then the appellants are not entitled to have an order passed in their favour under O. XXI, r. 16.

This point was considered by the Ahmednagar Court, and it held that the decree was still in time by reason of the *darkhast* proceedings taken by the appellants in the Parner Court. Gopaldas got the decree transferred to the Parner Court on July 26, 1932, and therefore "a *darkhast* should have been filed before July 26, 1935. Gopaldas died before the appellants presented the *darkhast* unauthorizedly on August 18, 1934, without obtaining an order under O. XXI, r. 16. They made the present application to the Ahmednagar Court on August 8, 1935 more than three years after the previous order about the transfer of the decree to the Parner Court was passed. Hence, *prima facie*, the decree had become time-barred before August 8, 1935. It is however contended that under s. 14, Lim. Act, in computing the period of limitation, the time during which the appellants were prosecuting the *darkhast* in the Parner Court in good faith should be excluded. Section 14, cl. (2), Lim. Act says:

"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

Although the parties to the *darkhast* proceedings in the Parner Court were the same as the parties to the proceedings under O. XXI, r. 16, before the Ahmednagar Court, yet the reliefs claimed in the two proceedings were different. In the Parner Court the appellants wanted to execute the decree itself; whereas in the Ahmednagar Court the relief asked for by them was to have their names substituted in place of the deceased decree-holder. It is argued that the appellants had presented the *darkhast* in the Parner Court in good faith believing that they had a right to do so. The expression "good faith" has a special meaning in the Lim. Act. Section 3 (20), General Clauses Act 1897, provides that a thing shall be deemed to be done in "good faith," where it is in fact done honestly, whether it is done negligently or not. But s. 2 (7), Lim. Act, says that nothing shall be deemed to be done in good faith which is not done with due care and attention. As held in *S. R. M. M. A. Firm v. Maung Po Saung* (10) proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words "good faith" are defined in the Act. In that case a person against whom an order was passed under O. XXI, r. 63, Civil P. C. instead of bringing a suit, applied for a revision of the order, and when that application was rejected, he filed a suit when it was time-barred. It was held that he was not entitled to the exclusion of the period during which he was prosecuting his application for revision. On the principle that gross negligence negatives good faith, it was held in *Ghishulal Ganeshilal v. Gumbhirmull Pandya* (11) that failure to inquire whether the necessary leave of Court had been granted; though applied for, was held to be such gross negligence as to deprive the plaintiff of the benefit of s. 14, Lim. Act.

In the present case also the applicant recklessly disregarded the provisions of O. XXI, r. 16, Civil P. C. and started to execute the decree without any authority from the Court which passed it. Hence, I do not think that the appellants are entitled to the exclusion of the time spent by them in prosecuting the *darkhast* in the

(10) 7 R 466; 120 Ind. Cas. 236; A I R 1929 Rang. 297; Ind. Rul. (1930) Rang. 28.

* (11) 62 C 510; 164 Ind. Cas. 111; A I R 1938 Cal. 377; 39 O W N 606; 9 R C 137.

Parner Court. The decree was therefore time-barred on the date on which they made the application to the Amednagar Court, and on the principle laid down in *Raghunath Govind v. Gangaram Yesu* (5) they are not entitled to an order allowing them to execute the decree under O. XXI, r. 16, Civil P. O. This appeal also must therefore be dismissed.

The respondents have put in cross-objections claiming their costs from the appellants. The lower Appellate Court has disallowed the costs on equitable grounds. Since the appellants have been deprived of the benefit of the decree obtained by Gopaldas owing to wrong legal advice, I do not think that I should interfere with the discretion exercised by the lower Appellate Court. Both the appeals are dismissed with costs. The cross-objections in both the appeals are dismissed with costs.

D.

Appeals dismissed.

OUDH CHIEF COURT

Second Civil Appeal No. 179 of 1937

February 9, 1940

HAMILTON, J.

SURAJ BAKHSH SINGH DEAD AND IN
HIS PLACE SHEO MAHIP BIKRAM
SINGH AND ANOTHER, MINORS UNDER THE
GUARDIANSHIP OF THEIR UNCLE
SARFRAZ SINGH AND OTHERS—DEFENDANTS
APPELLANTS

versus

Mahant THAKUR DAS—PLAINTIFF—
RESPONDENT

Hindu Law—Joint family—Interest of undivided member attached in execution of money decree against him—Attachment released on objection by other members of joint family that property was sold to them—Suit to set aside sale as fictitious—Defendant dying—Plea that there is no property against which decree could be executed, if can be taken—Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Transfer of Property Act (IV of 1882), s. 53—Creditor's proceeding under O. XXI, r. 63—Suit, if must be in representative character.

When a suit is brought against a member of a joint Hindu family for a declaration that the sale deed in favour of the defendant's nephews who formed along with the defendant the joint family of the property attached by the plaintiff in execution of his money decree was fictitious and fraudulent and was executed with the object of defeating the plaintiff's claim against the defendant and the defendant dies during the pendency of the suit in the original Court it cannot be said that as he was a member of a joint Hindu family, there was no longer any property against which the plaintiff could proceed. If the undivided interest is attached during his lifetime it may be sold after his death whether the order for sale was made in his lifetime or after his death.

The contention would be sound if the undivided interest of the defendant had not been attached in his lifetime in the execution of a decree against him for his personal debt.

There is no rule which forces a decree-holder to ask for execution against the whole of the undivided share of a Hindu co-parcener when the sale of only a part of it would be sufficient.

A creditor proceeding under O. XXI, r. 63, Civil P. C., who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of whose existence he is not aware. It is for the defendant who as debtor knows whether he has other creditors to object that there are other creditors and that a representative suit should be filed. If he does not raise such objection, the Court is entitled to hold that there are no other creditors and the plaintiff therefore can sue for himself alone for a declaration that the transfer by the defendant was fictitious and fraudulent with the object of defeating the plaintiff's claim.

[Case-law distinguished.]

S. O. A. against the order of the Civil Judge, Gonda, dated January 25, 1937.

Messrs. L. S. Misra and Sri Ram, for the Appellants.

Mr. H. D. Chandra, for the Respondent.

Judgment.—This is a second appeal by defendants.

The plaintiff Mahant Thakur Das held a decree for money against Mahabir Singh and when he applied for execution by sale of certain property, defendants Nos. 1 to 3 who are nephews of Mahabir Singh, filed an objection on the basis of a sale deed which purported to have been executed in their favour by Mahabir Singh and the property was released from attachment. The plaintiff then filed this suit for a declaration that the sale deed was fictitious and fraudulent and was executed with the object of defeating the plaintiff's claim against Mahabir Singh.

It was found that Mahabir Singh and these nephews formed a joint Hindu family and the deed of sale was fictitious and invalid.

Two points have been raised in this appeal, one that the plaintiff should have brought a representative suit and as he has not done so his suit must be dismissed and the other that Mahabir Singh died during the pendency of the suit in the original Court and when he died, as he was a member of a joint Hindu family, there was no longer any property against which the plaintiff could proceed.

This second contention can be disposed of quickly. The contention would have been sound if the undivided interest of Mahabir Singh had not been attached in

his lifetime in the execution of a decree against him for his personal debt. After his death then it could not be attached as against his nephews as it ceased to be his interest and passed to the other co-parceners by survivorship. If however as here the undivided interest is attached during his lifetime it may be sold after his death whether the order for sale was made in his lifetime or after his death: *vide* para. 289 of Mulla's Hindu Law.

It has been urged here that the execution application was against a share of about five pies as if it was a separate share and not against the undivided interest of Mahabir Singh. Had partition been simultaneous with the attachment, the share of Mahabir Singh on partition would have been found to be about 8 pies so that the decree-holder was really seeking execution against part of the undivided share of Mahabir Singh. I know of no rule which forces a decree-holder to ask for execution against the whole of the undivided share of a Hindu co-parcener when the sale of only a part of it would be sufficient. The decree-holder would have been more correct had he applied for sale of a fraction of the undivided share of Mahabir Singh which would have worked out at about 5-8ths but as at the time of attachment the share would have worked out at about 8 pies and what was attached, which was about five pies, can be sold after the death of Mahabir Singh, there is no practical difficulty.

Taking now the first point the learned Counsel for the appellant says that under s. 53 of the T. P. Act a decree-holder being a creditor suing to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor must sue on behalf of or for the benefit of, all the creditors. There are certain cases which deal with the point before the amendment of s. 53 of the T. P. Act which came into force in April 1930, such as *Kottarathil Puthiyapurayil Pokker v. Balathil Purkum Chandrankandi Kunhamad* (I. L. R. 42 Mad. 143) (1), *R. R. O. O. Chettyar Firm v. Ma Sein Yin*, (A. I. R. 1928 Rangoon 1) (2) and *China Mal v. Gul Ahmad*, (A. I. R. 1923 Lahore, 478) (3). The one decision after the amendment to which my attention has been called is *Shrimal*

Kasturchand Marwadi v. Hiralal Hansraj Marwadi, (I. L. R. 1938, Bom. 445) (4). It was there held that a suit brought under O. XXI, r. 63 of the Civil P. C., by a judgment-creditor, who has been defeated at the instance of an intervener in proceedings taken in execution of his decree, need not necessarily be a representative suit under s. 53 of the T. P. Act, on behalf of the general body of creditors. A number of earlier decisions have been referred to and there is a relevant passage on p. 451*. Reference has here been made to O. I, r. 8 of the Civil P. C., which deals with procedure in a representative suit. This O. I, r. 8 states that where there are numerous persons having the same interest in one suit, one or more of such persons may sue on behalf or benefit of all and notice has to be given to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable by public advertisement as the Court in each case may direct, and any of such persons may then apply to be made a party to such suit. The principle of a representative suit is to prevent a defendant from being vexed and molested by other similar suits by other persons of the body. Personal service can obviously not be made on non-existing persons and it is only when such existing persons are numerous that there may be another form of service such as public advertisement. No such service personal or otherwise can be of any use whatsoever when there are no persons in existence on whom service can be made. It appears to me, therefore, that O. I, r. 8, deals with persons in existence at the time the suit is brought and is to prevent an actual existing danger, namely, the bringing of suits by such persons and not a possible future danger which may never mature, namely, the coming into existence at some unknown period of persons who become creditors of the defendant in that suit.

If we consider s. 53 of the T. P. Act it is not easy to imagine a transfer made with intent to defeat or delay creditors who are not in existence at the time of the transfer. The wording of s. 53 indicates that it applies to cases where there are more than one creditor but only one brings a suit. To safeguard the defendant the plaintiff should name other creditors and other credi-

(1) 42 M 143; 51 Ind. Cas. 714; 25 M L T 47; (1919) M W N 39; 9 L W 138; 36 M L J 231.

(2) A I R 1928 Rang. 1; 105 Ind. Cas. 582; 5 R 588.

(3) A I R 1923 Lah. 478; 73 Ind. Cas. 719; 5 L L J 435.

(4) I L R (1938) Bom. 445; 175 Ind. Cas. 843; 40 Bom. L R 371; A I R 1938 Bom 289; 11 R B 7.

*Page of I. L. R. (1938) Bom. —[Ed.]

tors are safeguarded against possible damage to their interest by O. I. r. 8, because they are allowed to join in the suit if they are not prepared to rely on the creditor who is actually suing. The learned Counsel for the appellant says that a creditor, even if he thinks he is the only one, must bring a representative suit or, at any rate, he must say that he is not bringing a representative suit because he does not know of the existence of other creditors. If he brings a representative suit believing that he has no other creditor I do not see how he can comply with the requirements of O. I. r. 8, as he cannot take steps for serving persons whose existence he does not know of. It seems to me that he is entitled at any rate if he does not know that there are other creditors, to bring a suit for himself alone and it is for the defendant then to object that a representative suit is required because there are in fact other creditors. In the present case there is no evidence that there are any other creditors. *Girraj v. Sankanta Prasad*, (1937 O. W. N. 1169) (5), expressed a doubt as to whether a plaintiff instituting a suit according to the provisions of O. XXI, r. 63, was not bound by the provisions of s. 53 (1) of the T. P. Act. The point did not have to be decided and in any case there was no consideration of the point whether a representative suit should be brought when there was no evidence of the existence of any creditor other than the plaintiff.

In *A. K. A. C. T. V. Chettyar v. R. M. A. R. S. Firm*, (1 L. R. 12 Rangoon, 666) (6), the suit brought was properly brought as a representative suit so that the remark that a creditor must bring a representative suit in view of the amendment of s. 53 was *obiter dictum* and anyhow it did not consider whether a representative suit must be brought when there is nothing to show that there are other creditors besides the one that brings the suit.

In my opinion a creditor proceeding under O. XXI, r. 63, who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of whose existence he is not aware. It is for the defendant who as debtor knows whether he has other creditors to object that there are other creditors and that a representative suit should be filed. If

he does not raise such objection, the Court is entitled to hold that there are no other creditors and the plaintiff therefore can sue for himself alone.

I do not think it necessary to go further into the question whether a plaintiff suing under O. XXI, r. 63, must bring a representative suit if there are other creditors in existence.

I, therefore, dismiss the appeal with costs.

D.

Appeal dismissed.

MADRAS HIGH COURT

Criminal Revenue Case No. 316 and

Petition No. 292 of 1939

October 4, 1939

LAKSHMAN RAO, J.

In re PERIANNAPILLAI—PETITIONER
Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), s. 224 (2)—High Court, if can question order of Village Headman under s. 10 of Regulation (XI of 1816).

The order of the Village Headman under s. 10 of Regulation XI of 1816, was not subject to appeal or revision except under s. 107, Govt. of India Act of 1915, and cl. (2) of s. 224, Govt. of India Act, 1935 excludes the jurisdiction of the High Court to question the order in such cases,

Or. Rev. Case and P. to revise an order of the Court of the Village Headman, Balkrishnampatti, dated November 8, 1938.

Facts.—This revision petition is against the order of conviction and sentence till rising of Court made by an acting Village Headman under s. 10 of Regn. XI of 1816. The petitioner (accused) was charged with having abused the respondent (complainant) in an insulting language and after an enquiry the order of conviction was made. The ground in revision was that the Village Headman was not a permanent incumbent and he had therefore no jurisdiction to take cognizance of the offence.

Mr. A. V. Narayanaswami Ayyar, for the Petitioner.

The Public Prosecutor, for the Crown.

Order.—The order of the Village Headman under s. 10 of Regn. XI of 1816 was not subject to appeal or revision except under s. 107, Govt. of India Act of 1915, and cl. (2) of s. 224, Govt. of India Act of 1935 excludes the jurisdiction of the High Court in such cases. The revision petition is therefore dismissed.

N.S.

Petition dismissed.

(5) 1937 O W N 1169; 171 Ind. Cas. 927; 10 R O 148; 1937 O L R 582; A I R 1938 Oudh 33.

(6) 12 R 666; 152 Ind. Cas. 555; 7 R Rang. 172; A I R 1934 Rang. 302.

• LAHORE HIGH COURT

First Appeal No. 177 of 1938

December 9, 1938

SKEMP, J.

SRI RAM, PROPRIETOR OF MESSRS.
JUGAL KISHORE & SONS, DELHI—

APPELLANT

versus

EMPEROR THROUGH COLLECTOR,
DELHI, AND ANOTHER—RESPONDENTS

Succession Act (XXXIX of 1925), s. 299—Order to executor to furnish fresh security—If appealable—Administration—Surety—When entitled to be discharged—Executor adjudged insolvent—Surety, if can be released.

An order calling upon an executor to furnish fresh security is subject to appeal.

The surety is entitled to protection against the executor if it be shown that the latter is wasting the estate, and thereby rendering the former liable on his surety bond. The course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and, on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security the probate should be revoked and the surety discharged. *Raj Narain Mookerjee v. Full Kumari Debi* (4), 51 Ind. Cas. 936 (5) and 140 Ind. Cas. 127 (7), relied on. *Subroya Chetty v. Ragammall* (1), *In re Stark* (2) and 1 Ind. Cas. 143 (3), not followed.

Where therefore the executor by being adjudged insolvent has demonstrated that he is unable to manage his own affairs it is reasonable for the surety to believe that he is not a fit person to manage an estate of somebody else and he is entitled to be released from his surety bond.

F. A. from an order of the Senior Sub-Judge, Delhi, dated June 14, 1938.

Mr. Shamair Chand, for the Appellant.

Mr. M. Sleem, The Advocate-General, for the Crown.

Mr. Vishnu Datta, for the Respondent (Bhola Nath).

Judgment.—This is a first appeal against an order of the Senior Subordinate Judge, Delhi, directing one Sri Ram, who had obtained probate of a will, to lodge fresh security for the administration of the balance of the estate. This order was passed on an application by the surety Bhola Nath who had given security for the administration of the estate in the first instance. He sought to be released from his security bond on the grounds that Sri Ram had been adjudged insolvent and was not properly managing the estate. As a first step the Judge ordered Sri Ram to lodge fresh security. A preliminary objection is taken that no appeal lies. This is based on s. 299, Succession Act, which says:

"Every order made by a District Judge by virtue

of the powers hereby conferred upon him shall be subject to appeal to the High Court

Admittedly there is no specific provision in the Act enabling the Court to take fresh security or cancel a security bond, and Mr. Vishnu Datta for the respondent Bhola Nath argues that there can therefore be no appeal. On the other hand, Mr. Shamair Chand urges that the Senior Subordinate Judge was seized of the case by virtue of the Act, that the order was passed in the ordinary course of the case under the Act and therefore s. 299 must be deemed to apply. I accept this argument. If a Court can pass an order calling upon an executor to furnish fresh security it is obviously right and proper that the order should be subject to appeal. Mr. Shamair Chand for the appellant takes the point that once a surety has given security that an executor shall administer the estate, he cannot be permitted to withdraw. He relies for this proposition on *Subroya Chetty v. Ragammall* (1) which did so hold relying on *In re Stark* (2) and *Subroya Chetty v. Ragammall* (1) was followed in *Kandhya Lal v. Manki* (3). On the other hand there are several cases in which a surety has been released from security: see *Raj Narain Mookerjee v. Full Kumari Debi* (4) where the applicant had become surety for his sister for the due administration of the mother's estate but alleged that the administration was wasting the estate. It was held by a Division Bench of the Calcutta High Court that the Court has jurisdiction to take a second bond with fresh sureties and that the surety could be released from his obligation by giving notice. In *Surendra Nath Pramanik v. Amrit Lal* (5) another Bench of the Calcutta High Court held that where the surety had become worthless the Court could call on the executors for fresh security. In *Shahabuddin v. Fazal Din* (6) a Division Bench of the Chief Court held

"that a surety of an executor is entitled to be discharged from his liability as regards the future transactions of the latter when the executor for whom he is surety wastes the estate, and as the effect of his discharge would be to revoke the probate, if fresh security is not furnished an appeal lies against an order refusing such discharge."

(1) 28 M 161; 14 M L J 482.

(2) (1866) 1 P & D 76; 35 L J P 42; 13 L T 682; 14 W R 349.

(3) 31 A 56; 1 Ind. Cas. 143; A W N 1908, 288; 6 A L J 19.

(4) 29 C 68; 6 C W N 7.

(5) 47 O 115; 51 Ind. Cas. 936; A I R 1920 Cal. 584; 29 O L J 496; 23 O W N 763.

(6) 52 P R 1902; 89 P L R 1902.

The learned Judges said :

"The surety is.... entitled to protection against the executor if it be shown that the latter is wasting the estate, and thereby rendering the former liable on his surety bond. In our view of the law the course to be adopted, on waste by the executor being established by the surety, is to call on the executor to furnish other security, and on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security the probate should be revoked and the surety discharged."

In a recent case, *National Guarantee and Suretyship Association v. Prayag Deb* (7) it was held that :

"Although a surety for the due administration by a grantee of letters of administration cannot claim as of right to be relieved of all future liability by merely expressing his intention to revoke, either by notice or by an application to the Court.....yet the Court to which the guarantee is given has power, when good cause is shown, to grant a release from all liability for future transactions."

In the course of their judgment the learned Judges said :

"It may well be that at the time when the surety furnished security, the administrator was honest and was believed to be capable of administering the estate in a proper way, but he might subsequently become dishonest or might mismanage the estate, and so it would be astonishing if there was no provision of law which would give the surety remedy by way of objecting to the Court and asking to be relieved. He cannot merely sit idle and watch the administrator committing the waste and misappropriation, knowing fully well that the liability will be his own."

Mr. Shamair Chand suggested that as there is no authority of this High Court on the point it should be referred to a Division Bench, but I see no need for this course. There is a ruling of the Chief Court dealing with the point with which I am in respectful agreement. I also think the remarks in *National Guarantee and Suretyship Association v. Prayag Deb* (7) particularly apposite. The executor by being adjudged insolvent has demonstrated that he is unable to manage his own affairs and it is reasonable for the surety to believe that he is not a fit person to manage an estate of somebody else. I reject this appeal with costs to the respondents.

S.

Appeal rejected.

(7) 54 A 293; 140 Ind. Cas. 127; A I R 1932 All. 262; (1932) A L J 140; Ind. Rul. (1932) All. 616.

OUDH CHIEF COURT .

Civil Revision Applications Nos. 95 and 96 of 1937

February 28, 1940

ZIA-UL HASAN, J.

BACHCHU LAL—PLAINTIFF—
APPLICANT

versus

BHAGWATI AND ANOTHER—DEFENDANTS

—OPPOSITE PARTIES

Limitation Act (IX of 1908), s. 20—Payment of interest—If must be in handwriting of or under signature of party making it—Whether can be inferred that payment was of interest "as such," from circumstances.

For a payment of interest to come within the purview of s. 20 of the Lim. Act, it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. The payment of interest "as such" need not necessarily appear in the handwriting of or under the signature of the party making the payments. No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on account of interest but where the payment is proved to be on account of interest not only by the evidence of the witnesses but also from the fact that an account of interest due has been drawn up on the back of each bond and the payment has been shown as being out of that amount the payment falls within the purview of s. 20, Lim. Act. 35 Ind. Cas. 638 (1), and 43 Ind. Cas. 812 (2), relied on, 144 Ind. Cas. 899 (3), 120 Ind. Cas. 825 (4) and 128 Ind. Cas. 276 (5), distinguished.

O. R App. of the order of the Munsif (as Judge of Small Cause Court), Gonda, dated May 18, 1937.

Mr. K. P. Misra, for the Applicant.

Mr. M. L. Saksena, for the Opposite Parties.

Order.—These applications have been filed by Bachchu Lal against decrees of the learned Judge Small Cause Court, Gonda by which two suits filed by the present applicant were dismissed as time-barred.

The suits were brought on two bonds dated November 20, 1929 and April 23, 1930, respectively. The suits were filed on April 14 and 15, 1937 but the plaintiff in each case calculated limitation from April 15, 1934, on which date the obligor of the bond was said to have paid Rs. 10 on account of interest due on each of the bonds. These payments were endorsed on the back of the bonds by one Bhai Lal and the endorsements were signed by the executant of the bond, Mst. Raghubar Dei, with her thumb impressions. Two witnesses, Mata Prasad and Swami Dayal signed their names below the endorsements as witnesses to the payment. The plaintiff examined Bhai Lal, the scribe of the

endorsements, and Mata Prasad one of the witnesses, both of whom deposed that the payments were made by Raghubar Dei on account of interest. In spite of this evidence, the learned Judge held that the suits were barred by time as he thought that the payment of interest "as such" was not mentioned in the endorsements themselves. The learned Judge appears to me to have taken an entirely wrong view of the law. I know of no authority and none has been quoted before me, requiring that payment of interest "as such" much necessarily appear in the handwriting of or under the signature of the party making the payments. No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on account of interest but this is what is proved not only by the evidence of the witnesses mentioned above but also from the fact that an account of interest due has been drawn up on the back of each bond and the payment of Rs. 10, has been shown as being out of that amount. The case of *Hem Chandra Biswas v. Purna Chandra Mukerji* (I. L. R. 44 Cal. 567) (1), is an authority for the view that where there is nothing to show whether payment has been made in respect of principal or of interest, the Court is entitled to find out on the evidence for what purpose the payments were made. The learned Judge of the Court below has nowhere said in his judgment that he did not believe the witnesses produced by the plaintiff and in these circumstances their evidence was perfectly sufficient to prove that the payments in question were made on account of interest as such.

In *Charu Chandra Bhattacharjee v. Karam Bux Sikdar*, (27 Calcutta Law Journal, 141) (2), it was held that for a payment of interest to come within the purview of s. 20 of the Lim. Act, it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. In the present case the circumstance of the interest being calculated on the date of the payment coupled with the evidence of the witnesses in whose presence the payments were made can lead to no conclusion other than that the payments were made on account of interest.

The learned Counsel for the opposite parties has relied on the cases of *Ram*

(1) 44 C 567; 35 Ind. Cas. 638; 22 C W N 190; A I R 1918 Cal. 891.

(2) 27 C L J 141; 43 Ind. Cas. 812; A I R 1918 Cal. 477.

Prasad v. Binaek Shukul, (I. L. R. 55 All. 632) (3), *Narain Das v. Chandrawati Kuar* (6 O. W. N. 776) (4) and *Lalji v. Ghasi Ram*, (7 O. W. N. 420) (5), but they are not in point inasmuch as what they lay down is that it is necessary that at the time of a payment made under s. 20 of the Lim. Act, it should be specifically mentioned whether the payment is on account of principal or interest.

I allow both the applications with costs and setting aside the order of dismissal of the plaintiff's suits passed by the Court below, remand the cases to that Court for trial on the merits.

s. Application allowed.

(3) 55 A 632; 144 Ind. Cas. 899; A I R 1933 All. 453; 6 R A 5; (1933) A L J 930.

(4) 6 O W N 776; 120 Ind. Cas. 825; A I R 1929 Oudh 479; Ind. Rul. (1930) Oudh 25.

(5) 7 O W N 420; 128 Ind. Cas. 276; A I R 1930 Oudh 287; 6 Luck. 7; Ind. Rul. (1931) Oudh 36.

CALCUTTA HIGH COURT

Civil Rule No. 1315 of 1939

November 28, 1939

NASIM ALI AND NARSING RAU, JJ.
BHABAGOBINDA CHOUDHURI—
—JUDGMENT-DEBTOR—PETITIONER

versus

BHOLANATH BASAK AND OTHERS—

DEGREE-HOLDERS—OPPOSITE PARTY

Bengal Agricultural Debtors Rules, r. 145—Jurisdiction of Civil Court to decide amount of debt.

The question as to what is the amount of a debt of a particular debtor is to be decided by the Board under r. 145, Ben. Agri. Debtors Rules. The Civil Court, therefore, has no jurisdiction to go into this question.

O. Rule issued from the application for setting aside the order of the Sub-Judge, First Court, Pabna, dated August 17, 1939.

Mr. Surjit Chandra Lahiri, for the Petitioner.

Mr. Bansarilal Sarkar, for the Opposite Party.

Order.—The learned Advocate for the petitioner does not want to proceed against minor opposite parties Nos. 4 and 6. The Rule therefore stands discharged against the said minor opposite parties and proceeds against the remaining opposite parties at the petitioners' risk. The question as to what is the amount of a debt of a particular debtor is to be decided by the Board under r. 145, Ben. Agricultural Debtors Rules. The Civil Court therefore has no jurisdiction to go into this question. We accordingly modify the order of the learned Subordinate Judge to this extent that the execution

proceedings will be stayed against the petitioner only. There will be no order as to costs.

s.

Order accordingly.

BOMBAY HIGH COURT
Second Appeal No. 815 of 1936
April 6, 1939

SEN, J.

SHIVU SHIDDA CHAUGULA AND ANOTHER
—PLAINTIFFS—APPELLANTS

versus

LAKHMICHAND TULJARAM KOTHARI
—DEFENDANT—RESPONDENT

Transfer of Property Act (IV of 1882), s. 53—Surrender executed by widow held transfer within meaning of s. 53—Civil Procedure Code (Act V of 1908), s. 47—Transfer by party before decree—Transferee, if his representative.

A deed of surrender of the entire estate was executed by a widow according to the wishes of her deceased husband, in favour of her daughters. In the deed the widow stated that she had cancelled her ownership over the properties and made them over to the daughter's possession as full owners:

Held, that the surrender amounted to a transfer within the meaning of s. 53, T. P. Act. [p. 100, col. 1.] [Case-law discussed.]

A transferee of the interest of a party before a decree is passed against him or in his favour is not a representative of such party within the meaning of s. 47, Civil P. O. [p. 97, col. 2.]

S. A. from the decision of the District Judge, Belgaum, in Appeal No. 83 of 1936.

Mr. G. P. Murdeshwar, for the Appellants.
Mr. A. G. Desai, for the Respondent.

Judgment.—The appellants were plaintiffs in a suit for a declaration that the plaint property was not liable for attachment and sale in execution of a money decree obtained by the predecessor-in-title of the defendant, in Suit No. 493 of 1923, against their mother Avubai as the heir and legal representative of their deceased father Krishna Joti, and also for an injunction against the defendant. The material facts are as follows: Krishna Joti died in May 1922, leaving his widow, Avubai, and two daughters, who are the plaintiffs. One Anantrao brought Suit No. 493 of 1923 on two promissory notes passed by Krishna Joti for the recovery of the amount due thereunder from the estate of the deceased in the hands of the widow. During the pendency of the suit Avubai executed a deed of surrender (Ex. 54) in the plaintiffs' favour on July 1, 1924, in respect of the whole estate of her husband. Suit No. 493 of 1923 ended in a compromise decree passed on

October 25, 1924, under which Avubai was to pay the debt by instalments, and in default the plaintiff was to recover the decretal amount by sale of survey No. 381 and survey No. 443/1 on which a charge was created, and in case of deficit, from other properties of the deceased. The plaintiffs were not parties to this suit. The decree-holder assigned the decree to the defendant who has applied for execution by sale of survey No. 381. Before this, on September 21, 1924, the plaintiffs had mortgaged survey No. 381 for Rs. 1,000 to one Dadu. On a *darkhast* having been filed under the decree aforesaid for the sale of survey No. 381 (*darkhast* No. 392 of 1929) Dadu brought a Suit No. 647 of 1930 for a declaration that survey No. 381 was not liable to attachment and sale and for an injunction against the defendant. The defendant however by a *purshis* admitted the mortgage in favour of Dadu and asked for the right to redeem the property from such mortgage. The suit was accordingly dismissed on December 11, 1931, and under the *darkhast* only the equity of redemption in the property was put up for sale. The plaintiffs have accordingly brought the present suit.

The defence was that the deed of surrender had been passed with intent to defraud and defeat Avubai's husband's creditors and that therefore it was invalid under s. 53, T. P. Act, that it was also void under s. 52, T. P. Act, that the plaintiffs being the representatives of the widow, no separate suit on the present cause of action could lie under s. 47, Civil P. O., and that the plaintiffs being the universal donees under the surrender deed were liable under s. 128, T. P. Act. The plaintiffs contended that the defendant's conduct in Dadu's suit estopped them from challenging the surrender deed. The trial Court held that the surrender was invalid under s. 53 but not under s. 52, T. P. Act, that there was no bar of s. 47, Civil P. O., to the suit, that the plaintiffs were liable under s. 128, T. P. Act, and that the defendant was not estopped from challenging the surrender-deed. The lower Appellate Court held that the defendant was not estopped from challenging the deed, that Ex. 54 was a collusive document, passed with intent to defraud and deceive Krishna Joti's creditors, and that the suit was barred by s. 47, Civil P. O. In the present appeal, no contentions based on s. 52, T. P. Act, or estoppel have been raised. Mr. Murdeshwar has contended, *firstly*, that after the surrender

Avubai did not represent Krishna Joti's estate, and the compromise therefore could not bind that estate, *secondly*, that s. 53, T. P. Act, does not apply as the surrender was not a transfer and there is no evidence of fraud; and *thirdly*, that s. 47, Civil P. O. does not apply. Mr. Desai on behalf of the respondent has contended that Ex. 54 being a collusive document, it cannot be said that there was any real surrender at all, and that if it be held that it was a surrender, it amounted to or involved transfer, and therefore s. 53, T. P. Act, applies. *Thirdly*, he has contended that Avubai having entered the compromise in her character as representing the estate, the compromise decree is binding on the reversioners, the present plaintiffs. *Fourthly*, he has contended that the plaintiffs are liable under s. 128, T. P. Act, and that s. 47, Civil P. O., applies as the plaintiffs are Avubai's "representatives-in-interest."

The first contention of Mr. Desai is, in my opinion, clearly untenable. It was neither party's case that the transfer was a sham or colourable transaction and that it was therefore void *ab initio*. Though there are some indications that the Appellate Judge might have been inclined to regard it in such light, there is no such defence in the written statement of the defendant, and three of the issues raised by the trial Court expressly refer to the transaction in dispute as a surrender. Though the lower Appellate Court raised an issue No. 2, "Whether Ex. 54 is a collusive document passed by Avubai with intent to defeat and defraud the creditors of the deceased Krishna?", it is clear that this issue was raised in order to determine the applicability of s. 53, T. P. Act. With regard to this issue the learned District Judge said:

"I agree with the lower Court in holding that the deed (Ex. 54) was passed with intent to defeat and defraud the creditors of Krishna."

There was, thus, no actual finding that the transaction was sham or colourable. It is therefore too late for Mr. Desai to raise such a contention in the present appeal. The main issue in this case is whether s. 53, T. P. Act, applies and that is whether the surrender is a transfer within the meaning of that section. If it is a transfer, then, in view of the finding of fact arrived at by both the Courts below, that the transfer was made with intent to defeat and defraud the creditor of the deceased Krishna Joti, it would be voidable under s. 53. I see no difficulty in distinguishing between the two positions that the transfer was a sham or

colourable transaction, i. e., it was not a real transaction at all, and that it was a transfer made with intent to defeat and defraud the creditors. If the surrender can be void under s. 53, T. P. Act, it cannot be fairly argued that Avubai did not represent Krishna Joti's estate at the time of the compromise and that the compromise does not bind the estate if the surrender is a transfer, it being without consideration will be a gift of the transferor's whole property, and the plaintiffs would be liable under s. 128, T. P. Act, for the liabilities of the donor existing at the time of the transfer to the extent of the estate.

As regards the applicability of s. 47, Civil P. O., the plaintiffs are not Avubai's representatives within the meaning of that section. It has not been seriously contended that a transferee of the interest of a party before a decree is passed against him or in his favour is such a representative. Thus, the real question at issue is whether the surrender in this case is a transfer within the meaning of s. 53, T. P. Act. No authority has been cited which covers this precise point. Mr. Murdeshwar however has relied on two Privy Council decisions, *Bhagwat Koer v. Dhanukdhari Prashad Singh* (1) and *Vytla Sitanna v. Marivada Viranna* (2). The first of these cases was not a case of transfer in any sense at all. In that case, upon the death of a Hindu in 1872 his nephew obtained a certificate under Act XXVII of 1860 as the sole survivor of his joint family; the widow of the deceased opposed the application and alleged a partition in 1864. By agreements made in 1874 the widow accepted the decision, recognized the nephew's title, and was granted by him a maintenance allowance which she continued to receive until her death in 1904. It was held that the widow's agreement of 1874, in conjunction with her acceptance of maintenance till 1904, amounted to a complete relinquishment of the estate to the nephew, then the next reversioner. At p. 270-71* their Lordships said:

"The power of Hindu widow to surrender or relinquish her interest in her husband's estate in favour of the nearest reversioner at the time has often been considered and was fully dealt with by the Board in the recent case in *Rangasami Goundan v. Nachi-*

(1) 46 I A 259; 53 Ind. Cas. 347; A I R 1919 P C 75; 47 O 466; 37 M L J 513; 17 A L J 1036; (1919) M W N 860; 1 P L T 1; 2 U P L R (P C) 27 (P O).

(2) 57 M 749; 148 Ind. Cas. 828; A I R 1931 P O 105; 61 I A 200; 6 R P O 142; 11 O W N 596; (1934) M W N 414; 39 L W 607; (1934) A L J 433; 38 O W N 697; 59 O L J 354; 67 M L J 20; 36 Bom. L R 563; 15 P L T 497 (P O).

*Page of 46 I. A.—[Ed.]

appa Goundan (3). As pointed out in that case, it is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property. In the present case there was indeed no formal surrender by the widow of her estate; but there was an express agreement, binding upon her, that for considerations which appeared to her sufficient she would abandon the claim which at the time she had a good right to make and would have no right, claim or demand in respect of the estate of her late husband. It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist; but in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate."

In *Vytla Sitanna v. Marivada Viranna* (2), the facts were that on the death of a Hindu in 1880 a dispute as to succession which arose between his widow and a claimant was referred to a *panchayat* which awarded that the property should be divided between them. In 1888 the widow conveyed half the property to the claimant, and the other half, reserving about six acres for her own maintenance, to her daughter who was the reversionary heir to the deceased. The daughter died in 1894. On the death of the widow in 1921, the heir of her husband claimed the whole estate. It was held that the award of the *panchayat* should not be interfered with, as it appeared to be fair and reasonable settlement of a doubtful claim based on both legal and moral grounds. A question that arose in that case was whether assuming that the award given in his favour was good the conveyance by the widow of the rest of the property, reserving only a few acres for herself, amounted to a surrender of her estate, her husband's next heir being her daughter who took only an estate for life. It was held that there was no reason for differentiation between the cases where the widow's husband's next heir was a male and where it was a daughter taking merely an estate for life. Their Lordships remarked in this connection (p. 759*):

"... though the doctrine of surrender by a widow has undergone considerable development in recent years, it must be remembered that the basis of it is the effacement of the widow's interest, and not the

ex facie transfer by which such effacement is brought about. The result is merely that the next heir of the husband steps into the succession in the widow's place."

Mr. Murdeshwar has relied on this description for the basis of the surrender by a widow, and he has contended that the "*ex facie* transfer" should not at all be considered in considering the nature of the transaction. He emphasizes the sentence, "... in substance, and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate," to be found at p. 271* in *Bhagwat Koer v. Dhanukdhari Prashad Singh* (1). On the other hand, Mr. Desai has contended that such surrender has been regarded as a conveyance in several cases. For instance, in *Vytla Sitanna v. Marivada Viranna* (2) their Lordships said (p. 759†):

"It follows therefore that the widow's conveyance to her daughter Nagamma in 1888 was a surrender of her estate."

In *Rangasami Goundan v. Nachiappa Goundan* (3) also, the nature of a Hindu widow's surrender of her estate was one of the matters considered. The suit was instituted by one Rangasami Goundan against the minor respondent and his father together with thirty other defendants. The lands in dispute had formed part of the estate of one Ramasami Gounden, who had died childless, and his mother had then succeeded to his property for a woman's estate. Thereafter she had executed a deed of transfer in favour of her nephew, who at that time was the nearest reversionary heir to her deceased son. At p. 84‡ their Lordships stated one of their conclusions as to the effect of the decided cases thus:

"An *alienation* by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation."

At p. 79* their Lordships referred to *Behari Lal v. Mascho Lal Ahir* (4) from which the following passage was quoted (p. 32‡):

"... it may be accepted that, according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee."

Mr. Desai has contended that these decisions of the Privy Council sufficiently show that where a deed of transfer clearly shows

(4) 19 I A 30; 19 O 236; 6 Sar. 88 (P O).

*Pages of 46 I. A.—[Ed.]

†Page of 57 M.—[Ed.]

‡Page of 19 I. A.—[Ed.]

(3) 46 I A 72; 50 Ind. Cas. 498; A I R 1918 P O 196; 42 M 523; 36 M L J 493; 17 A L J 536; 29 O L J 539; 21 Bom. L R 640; 23 O W N 777; (1919) M W N 62; 26 M L T 5; 10 L W 105 (P O).

*Page of 57 M.—[Ed.]

on whom the estate is to devolve on the widow's surrender, there is a clear conveyance or vesting of the estate in the grantee. In *Nilkant v. Muktabai* (5), Pollock, J., sitting singly, decided that the word "transfer" in s. 53, T. P. Act. was wide enough to cover a surrender by a widow of her widow's interest. In that case the two widows of one Jagannath had surrendered their estate in favour of the daughter of one of the widows by a registered deed, and it was held that as the effect of the surrender was to deprive the creditors of one of the widows of their remedy against her, the transfer was voidable under s. 53. In *Haribhai Nanaji Patil v. Narayan Hari Purvant* (6) Rangnekar, J. has interpreted the doctrine of surrender in these words (p. 880) :

"The doctrine, as I understand it, is nothing more than this, that the widow, to use the words of Lord Dunedin, operates her own death. She withdraws her life-estate in the property and divests herself of her ownership and vests that ownership from the moment of surrender in the next reversionary heir, if he be one, or in all the reversionary heirs, or, as it is sometimes called, the whole body of reversionary heirs, if there happen to be more than one in the same degree."

His Lordship referred to *Behari Lal v. Madho Lal Ahir* (4) from which the following passage was quoted (p. 32*) :

"It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life-estate is a practical check on the frequency of such conveyances."

The contention of Mr. Murdeshwar however is that the conveyance or alienation is not essential to a surrender, as *Bhagwat Koer v. Dhanukdhari Prashad Singh* (1) clearly shows, for in that case there was no conveyance nor any former surrender, but there was an *ekrarnama* passed by the widow which was construed to have the effect of a surrender. In the present case, the deed we are concerned with is Ex. 54, and in this Avubai plainly said that she had cancelled her ownership over the properties in suit and made them over to the plaintiffs' possession as full owners. Those last words, according to Mr. Murdeshwar, do not make the transaction a real conveyance. As in *Bhagwat Koer v. Dhanukdhari Prashad Singh* (1), the actual form of the deed had to be disregarded and the basis of the transaction must be held to be "the effacement of the widow's interest, and

not the *ex facie* transfer by which such effacement is brought about": *Vytla Sitanna v. Marivada Viranna* (2). If the words apparently amounting to transfer are used in a deed of surrender, it must be remembered that such surrender can only be made in favour of the next reversioner or the whole body of reversioners and that therefore no choice in the matter of the transferees is possible such as one would expect in the case of a real transfer. No doubt in several of the cases cited above, words have been used which purport to convey the property in dispute and the judgments also have not expressly stated anywhere that the transactions in question did not amount to transfers. Mr. Murdeshwar's contention however is that if the transaction be one and its basis be the self-effacement of the widow, it would be illogical to regard it as constituting a transfer also at the same time. What some of the documents appear to have considered in the cases cited above, according to him, is to state the effect of the surrender, i. e., the manner in which the property in question was to pass to other persons or person, and he contends that this is not essential to a surrender as can be seen from *Bhagwat Koer v. Dhanukdhari Prashad Singh* (1).

The law as to the effect of surrender is considered at length by Rangnekar, J. in *Haribhai Nanaji Patil v. Narayan Hari Purvant* (6). I have already referred to a passage in which his Lordship held that according to the principle underlying the doctrine of surrender the widow withdraws her life-estate in the property, divests herself of her ownership and vests that ownership from the moment of surrender in the next reversionary heir or heirs. After referring to the dictum of Sir John Wallis in *Vytla Sitanna v. Marivada Viranna* (2), that the basis of it is the effacement of the widow's interest, his Lordship said (p. 881*) :

"The principles therefore which I gather from these decisions and others referred to in the course of the argument are these ; (1) that there must be a complete self-effacement of the surrendering widow with the intention of accelerating the succession of the next apparent heir; (2) that the surrender must be *bona fide* and must not be a mere cloak, the real object of which was to divide the estate between the reversionary heir and the widow; (3) that it is the substance of the transaction that has to be considered in determining the question whether a conveyance operates as a good surrender or not."

The use of the word "conveyance" is again to be noted. Even in *Bhagwat Koer*

(5) I L R 1936 Nag. 69; 165 Ind. Cas. 944; A I R 1936 Nag. 166; 9 R N 109.

(6) 40 Bom. L R 876 (880); 178 Ind. Cas. 481; A I R 1938 Bom. 438; I L R (1938) Bom. 723; 11 R B 169.

*Page of 19 I. A.—[Ed.]

*Page of 40 Bom. L. R.—[Ed.]

v. *Dhanukdhari Prashad Singh* (1), on which Mr. Murdeshwar relies, it is pointed out that it is settled law that the Hindu widow can renounce the estate in favour of the next reversioner. This case was not considered with reference to s. 53, T. P. Act, though it no doubt shows that there can be surrender without express transfer or conveyance. All the other cases considered however show that, as a matter of fact, the surrender was made in favour of the next reversioner. That being so, there is not reason to think that in such cases the conveyance is also not an essential part of the transaction; for one can hardly expect a widow to state in a deed merely that she is effacing herself from her husband's estate. It seems to me doubtful whether, were such a document executed it could be regarded as a proper deed of surrender. In *Vytla Sitanna v. Marivada Viranna* (2), it is no doubt stated at p. 759*, that the basis of the surrender is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about. I have shown above that this statement occurs in the discussion of the question whether there can be a valid surrender in favour of the widow's daughter, a discussion which arose for the purpose of the consideration of the question of limitation which was raised in that case. From this point of view, the aspect of surrender which gives rise to the question whether it amounts to a transfer or not within the meaning of s. 53, T. P. Act, was unimportant. There can be no doubt in the present case that Ex. 54 does not merely show the effacement of the widow. Before she made the statement, "I have cancelled my ownership." Avubai clearly stated, "I have given you the *malki* over the above-mentioned properties of my ownership in accordance with the wishes of my husband." I see no reason why this should not be regarded as amounting to a transfer within the meaning of s. 53, T. P. Act. As to the reason which actuated her in passing the deed she said:

"It is my desire that according to the wishes of my husband, the property of my ownership should go to you.....Lest there should be any impediment whatever in your way arising from claims of adoption, *bhaubandi*, etc., I am executing this *malaki patra* in your favour."

Thus, the desire that the property should vest in her daughters was even more prominent in Avubai's mind than her desire to "cancel her ownership," to use her own language. Psychologically considered, her

self-effacement was but the means whereby the end she desired to attain was attained. I have therefore no hesitation in finding that the present case must be held to be one of transfer and not merely of self-effacement of the widow. In this view, it having been held by the Courts below as a finding of fact that Ex. 54 was passed with intent to defeat and defraud Krishna Joti's creditors, the transaction must be held to be void. The plaintiffs' suit has therefore rightly failed and the appeal will accordingly be dismissed with costs.

s.

Appeal dismissed.

RANGOON HIGH COURT

First Appeal No. 61 of 1939

August 10, 1939

DUNKLEY AND WRIGHT, JJ.

P. M. HAMEED ROWTHER—APPELLANT
versusK. S. AIYAPPA MUDALIAR AND OTHERS—
RESPONDENTS

Partnership—Money borrowed by one of two partners utilized for joint benefit of both—Liability of other partner or his estate for such debt—Debt contracted by executor of his estate on his death—Liability of estate and executor.

Where only one of the two partners of a partnership has borrowed money and it is utilized for the joint benefit of both the partners, the creditor cannot have any right to recover the money from the latter partner or from his estate when there is no evidence that he assumed any liability for such loan, before his death. The partnership is dissolved on the death of such a partner and his estate is not liable for the debts contracted subsequently by the executor of his estate. For such debts the executor is personally liable.

F. A. against the decree of the Assistant District Court, Hanthawaddy, dated April 24, 1939.

Messrs. Clerk and M. Bhattacharya, for the Appellant.

Messrs. Hay, H. Myo Kin, Kalyanvala and Wan Hock, for Respondents Nos. 1, 2, 3 and 4, respectively.

Dunkley, J.—This appeal arises out of a suit on a mortgage by deposit of title deeds for the recovery of a sum of Rs. 7,500 as principal and the interest due thereon. The suit has been dismissed by the learned Assistant District Judge of Hanthawaddy and it is against the judgment and decree of the Assistant District Court that the present appeal has been brought. It is common ground that defendant-respondent No. 1, K. S. Aiyappa Mudaliar, and one L. Subbiah Mudaliar jointly owned, as

co-owners in equal shares, a considerable area of paddy land, and the title deeds, which were deposited with the plaintiff-appellant and have been produced by him, were the title-deeds of two of the holdings belonging to defendant-respondent No. 1 and L. Subbiah Mudaliar jointly. Defendant-respondent No. 2, S. Marimuthu Mudaliar, has been sued as the executor of L. Subbiah Mudaliar, who died on March 20, 1931. This date has been proved by the production of the death certificate. On August 1, 1932, by a registered deed of mortgage respondent No. 1 mortgaged his half share in one of the holdings concerned in this suit to the M. V. R. Chettyar Firm, who subsequently assigned the mortgage to defendant-respondent No. 3, K. N. V. K. N. Kannappa Chettyar, and respondent No. 3 has been joined as a defendant as the assignee of this mortgage by registered deed. On the same date respondent No. 2, as the executor of L. Subbiah Mudaliar, mortgaged L. Subbiah Mudaliar's half share of this same holding, by registered deed, to the M. V. R. Chettyar Firm, who subsequently assigned this mortgage to defendant-respondent No. 4, K. N. K. V. R. Venkatachalam Chettyar, who has been joined as a defendant-respondent as the assignee of this mortgage. The amended plaint of the plaintiff appellant, so far as it is now of any importance, reads as follows:

"1. That defendant No. 1 and one L. Subbiah Mudaliar now deceased were carrying on the business of acquiring lands, cultivating paddy on the same and selling paddy and rice jointly and in co-partnership.

2. That in or about the year 1931 the said L. Subbiah Mudaliar died leaving a will appointing defendant No. 2, the executor thereof who has since obtained probate of the said will from the High Court of Judicature at Rangoon, in Civil Miscellaneous No 128 of 1931 of the said Court.

3. That as such legal representative defendant No. 2 has been carrying on the said business in partnership with defendant No. 1 and has been in joint possession of their properties and assets.

4. That for the purpose of cultivating the partnership lands and expenses incidental thereto, at the request of defendant No. 1 and the said L. Subbiah Mudaliar, the plaintiff from time to time lent and advanced to them several sums of money, to wit a sum of Rs. 3,000 on March 13, 1931; a sum of Rs. 3,000 on March 23, 1931 and a sum of Rs. 1,500 on August 13, 1931 repayable with interest at Rs 1-4-0 per cent, per mensem on demand and in evidence thereof defendant No. 1 executed promissory notes in plaintiff's favour, the promissory note in respect of the second sum of Rs. 3,000 having been jointly executed by both defendants. (By this is meant respondents Nos. 1 and 2.)

5. That to secure the repayment of the aforesaid loans of March 13 and 23, 1931 as well as to cover future advances to the extent of Rs. 2,000 defendant No. 1 and the said L. Subbiah Mudaliar by

his agent, defendant No. 2, with intent to create a mortgage deposited with the plaintiff title-deeds relating to their immovable property, *viz.* paddy lands. The said title-deeds are hereto annexed.

6. That subsequent to the death of L. Subbiah Mudaliar defendant No. 2 as legal representative agreed that the said property covered by the said title-deeds were to be treated as security for the aforesaid loan of Rs. 1,500 as well."

Now, the case set up in the plaint is a case of money lent to one of the partners of a trading partnership for the benefit of the partnership, and plainly the appellant's case must stand or fall by this averment. It is unnecessary to decide whether a partnership ever existed between respondent No. 1 and L. Subbiah Mudaliar, because, under the provisions of s. 253 (10), Contract Act, (which has now become s. 42 (c), Partnership Act), that partnership was dissolved by the death of L. Subbiah Mudaliar on March 20, 1931. It is said that the partnership was continued, or, more strictly, a new partnership was formed between respondent No. 2 as L. Subbiah's executor and respondent No. 1; but there is no evidence to show that any such partnership was formed, except a statement contained in the promissory note, Ex. C, which was written by respondent No. 2 and signed by both respondents Nos. 1 and 2. This promissory note says that it was written and given on March 23, 1931, by two persons, namely, (1) K. S. Aiyappa Mudaliar, and (2) S. Marimuthu Mudaliar, "carrying on business in rice in the above said place," and it further acknowledges that they owed the plaintiff Rs. 3,000 for value received in cash on account of their business. What this business was is not stated, and certainly this document cannot have any reference to the previous partnership business, if there was such a partnership business between, respondent No. 1 and L. Subbiah, Mudaliar, for the appellant's own case is that when this document was signed on March 23, he did not know that L. Subbiah Mudaliar was dead, and that respondents Nos. 1 and 2 represented to him that L. Subbiah was still alive. Consequently, there is no evidence of any partnership between respondents Nos. 1 and 2.

The first loan of Rs. 3,000 was admittedly borrowed by respondent No. 1 alone on March 13, and there is no evidence whatever to show that this money was utilized for the joint benefit of respondent No. 1 and L. Subbiah. Even if it were so utilized, that would not give the appellant any right to recover the amount from L. Subbiah

or from the latter's estate. His debtor was respondent No. 1, and respondent No. 1 alone. Nowhere in his evidence has the appellant suggested that L. Subbiah, before his death, assumed any liability for this first loan. He says that a few days before L. Subbiah died he called him, the appellant, to his house and told him that he had handed over the conduct of his business to his son-in-law, who is respondent No. 2 and that he, the appellant, should carry on business with his son-in-law as if he was carrying on business with him (L. Subbiah). Then he states that subsequently, on March 23, respondents Nos. 1 and 2 came to him and borrowed the second sum, Rs. 3,000, and that at that time respondent No. 2 told him that he had got instructions from his father-in-law to say that the title deeds then deposited would be security for the loan then taken, the previous loan and future loans. It has now been proved that on that date L. Subbiah was dead and, consequently, even if it be accepted that respondent No. 2 did make such a statement, his statement in regard to the previous loan could not bind the estate of L. Subbiah. Hence, so far as the first loan of Rs. 3,000 is concerned, no liability can be attached to L. Subbiah's estate, and so far as the two subsequent loans of Rs. 3,000 and Rs. 1,500 are concerned, no partnership was in existence at that time (whether there was a partnership before L. Subbiah's death or not) and L. Subbiah's estate cannot be made responsible for either of these two loans. No doubt, respondent No. 2 is personally liable, by reason of the promissory note, Ex. C, for the second loan of Rs. 3,000 but he has not been sued in his personal capacity and, consequently, in this suit a decree cannot be passed against him personally. Hence no liability attaches to respondent No. 2 as the legal representative of L. Subbiah.

Turning now to the liability of respondent No. 1, he admits having taken these loans, but he denies the creation of a mortgage by deposit of title-deeds as security for these loans. The title-deeds have been produced by the plaintiff, and the presumption therefore is that they were so deposited as security for the debts which were due; and the burden was on respondent No. 1 to explain how the title-deeds came into the possession of the appellant. Respondent No. 1 has set up an absolutely incredible story to account for the appellant's possession of these deeds, and I can only express my astonish-

ment that the learned Assistant District Judge has seen fit to give credence to it. Respondent No. 1 says that after he had made his mortgage by registered deed to the M. V. R. Firm in 1932 he was pressed by that firm to redeem the mortgage. At that time the title-deeds were deposited with the M. V. R. Firm and so in 1934 he took the title-deeds back to try and raise money on them elsewhere, and in 1936 he handed them to the appellant for this purpose and since that time the appellant has retained them. Only one of the two properties, of which the appellant holds the title-deeds, was mortgaged to the M. V. R. Firm, and therefore he has entirely failed to explain how the appellant came into possession of the title-deeds of the other property. Moreover, it is incredible that he would leave these deeds for a period of over two years in the hands of the appellant, for the purpose of the appellant raising money thereon, without demanding them back. He has called no evidence at all to support his story of the handing over of the title-deeds to the appellant in 1936. On December 30, 1936, the appellant's Advocate sent him a letter in which the mortgage upon which the present suit has been brought was specifically set out, and that letter elicited no reply. The only manner in which respondent No. 1 has attempted to support his story is by calling the evidence of two witnesses in an attempt to show that the title-deeds of the property mortgaged to the M. V. R. Firm were handed over to that firm in 1932. One of these witnesses is Veerappa Chettyar, who was the proprietor of that firm, and the other is Venkateswaran who is a clerk in a Rangoon Advocate's office. Veerappa had to admit in cross examination that the whole of this transaction of the mortgage to his firm was carried through by his agent, Ramanathan and that he knew nothing about it; and Venkateswaran had to admit that he merely typed the mortgage deed from a draft and that the draft was prepared by a Pleader named Rao. Consequently, the best evidence that these title-deeds were handed to the M. V. R. Firm was the evidence of Ramanathan and Rao, and yet neither of them has been called. It is said that they have both gone to India. But Ramanathan could have been examined on commission, and Rao was in Rangoon until January 1939, and therefore could easily have been examined *de bene esse* before his departure. The story which has

been set up by respondent No. 1 to account for the appellant's possession of these title-deeds is clearly false. Therefore the appellant is entitled to a mortgage decree against respondent No. 1.

So far as respondents Nos. 3 and 4 are concerned, respondent No. 3 is a second mortgagee of respondent No. 1's interest in one of the mortgaged properties. His mortgage will clearly have to be postponed to the mortgage of the appellant. Respondent No. 4 is the mortgagee of L. Subbiah's interest in this property, and I have already held that that interest is not subject to the appellant's mortgage. Consequently, this appeal fails as against respondents Nos. 2 and 4 and is dismissed with costs as against them. As against respondents Nos. 1 and 3, the appeal must be allowed with costs in both Courts. The judgment and decree of the Assistant District Court dismissing the suit are set aside, and instead thereof there will be a preliminary mortgage decree in the usual form for the amount claimed against respondents Nos. 1 and 3 and against respondent No. 1's interest only in the two mortgaged properties. The decree will declare that the mortgage of the appellant has priority over the mortgage created in favour of respondent No. 3 by the mortgage deed of August 1, 1932, in favour of M. V. R. Ohetteyar Firm, and subsequently assigned by that firm to respondent No. 3 on May 9, 1934.

Wright, J.—I agree.

s.

Order accordingly.

MADRAS HIGH COURT

Criminal Revision Case No. 418 and

Petition No. 388 of 1939

September 19, 1939

BURN AND STODART, JJ.

In re PALUVADI VENKATARAMAYYA

—PETITIONER

Criminal Procedure Code (Act V of 1898), ss. 415, 439—“Any two or more of the punishments”, meaning of — Revision — Interference with conviction on facts.

Section 415, Criminal P. C., refers to two or more punishments of different kinds. It has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50.

An accused who was convicted of rioting only and was sentenced to pay a fine of Rs. 20 filed an appeal under s. 415-A. He alleged that as two other accused who were convicted at the same trial and sentenced to pay two fines Rs. 20 for rioting and Rs. 25 for an offence under s. 355, I. P. C., had a right of appeal under s. 415-A he had also the right of appeal :

Held, that none of the accused had any right of appeal as there was no combination of punishments in one sentence within the meaning of s. 415. *Public Prosecutor, Madras v. Kollur Dasa Pai* (1), dissented from, 182 Ind. Cas. 258 (2), followed, 136 Ind. Cas. 248 (3), 171 Ind. Cas. 337 (4) and 134 Ind. Cas. 1196 (5), not followed, 138 Ind. Cas. 720 (6) and 96 Ind. Cas. 270 (7), relied on.

Obiter.—Where the grounds taken for saying that the Magistrate was wrong in convicting accused are all grounds of fact and not connected with any question of law, high Court cannot interfere in revision with conviction.

Or. R. Case and P. to revise the judgment of the Sessions Court, Kurnool Division, in Criminal Appeal No. 7 of 1939.

Mr. K. S. Jayarama Ayyar, for the Petitioner.

Mr. K. Venkataraghavachari, for the Public Prosecutor, for the Crown.

Burn, J.—This is an application for revision of the order of the learned Sessions Judge, Kurnool, in O. A. No. 7 of 1939. That appeal was presented to the learned Sessions Judge from the decision of the Sub-Divisional First Class Magistrate, Markapur, in O. C. No. 48 of 1938. In that case the First Class Magistrate was dealing with 24 persons who had been tried by the Stationary Second Class Magistrate of Giddalore in O. C. No. 593 of 1937. The learned Sub-Magistrate found all the 24 accused persons guilty of rioting (s. 147, I. P. C.) wrongful confinement (s. 341, I. P. C.) assault with intent to dishonour (s. 355, I. P. C.) and simple hurt (s. 323, I. P. C.) read with s. 149, I. P. C. He convicted them under those sections but considering that they were persons who might properly be dealt with under s. 582, Criminal P. C., he submitted the case to the Sub-Divisional Magistrate under the provisions of s. 562 (1) proviso. The learned First Class Magistrate dealing with the case under the provisions of s. 380, Criminal P. C., convicted all the 24 accused of rioting (s. 147, I. P. C.) and sentenced them for that offence to pay a fine of Rs. 20 each and accused Nos. 6 and 24 be convicted also under s. 355, I. P. C., and sentenced them to pay a fine of Rs. 25 each for that offence. The learned Sub-Divisional Magistrate did not say, what he proposed to do with regard to the other convictions which had already been recorded by the Sub-Magistrate. But that is a matter which is not before us now and we do not propose to interfere with it.

The appeal presented to the learned

Sessions Judge was on behalf of accused No. 23 only. He had been convicted only of rioting (s. 147, I. P. C.) and sentenced to pay a fine of Rs. 20. Under s. 413, Criminal P. C., accused No. 23 would ordinarily have no right of appeal but the appeal was filed on his behalf under the provisions of s. 415-A. It was alleged that accused Nos. 6 and 24 having been sentenced to pay two fines of Rs. 20 and Rs. 25 had a right of appeal under s. 415-A and therefore accused No. 23 having been convicted at the same trial had also a right of appeal. The learned Sessions Judge has held that none of the 24 accused had any right of appeal in this case. He therefore rejected the appeal referring accused No. 23 to an application for revision to this Court if so advised. Accused No. 23 has applied for revision of the order of the learned Sessions Judge. The only authority of this Court quoted by learned Counsel for the petitioner is the decision of King, J. in *Public Prosecutor, Madras v. Kollur Dasa Pai* (1). That was a case in which on a summary trial a First Class Bench of Magistrates had sentenced one of several persons convicted under the Gaming Act to pay a fine of Rs. 25 for an offence under s. 9 and a fine of Rs. 50 for an offence under s. 8. The persons convicted appealed to the Sessions Judge, and he held that an appeal lay. The learned Public Prosecutor filed a revision petition against that decision and King, J. held that the learned Sessions Judge's decision was correct. With respect we think that the decision of King, J. in that case was wrong. The matter depends upon the interpretation of s. 415, Criminal P. C. which says:

"An appeal may be brought against any sentence referred to in s. 413 or s. 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be applicable merely on the ground that the person convicted is ordered to find security to keep the peace."

It is contended on behalf of the petitioner that the learned Sub-Divisional Magistrate when he imposed upon accused Nos. 6 and 24 two fines of Rs. 20 and Rs. 52 respectively was passing a sentence combining two of the punishments referred to in s. 413. Now s. 413 is as follows:

"Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only or in which a Court of Session or District Magistrate or other Magistrate of the First Class passes a sentence of fine not exceeding Rs. 50 only"

(1) (1936) M W N 213.

There are two punishments here mentioned (1) imprisonment and (2) fine. But it is pointed out that in s. 415 there is a reference to "any two or more" of the punishments mentioned in s. 413 or s. 414 and since in s. 413 there are only two kinds of punishments mentioned and in s. 414 there is one kind of punishment mentioned, namely the punishment of fine, it is argued that if there are two or more sentences of fine this must be regarded as a sentence combining two of the punishments mentioned in s. 413 or s. 414. We are unable to accept this argument. We are of opinion that s. 415 when it refers to two or more punishments is referring to two or more punishments of different kinds. The history of the Code is we think important in this connection and makes the matter clear. When s. 415 was just enacted there were three kinds of punishments provided in both ss. 413 and 414, namely in s. 413 a sentence of imprisonment not exceeding one month only or fine not exceeding Rs. 50 only or whipping only and in s. 414 a sentence of imprisonment not exceeding three months only, fine not exceeding two hundred rupees only or whipping only. In those circumstances although it might possibly be argued that s. 415 was to some extent superfluous, it could not be argued that it had no meaning. It was clear that it meant to refer to sentences in which two or more different kinds of punishments referred to in s. 413 and s. 414 were combined. After the modifications in s. 413 and s. 414 introduced in 1923 it is impossible to attribute any real meaning to the phrase "any two or more of the punishments therein mentioned" in s. 415 so far as it relates at any rate to s. 414. It is clear, we think, as Edgley, J. stated in *Kali Charan v. Adhar Mandal* (2), that s. 415 has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50. Learned Counsel for the petitioner has relied upon two decisions of the Oudh Chief Court reported in *Kandhar v. Emperor* (3) and *Markand Singh v. Ganga* (4), and also upon the decision of Cuming, J. in

(2) 43 O W N 360; 182 Ind. Cas. 258; A I R 1939 Cal. 274; 40 Cr. L J 652; I L R (1939) 1 Cal. 325; 12 R O 38.

(3) 7 Luck 501; 136 Ind. Cas. 248; A I R 1932 Oudh 27; (1932) Cr. Cas. 59; 33 Cr. L J 278; 8 O W N 1373; Ind. Rul. (1932) Oudh 104.

(4) 13 Luck 618; 171 Ind. Cas. 337; A I R 1937 Oudh 524; 38 Cr. L J 1062; 1937 O W N 1068; 1937 O L R 547; 10 R O 114.

the case reported in *Akbar Ali v Emperor* (5). With respect we are not able to agree with those decisions. We prefer the opinion of Mitter, J., in the case reported in *Nawab Ali Haji v Joinab Bibi* (6), and the view of the learned Chief Justice of Bombay and Crump, J. in the case reported in *Shidlingappa v. Emperor* (7). Our decision can be rested upon the words of s. 415 itself. It is not possible in this case to say that the learned Sub-Divisional Magistrate has passed any sentence by which any two or more of the punishments mentioned in s. 413 are combined. The learned Sub-Divisional Magistrate did not combine any of the punishments in either of the sentences that he imposed. He imposed two separate sentences of fine. There is no combination of punishments in one sentence within the meaning of s. 415, Criminal P. C. We think therefore that the learned Sessions Judge was correct and that this application for revision must be dismissed.

Learned Counsel for the petitioner has attempted to persuade us to interfere in revision finally against the order of the learned Sub-Divisional Magistrate. That is not the prayer in the petition which is for revision of the order passed by the learned Sessions Judge. But in so far as this is concerned we observe that the ground taken for saying that the learned Sub-Divisional Magistrate was wrong in convicting accused No. 23 (present petitioner) are all grounds of fact and not connected with any question of law. Learned Counsel points out that the Sub-Magistrate who tried the case recommended that all the accused should be dealt with under s. 562, Criminal P. C. But the learned Sub-Divisional Magistrate has given reasons for not dealing with them under that section and we do not think that there are sufficient grounds for interfering with the exercise of his discretion. We cannot interfere with the conviction on the facts. Accused No. 23 was convicted of rioting and let off with a fine of Rs. 20 which cannot be said to be excessive. This petition is dismissed therefore.

N.S.

Petition dismissed.

(5) 59 O 19; 134 Ind. Cas. 1196; A I R 1931 Cal. 642; (1931) Cr. Cas. 842; 33 Cr. L J 90; 35 O W N 752; Ind. Rul. (1932) Cal. 76.

(6) 59 O 1131; 138 Ind. Cas. 720; A I R 1932 Cal. 551; (1932) Cr. Cas. 551; 33 Cr. L J 704; 36 O W N 407; Ind. Rul. (1932) Cal. 525.

(7) A I R 1926 Bom. 416; 96 Ind. Cas. 270; 27 Cr. L J 926; 28 Bom. L R 668.

RANGOON HIGH COURT

Civil Revision Application No. 328 of 1938

March 16, 1939

BAGULEY, J.

G. H. SHEERAZEE—APPLICANT

versus

T. V. REDDY—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 63-C (1), (Rangoon) s. 46—Execution of decree against garnishee—No order under O. XXI, r. 63-C (1) passed—Legality—Attachment of debt outside jurisdiction of Court, directly—Legality—Executor—Liability of—When personally liable—Attachment—Removal of—Costs—Illegal attachment—Proceedings to set aside—Decree satisfied in meantime—Objector, if entitled to costs.

The proper remedy for a decree-holder on failure of the garnishee to comply with the notice under O. XXI, r. 63-C, is to act under r. 63-C (1), and get from the Court an order to the garnishee to comply with the terms of the notice. Until there has been a definite order against the garnishee to pay under r. 63-C (1), there is nothing executable directly against the garnishee as a decree. Hence no execution proceedings can be continued directly against the garnishee personally or as executor, and the attachment of his banking account is bad.

A Court cannot take out execution against a debt unless the debt is within its ordinary civil jurisdiction. Hence an attachment of a debt outside jurisdiction of a Court made directly and not by precept, is illegal. *Ghanshamlal v. Bhansali* (1), *Richardson v. Richardson* (2) and 11 Ind. Cas. 417 (3), relied on.

Where a person is only a debtor in his capacity as an executor, and not personally liable, there is no warrant whatsoever for attaching his personal banking accounts. If the executors have no banking accounts that could be attached, the only remedy is to attach property of the estate of the deceased, unless it is shown that the executor has been mixing up estate money with his personal property.

Where a decree-holder has attached banking account of a garnishee illegally and during proceedings to set aside the attachment, the decree is satisfied and the proceedings are closed, the garnishee is entitled to his costs.

C. R. App. from the order of the Small Cause Court, Rangoon, in C. R. No. 597 of 1937.

Mr. Kya Gaing, for the Applicant.

Mr. Dadachanji, for the Respondent.

Judgment—This is an application to revise an order passed by the Chief Judge of the Rangoon Small Cause Court. The respondent obtained from the Court a garnishee order against G. H. Sheerazee's banking accounts in Mandalay. The latter applied for removal of attachment, and before the case came up for hearing, the decree-holder filed an application saying that the decree had been satisfied in full, so the learned Judge passed the following order:

"The applications for removal of attachment are therefore closed. Mr. Kya Gaing asks for costs, and I am not inclined to grant costs, having regard to the circumstances of the case".

The learned Judge gives no special reason for refusing costs, which, in the ordinary way, would have been given to G. H. Sheerazee, but simply refers to the circumstances of the case, and I presume that he was of the opinion that the decree-holder had been in the right or else that G. H. Sheerazee had been in the wrong, throughout and was only saved from having the money taken out of his banking account by some fortuitous circumstance happening which resulted in the decree being paid off. It is therefore necessary to look into the circumstances of the case in full. A perusal of the case is not without interest.

The proceedings began by T. V. Reddy suing M. C. Sheerazee, said to be somewhere in Iran. The suit was on a promissory note, and was filed on January 19, 1937. On the same date an application was filed for attachment before judgment; and the particular property sought to be attached was the share of the defendant due from his father's estate which was in the hands of the executors of his father's will. Prohibitory orders were issued to the two executors, M. M. Sheerazee and G. H. Sheerazee, both of whom were resident in Mandalay, outside the jurisdiction of the Court of Small Causes, Rangoon. A decree was passed on June 18, 1937, and on August 18, an application was filed to call upon the garnishee to deposit the attached sum in Court. Notices were issued through the Small Cause Court of Mandalay, and G. H. Sheerazee wrote a letter to the Judge of the Small Cause Court, Rangoon, saying that there were no funds available in the estate of the late Khan Bahadur A. A. A. Sheerazee to pay the balance of M. C. Sheerazee's share. He further said that as soon as funds were available, the amount attached would be remitted. These proceedings ended with the diary order: "The prohibitory order will continue."

The next step was an application for a prohibitory order to be served on the Manager of the Imperial Bank of India, Rangoon, to withhold sufficient money to satisfy the Court out of the banking account of G. H. Sheerazee, who was referred to as the judgment-debtor; but that was infructuous, as the Imperial Bank had no account of Sheerazees'. Then on May 25, 1938 a fresh application was filed. The decree-holder's regular legal adviser was not in Rangoon and another member of the Bar signed the application for him. The application was headed "T. Venkata Reddy, decree-holder;"

the petition is said to be made by the petitioner, but it is signed "Nallamilli Narayana Reddy, petitioner," and the relief asked for is the issue of a prohibitory order to the Manager, National Bank of India, Mandalay, to withhold the sum of Rs 1,610-13-0 to the credit of Khan Bahadur G. H. Sheerazee

"in fixed deposit, current, savings bank or other accounts whatsoever, or, in the alternative, the whole sum of Rs. 1,610-13-0 lying in his hands of the estate of the late A. A. Sheerazee in the name of Khan Bahadur G. H. Sheerazee as executor".

Accompanying the formal application is a petition asking that the Court may issue this order under O. XLVI. As O. XLVI, deals with references to the High Court, there is clearly some mistake, and it is unfortunate that, owing to a similarity of numbers, this might be regarded as an application under O. XXI, r. 46, which refers to attachment of debts, or to s. 46, which refers to attachment by issuing a precept. The order endorsed on the petition was:

"Let attachment issue to the Bank at Mandalay attaching to the extent of the decree the money standing to the credit of G. H. Sheerazee personally or to the credit of the estate of the deceased Sheerazee, of which G. H. Sheerazee is executor."

Unfortunately the record has no papers which show what actually went out from the office; there is merely a typed order in the diary: "Issue precept, returnable on June 26, 1938". The signature of the Judge is typewritten, and there is an Indecipherable initial in the corner which might be anybody's. Be that as it may, it is clear that the Bank got some order, because they stopped paying out from G. H. Sheerazee's personal accounts at the Mandalay branch; and G. H. Sheerazee filed an application for removal of the attachment, which does not give any particular reasons as to why it should be removed, save that he has been put to a great deal of inconvenience and hardship, and that he was at the time in a nursing home in Maymyo in a serious state of health. There is an affidavit to support the application, but no reason is given except that his cheques have been dishonoured and that he was ill. However, the attachment was removed because, according to the diary, the decree-holder filed an application saying that the decree had been satisfied; but this application is not on the file, so where the money came from is not known.

On these facts, the question arises as to whether the learned Chief Judge was justified in refusing the present applicant his costs. I can see no reason whatsoever why

the ordinary rule should not have been followed. T. V. Reddy seems to have been acting wrongly very nearly throughout. In the first place, he had no decree or order which is executable as a decree against G. H. Sheerazee. This is the first case which I have had before me under our garnishee rules. If we assume that G. H. Sheerazee had a legal order issued to him attaching money in his hands due to M. C. Sheerazee the Court should have proceeded under O. XXI. rr. 63-A, 63-B, etc. G. H. Sheerazee did not take any action when the debt was attached in his hands in the first place. When an order was issued to him calling upon him to pay money into Court—presumably under r. 63-B—he wrote and said that as an executor he had no funds available, but would pay when he had funds; and all that the Court did was to note “let the prohibitory order continue.” What the decree-holder should have then done was to act under r. 63-C (1), and get from the Court an order to the garnishee to comply with the terms of the notice; and r. 63-C (1) goes on to say: “On such order execution may issue against the garnishee as though such order were a decree against him.” This rule makes it quite clear that until there had been a definite order against the garnishee to pay under r. 63, C (1), there is nothing executable directly against the garnishee as a decree. This being the case, no execution proceedings could have been continued directly against the garnishee personally or as executor, and the attachment of his banking account was entirely bad.

This however is not the only mistake. The Bank at Mandalay was not within the jurisdiction of the Court of Small Causes, Rangoon. This seems to have been recognized by the reference in the petition of May 5, to the issue of a precept to the District Court. Section 46, Civil P. C., makes provision for attachments by precept outside the jurisdiction. A Court cannot take out execution against a debt unless the debt is within its ordinary civil jurisdiction. I had this point before me recently in an unreported case, Civ. Rev. No. 292 of 1938. *Janki Prasad Rajaram v. The Trustees of the India Staff Provident Fund of the National Bank of India, Ltd.* In that case no attachment was possible in any way whatsoever, because the debt was a sterling debt located in London. In the present case the debt is within Burma but is not within the jurisdiction of the Small Cause Court, Rangoon. It would be attachable

under s. 46 by precept, but there is nothing on the file to show that this has been done. The order written by the learned Chief Judge is simply to the effect that an attachment be issued to the Bank, and in view of the fact that the attachments before judgment were issued direct by the Small Cause Court, Rangoon, and were not made by precept, it may, I think, be assumed that the second attachments were issued in the same way.

In *Ghanshamlal v. Bhansali* (1), it was held under the old Code that debts could not be attached if the debts were not within the jurisdiction, of any Court in British India. In an English case, *Richardson v. Richardson* (2), an application was made in London to the High Court to attach a debtor's Bank balances outside its jurisdiction, and it was held that this could not be done. On p. 235* occurs the passage;

“The debt must be properly recoverable within the jurisdiction. In principle, attachment of debts is a form of execution, and the general power of execution extends only to property within the jurisdiction of the Court which orders it. A debt is not property within the jurisdiction if it cannot be recovered here”.

Also in *Begg, Dunlop & Co. v. Jagannath Marwari* (3), it is laid down that it is not competent to a Court, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside the jurisdiction, by a person not resident within the jurisdiction of that Court. This, of course does not apply to attachments of salaries, which are governed by a special rule, viz. O. XXI, r. 48. In either event therefore these attachments were illegal. The attachment before judgment was of a debt alleged to be due by somebody in Mandalay to somebody resident in Iran and the second attachments were of debts payable by the Bank in Mandalay to G. H. Sheerazee in Mandalay also. A further point may also be noted. As G. H. Sheerazee is only a debtor in his capacity as an executor, and not personally liable, there was no warrant whatsoever that I can see for attaching his personable banking accounts. If the executors had no banking accounts that could be attached, the only remedy was to attach property of the estate of the deceased A. A. A. Sheerazee unless it were shown that the executor had been

(1) 5 B 249.

(2) (1907) L R P 228.

(3) 39 C 104; 11 Ind. Cas. 417; 14 CL J 228; 16 C W N 402.

*Page of (1907) L. R. P.—[Ed.]

mixing up estate money with his personal property. I can therefore see no merit, whatsoever about T. V. Reddy's handling of these execution proceedings, and therefore there is no judicial reason why the present applicant should not have the costs to which he was entitled and for which he asks, viz three gold mohurs. The respondent will also have to pay the costs of this application, including Advocate's fee which I fix at two gold mohurs.

s.

Application allowed.

PRIVY COUNCIL

Appeal from the Calcutta High Court
January 16, 1940

LORD THANKERTON, LORD ROMER,
SIR GEORGE LOWNDEN, SIR GEORGE RANKIN
AND MR. M. R. JAYAKAR

GADADHUR MULLICK AND OTHERS—

APPELLANTS

versus.

THE OFFICIAL TRUSTEE OF BENGAL

AND OTHERS—RESPONDENTS

Hindu Law—Will—Testator bequeathing moiety in favour of son R—Other moiety to be held in trust for R's male issue—In case of R's death without male issues this other moiety to go to R. D. Trust Estate—Gift to Trust Estate, if void—This gift, when takes effect—Limitation Act (IX of 1908), s. 10—Assignee from trustee, without consideration—Defence of limitation, if available.

In truth, inheritance is not donation, and a bequest is not a donation *de praesenti* between living people. It is to be recognised that the Hindu Law has been greatly influenced by the notion of "relinquishment in favour of a sentient being" as the basis of a gift and of inheritance, but this principle has not, been allowed to arrest the development of the Hindu Law of wills. The doctrine that there must be acceptance at the time of relinquishment has different values according as it is applied to gifts *inter vivos* or is extended by analogy to bequests or inheritance, though by a theory of some refinement heir and donee were once thought to be equally governed by the same principle. The theory, is sometimes put by saying that the estate cannot remain in abeyance. Thus it appears that property in the heir must arise immediately upon the death of the ancestor in the same manner as the property of the donee arises immediately upon relinquishment by the donor. But it must needs be admitted that the rigour of this theory, even if it be not destructive of all future gifts, is inconsistent with any recognition of contingent or executory bequests. It has effect (save in so far as the Legislature has abrogated it: [Hindu Wills Act, 1870, Hindu Disposition of Property Act, 1916]), to limit the class of persons who are capable of taking under a will, restricting it to persons who either in fact or in contemplation of law are in existence at the death of the testator. But it does not remain as a further obstruction to the taking by such persons of a beneficial interest known to and permitted by the law. Indeed, if an estate in remainder can be limited to take effect on the natural

determination of a life estate and may be so limited upon a condition which may never be fulfilled if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu Law to be saved by refusing to recognise a limitation to take effect upon condition in the future because it lacks "support" from a particular estate. It cannot be disputed that if a conditional limitation is invalid, the interest, unless otherwise disposed of by the will, must go to the heir. But if limited interests are to be recognised, there is no reason to hold that because a prior interest goes to the heir as such a conditional limitation or any other limitation is bad at Hindu Law. [p. 117, cols. 1 & 2.]

The principle of Hindu Law which prevents an estate being in abeyance is an important doctrine of the law of inheritance and it has important consequences as regards adoption. The rule is that the right of succession vests immediately on the death of the owner. Apart from the case of a child *en ventre sa mere* or of an adopted child, the estate once vested in an heir will not be divested by the subsequent birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner. In like manner, though the doctrine is not really the same, delivery in some sense is necessary at Hindu Law to distinguish the completed gift from the mere promise. But neither of these doctrines nor yet the principle that a man cannot devise an interest of a nature and quality unknown to the Hindu Law (e. g., descendible in a manner unknown to that law) conflict with the principle that where there is a will the heir can as such take only that part of the testator's property which is not disposed of by the will. He will take by descent and by his right of inheritance whatever is not validly disposed of by the will and given to some other person. *Ganendra Mohan Tagore v. Upendra Mohan Tagore* (1) and *Soorjeemoney Dossee v. Dinobundoo Mullick* (4), and other case-law discussed. [p. 117, col. 2; p. 118, col. 1.]

A testator bequeathed a moiety of his estate to his only son R and as regards the other moiety it was provided that it was to be held by R and certain other persons in trust for R's male issue. It was further provided that in case of R's death without male issue this other moiety was to go to a certain trust known as R. D. Trust Estate:

Held, that merely because of the failure of the testator's disposition of the interest in favour of the R. D. Trust Estate during the life-time of R, the bequest in favour of the R. D. Trust was not invalid. This gift to R. D. Trust took effect on the death of R without leaving male issue, who as heir of the testator would take the prior interest for his own life in this moiety such interest not having been disposed of by the will. The contention that the testator's directions to regulate the devolution of his property though within limits laid down by law would fail if the heir took any interest immediately upon the death of the testator, was fallacious, for it assumed that the complete interest in the property had devolved on the heir, which was the very point in dispute.

[Case-law discussed.]

Where the assignee of a trustee does not give valuable consideration, in a suit to recover trust property from the assignee by the Official Trustee, defence of limitation is not available to him but is excluded by the terms of s. 10, Lim. Act. [p. 110, col. 1.]

Messrs. L. P. E. Pugh, K. C. and J. M. Parikh, for the Appellants.

Sir Thomas Strangman, K. C. and Mr. W. W. K. Page, for Respondent No. 1.

Sir George Rankin.—One Shib Chandra Mullick, a Hindu governed by the Dayabhaga, was possessed of considerable property movable and immovable, comprising a number of house properties in Calcutta and its suburbs, as well as *zamindari* property in the Sundarbans. He died on August 4, 1866, leaving him surviving a widow and an only son, Rishikesh Mullick. By his will, dated August 3, 1866, he appointed one Dwarkanath Bhanjoo, his son Rishikesh and the Administrator-General of Bengal for the time being (who never acted) to be "executors and trustees of this my will". After providing for his widow's maintenance and residence and giving pecuniary legacies to her and to certain other persons, he disposed of the residue of his property as follows:—

"I give devise and bequeath all the rest, residue and remainder of my property movable and immovable unto my Executors hereinafter named in trust as to one moiety thereof for my only son Rishikesh upon his attaining the age of twenty-one years and as to the other moiety thereof, In trust for the male issue of my said son Rishikesh (Rishikesh) share and share alike if more than one and if only one to that only one but in case my said son should die without male issue or leaving male issue such male issue should die under the age of sixteen years without leaving male issue him or them surviving them as to that moiety. In trust to be paid over to the Trustees and added to the Trust Fund known as Roopchand Dhur Trust Estate and subject to the trusts thereof and in case my said son Rishikesh should die before attaining the age of twenty-one years and without leaving male issue him surviving or to be born after his death in due course of time then as to the moiety of the movable and immovable estate bequeathed and devised to him. In trust to be paid over to the Trustees and added to the Trust Fund known as Roopchand Dhur Trust Estate and subject to the Trusts thereof."

No question now arises as to the moiety which was given to Rishikesh ("the first moiety"), but as to the other moiety ("the second moiety") the present appeal raises questions as to the validity and effectiveness of the gift to the Roopchand Dhur Trust Estate. It is to be observed that the will came into effect before the Hindu Wills Act of 1870 and that the validity of its provisions must be judged according to the Hindu Law in force in Bengal in 1866.

On August 14, 1866, probate of the will was granted to Rishikesh and Dwarkanath Bhanjoo, who took possession of the testator's estate. On January 9, 1873,

Rishikesh, having attained the age of 21 years died intestate, never having had a son, but leaving him surviving a widow, Purasundari, and a daughter. The appellants' averments as to what happened after the death of Rishikesh may for the purposes of this appeal be accepted and are stated in their "Case" as follows:—

"It appears from mutation papers and cess returns exhibited in the case that after the death of Rishikesh Dwarkanath Bhanjoo continued to act as sole surviving executor till the year 1880, when he applied for mutation of names in favour of Purasundari, and in 1881 or 1882 made over the whole estate to her. The widow as heiress of Rishikesh remained in possession of the whole of the testator's residuary estate until her death, which occurred on September 11, 1932. During this long period of 50 years neither the plaintiff nor anyone else interested in the Roopchand Dhur Trust claimed under the will or questioned the right of the lady until the present suit of 1934."

On April 27, 1934, the Official Trustee of Bengal (respondent No. 1) filed a suit in the High Court at Calcutta claiming as trustee of the Roopchand Dhur Trust to be entitled under the terms of the testator's will to the whole of his residuary estate: alternatively, to one-half thereof. He impleaded the present appellants, who are the reversioners of Rishikesh, as persons wrongfully claiming the estate and wrongfully in possession thereof. The claim to the first moiety (which by the terms of the will was given to Rishikesh on his attaining the age of 21 years) was abandoned at an early stage of the suit. But as to the second moiety the suit succeeded before the trial Judge (Ameer Ali, J.) and also on appeal to a Division Bench (Costello and Panckridge, JJ.). A preliminary decree for partition was made (June 28, 1937) and affirmed on (appeal April 6, 1938).

The first question is whether the suit is barred by limitation and this defence must prevail unless s. 10 of the Lim. Act, 1908, applies to the case.

"Section 10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

The appellants contend that this section does not deprive them of the protection *prima facie* afforded to them against stale claims by the appropriate articles in the schedules. They point to the fact that under the will no right arose to the Roopchand Dhur Trust

in respect of the moiety now in question until after the death of Rishikesh. Hence they deny that Rishikesh in his lifetime was ever a trustee. They maintain that, even if he was a trustee, his widow took from his surviving co-trustee Dwarkanath Bhanjoo; hence that neither she nor the appellants are to be regarded for the purposes of s. 10 as the legal representatives of a trustee. To this a further argument is added that the widow received the estate from the surviving executor at a time when any claim to a legacy or a distributive share by the plaintiff had become barred by limitation.

This defence, in their Lordships' opinion fails. That the interest of the Roopchand Dhur Trust did not arise until the death of Rishikesh is clear enough, in the sense that before that date it was a contingent interest; but Rishikesh as one of the executors and trustees of his father's will had a duty in his lifetime to preserve the property of which the residuary estate consisted. There was an express trust for a specific purpose and he was under a duty to fulfil that part of it which required fulfilment in his lifetime. But when he died he ceased to be a trustee and Dwarkanath Bhanjoo became sole trustee. On the appellants' own showing Purasundari took from him and is the assign of a trustee. As it is not pretended that she gave valuable consideration, the defence of limitation is not available to her but is excluded by the terms of s. 10. Had the plaintiff in 1881 or 1882 sued Dwarkanath to recover the share of residue given to the Roopchand Dhur Trust, s. 10 would have had the same effect to exclude any plea of limitation raised by the trustee.

The validity of the bequest of the second moiety to the Roopchand Dhur Trust Estate must therefore be examined. The first limitation of the beneficial interest in this moiety is to the male issue of Rishikesh. This failed as he had no male issue at the death of the testator (or at any other time). There is no other disposition of the beneficial interest which could take effect in the lifetime of Rishikesh. But there is a limitation to the Roopchand Dhur Trust Estate which is to take effect in either of two events (a) in case Rishikesh should die without male issue) which probably means without leaving male issue), (b) in case Rishikesh should die leaving male issue but such male issue should die under the age of 16 years without leaving male issue him

or them surviving. The former is the event which happened: the state of affairs described in (b) on any view of that provision did not happen. Clearly the two contingencies are independent and indeed mutually exclusive. Hence though the gift to the Roopchand Dhur Trust might be invalid had it been claimable solely on the ground of fulfilment of condition (b), this consideration would not in any way invalidate the gift if, in the events which happened, it was claimable under (a). Panckridge, J. put the matter simply and correctly:

"If the testator has separated the gift so as to take effect upon the happening of any of several events, and the event which happens is not too remote, the gift over is good."

The bequest to the Roopchand Dhur Trust which has here to be considered is therefore a bequest to take effect on the death of Rishikesh without male issue, the disposition intended to have effect during the life of Rishikesh having failed. It is not disputed that had the will given an estate for life to Rishikesh and then directed that upon his death without leaving male issue it should go to the Roopchand Trust Estate, this conditional limitation would have been good. The question for decision is as to the effect at Hindu Law of the failure of the testator's disposition of the interest in this moiety during the life of Rishikesh. The view taken by the learned Judges in the High Court is that the gift to the Roopchand Dhur Trust Estate is good and took effect on the death of Rishikesh, who as heir of the testator took the prior interest for his own life in this moiety, such interest not having been disposed of by the will. The view contended for with much learning and ability by Mr. Pugh and Mr. Parikh on behalf of the appellants is, that the gift to the Trust Estate is void at Hindu Law, no interest being taken under the will by any ascertained person at the time of the testator's death. There is, therefore, it is said, no possibility of relinquishment by the testator and acceptance by or on behalf of the legatee being supposed to have taken place at the time of the testator's death as required by Hindu Law. The same result is contended for on a broader, if not necessarily a separate ground—that, there being no gift taking effect at the time of the testator's death, there was therefore an intestacy, and Rishikesh took this moiety as heir; with the result that it could not thereafter

be divested. From the principle that on the death of a Hindu, the right of succession to his property cannot remain in abeyance, it is said to follow that where there is a will, property, unless vested by the will in a devisee or legatee immediately on the death of the testator, must go to the heir and all the provisions of the will as to the property must fail.

These arguments require that their Lordships should consider the Hindu Law upon the subject of conditional limitations in order to ascertain the principles which determine the validity of a bequest which by its terms is to take effect at the close of a life in being but only upon the happening of an uncertain event. Is it necessary that a prior interest taking effect immediately on the death of the testator should have been bequeathed by the will? The history of the recognition by British Indian Courts of the testamentary power at Hindu Law has been traced by Mr. Mayne in Chap. XI of his well known work and it is sufficiently plain that the Hindu will in its present form is a development since the middle of the eighteenth century. It is not, therefore, necessary at this stage to discuss whether the notion of a will is an original part of the Hindu Law [cf. the judgment of Norman, J. in the *Tagore case* (*Ganendra Mohan Tagore v. Upendr Mohan Tagore*) (1)]. Nor can the course of the decisions be now diverted by any conclusion that could be reached as to the true intention of the first chapter of the *Dayabhaga*—that is, whether it teaches, contrary to the *Mitakshara*, that the donee's right arises by the donor's act of relinquishment alone and does not require acceptance by the donee [cf. *Sarkar's Hindu Law*, 7th ed., p. 991. *Dayabhaga* I 22].

The right of a Hindu in Bengal to make a will was recognised by this Board in 1855 as well-established, it being stated that "the strictness of the ancient law has long since been relaxed". [*Nagalutchmee Ummal v. Gopoo Nadaraja Chetty* (2)]. But in a later case it was said on behalf of the Board by Lord Justice Turner that "with reference to the testamentary power of disposition by Hindus the extent of this power must be regulated by the Hindu Law" [*Sonatun Bysak v. Smt. Juggutsoondree Dossee* (3)].

In 1862 the question whether a person in existence at the date of the testator's death

might become entitled upon a future contingency to receive an additional benefit was directly dealt with by a judgment delivered by Lord Justice Knight Bruce on behalf of a Board which had the aid as assessors of Sir Lawrence Peel and Sir James Colville [*Sn. Soorieemoney Dossee v. Denobundoo Mullick* (4)]. There a Hindu in Bengal had by his will given the whole of his estate to his five sons in equal shares, but had provided that if any son should die [not leaving any son or son's son] that share should not go to the widow or daughter of the testator's son so dying or to any daughter's son, but should go to "such of my sons and my son's sons as shall then be alive." One of the testator's sons having died without male issue his widow claimed his fifth share as his heir. It was held by the Supreme Court (*per* Sir Barnes Peacock, C. J.) that "the limitation over was valid as an executory bequest." This Board, pressed with the observation previously made by Lord Justice Turner, considered whether the Hindu Law prohibits such a provision. Lord Justice Knight Bruce said:

"Whatever may have formerly been considered the state of that law as to the testamentary power of Hindus over their property, that power has now long been recognized, and must be considered as completely established. This being so, we are to say, whether there is anything against public convenience, anything generally mischievous or anything against the general principles of Hindu Law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the Law of England), (upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not; that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist. Such powers have been long recognised in practice. The Law of India, at least the law of Bengal, has long been administered upon that basis, and the very mode in which this suit has been framed, and the manner in which it was conducted in India, are evidence, if evidence were wanting, that such is the general opinion, entertained in Bengal. Their Lordships, therefore, being of opinion, as has already been stated, that according to the true meaning of this will the property was given over upon an event which was to take place, if at all, immediately on the close of a life in being at the time when the will was made, and seeing that that event has happened, considered that the testator, in making this provision, did not infringe or exceed the powers given him by the Hindu Law, and that the clause effectually gives the corpus of the property to the surviving sons immediately on the death of that son who died without leaving male issue."

No question arose or appears to have been raised as to the necessity for every

(1) 4 B L R O C J. 103, (219); 18 W R 359.

(2) 6 M I A 309, (314); 1 Sar. 543 (P O).

(3) 8 M I A 66, (85).

(4) 9 M I A 123; 291; 1 Sar. 837; 4 W R. 114; 19 E R 688 (P O).

donee to have been in existence at the testator's death. As was later noticed [in the *Tagore case* (1)], it was sufficient to reject the claim of the widow without considering whether sons of any other deceased son of the testator could have claimed to participate in her deceased husband's share. But the words "remainder" and "executory bequest" which the Lord Justice "borrowed" to express his meaning were somewhat unreasonably taken as introducing the technicalities of English Law into the Hindu Law. The words, however, were used together for the very purpose of excluding such technicalities—the differences between contingent remainders and executory devises not being in point in connection with a Hindu will. What were those differences? They turned upon whether there was or was not a particular prior estate, whether it was an estate of freehold, whether it was conferred by the same will, whether the subsequent interest was to take effect at the natural determination of the prior estate, or before or after that event. The language of the Lord Justice disregards all such matters and contains nothing to intimate that there is any need for a conditional limitation to be "supported" by any prior estate conferred by the same will, though it is expressly restricted to dispositions which must take effect immediately at the close of a life in being. This stipulation has nothing whatever to do with any doctrine of the Hindu Law and the use of the technical phrase "executory devise" is enough in itself to show that the Lord Justice is not intending to confine his remarks to estates dependent for their validity upon their relation to a prior (particular) estate. Sir Barnes Peacock, in the *Tagore case* (1), appreciated that the words "remainder" and "executory bequest" were used to mean "conditional limitations"; and in an unanswerable passage emphasised the absurdity of applying the English Law of contingent remainders and executory devises, of springing and shifting uses, to cases governed by Hindu Law which knows nothing of freehold estates. The language of Lord Kingsdown in *Bhoobum Moyee Debia v. Ram Kishore Acharj Choudhuri* (5), was that, though the testamentary power of disposition among Hindus had been established in Bengal, "it would be to apply a very false and mischievous principle if it were held that the nature

(5) 10 M I A 279, (308); 3 W R (P O) 15. 1 Suth. 574; 2 Sar. 111; 19 E R 978 (P O).

and extent of such power can be governed by any analogy to the Law of England." This observation was not required to correct anything said in *Soorjeemoney's case* (4), but was evoked by the fact that a Judge of the Sudder Court had, in the case then before the Board applied to a Bengalee deed the rules which he discovered in "Ferne on Contingent Remainders." Still, it might not be candid to deny that *Soorjeemoney's case* (4), had dealt abruptly rather than meticulously with Hindu Law and was in some respects lacking in precision; hence subsequent decisions must be scrutinised to see if they restrict the freedom of bequest which it allowed.

In a case which raised a question as to the property over which the testator had power of disposition, Sir James Colville in 1867 [*Baboo Beer Pertab Sahee v. Maharajah Rajinder Pertab Sahee* (6)] said:—

"Decided cases too numerous to be now questioned, have determined that the testamentary power exists, and may be exercised at least within the limits which the law prescribes to alienation by gift *inter vivos*."

But little can be gained by an attempt to construe narrowly this cautious observation.

In the *Tagore case* (1), *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (7). Phear, J., as trial Judge treated *Soorjeemoney's case* (4), as authority for holding that a gift could be made by will to a person not in existence at the testator's death and for the general application of English principles of law to the limitations in a Hindu will. On appeal Peacock, C. J., and Norman, J., overruled those opinions. They went elaborately into the essentials of a gift at Hindu Law with special reference to the question whether a person could take if not in existence at the date of the relinquishment by the donor. The learned Chief Justice held that on general principles of Hindu Law the donee under a gift *inter vivos* must be in existence at the date of the gift and the donee under a will must be in existence at the date of the death of the giver.

He does not seem to have felt any difficulty in the case of what in English Law would be called vested remainders. But he considered that on the principles of the Hindu Law a gift whether *inter vivos*, or by will "cannot be made in such a manner as that the donee cannot be ascertained at the time at which the property

(6) 12 M I A 1, (38); 9 W R (P O) 15; 2 Suth. 114; 2 Sar. 348; 20 E R 241 (P O).

(7) (1872) L R I A Sup. Vol. 47; 9 B L R (P O) 377; 18 W R 359; 2 Suth. P O J 692; 3 Sar. P O J 85.

by virtue of the gift or devise ceases to be that of the donor or testator." Citing the first chapter of the Dayabhaga he observed that "there is nothing to show that after property has ceased by virtue of a gift to be that of the donor there can be any contingency or uncertainty as to the person in whom it is to vest or that the property can be so given by will as to remain in abeyance or in *nubibus* until the donee comes into existence". He doubted whether it was consistent with Hindu Law that executory bequests should be sanctioned. On the other hand, he recognised that, in *Soorjeemoney's case* (4), by his own decision and the decision of the Judicial Committee, the conditional limitation which, by borrowing terms from English Law, was called an "executory bequest" had been held valid according to Hindu Law. He also recognised that upon the Hindu texts a gift may be made upon condition and that "even a gift in remainder upon condition is good." Like Norman, J., he noticed verses 4 and 5 in the first chapter of the Dayabhaga where it is said that *daya* (heritage) signifies what is given [pp. 180, 218]. From this he drew the conclusion that both in the case of a gift and in the case of inheritance property must arise immediately in the heir or donee upon death or relinquishment by the owner.

In agreement with the Appellate Bench of the High Court it was held by the Judicial Committee (a) that the gift of a life estate was valid even though made to a son; (b) that a testator cannot create an estate which is unknown to the Hindu Law e. g., an estate in tail male and (c) that a gift cannot be made by will to a person not in existence at the time of the testator's death. The general principle governing wills was stated in the judgment delivered by Willes, J., on behalf of the Board as follows: "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can be transferred."

It is important that the close connection between the several branches of this decision should not be overlooked. If Hindu Law, whatever may have been its earliest form, is to have regard not only to absolute or complete ownership in property but to limited interests therein—life estates followed by other life estates or by remain-

ders—some modification may be necessary in the abstract theory of gift as applied to wills. Again, so long as it was in doubt whether an unborn person could take under a will it was difficult to recognise contingent or executory bequests in view of the absence from Hindu Law of any rule against perpetuity. But those matters being settled, a provision that the taker must be in existence at the date of the testator's death would seem to preserve the essential principle of the Hindu Law in a form not inconsistent with effective testamentary power. The facts of the *Tagore case* (1), itself did not call for any more detailed treatment of executory bequests. A large number of contingent remainders had been given by the will but all of these failed and certain contingent life interests likewise failed. The original life estate given to Juttendro was held to be valid, and it does not appear to have been doubted that a Hindu could validly create contingent intestates. The effect of this case upon *Soorjeemoney's case* (4), in their Lordships' opinion was to show how the principles of the Hindu Law of gift were to be applied to wills. It established, though not as a definition in all respects precise, that the scope of such principles was to determine the property which could be transferred and the persons to whom it could be transferred. The donee under a will must be such a person as was capable of taking according to Hindu Law. There is nothing in the judgment of Willes, J., to suggest that a person capable of taking because in existence at the death of the testator will have further difficulties to surmount by showing that he accepted at the time of the death the interest which the testator intended him to have—a condition which Peacock, O. J., and others had held, with complete logic, to exclude the possibility of executory bequests. On the other hand the judgment did contain a warning that the Hindu Law of gift was not of universal applicability to Hindu wills. It need not, however, be taken as a final decision upon matters not fairly raised by the facts of that case or *Soorjeemoney's case* (4).

In later cases before the Board the question of the absence or failure of a disposition of the prior interest did not arise, but the references to *Soorjeemoney's case* (4) disclose no suggestion that the gift of a prior interest is necessary. In *Bhoobun Mohini Debya v. Hurriah Chunder Chowdhry* (8), the

(8) 5 I A 133; 4 O 23; 3 O L R 339; 3 Sar. 815; 3 Suther. 537; 2 Ind. Jur. 430 (P O).

sanad was held upon its true construction to give to the grantor's sister an absolute interest in certain villages defeasible in the event of a failure of her issue at the time of her death, in which event it was to revert to the donor or his heirs. In *Ram Lal Mookerjee v. Secretary of State* (9), the testator gave his estate in the events which had happened, to his widow for the interest of a Hindu widow, and the "reversion" to his daughter's daughter Hori Dasi. Sir Robert Collier referred to *Soorjeemoney's case* (4), the *Tagore case* (1) and the case last cited, saying that since these cases it could not be disputed that "a gift by will upon an event which is to happen, if at all immediately upon the close of a life in being, to a person in existence, and capable of taking under the will at the testator's death, was good and valid under Hindu Law, and consequently that it was competent to the testator, by the use of apt words, to confer an absolute estate on Hori Dasi on the death of his widow (p. 61)."

In *Tarakeswar Roy v. Shoshi Shikhareswar* (10), the will was held to give a life estate to each of the three nephews of the testator with a gift over, of the share of any nephew dying without leaving male issue, to the other nephews for life. Sir Robert Collier said that

"the gift over was to persons alive and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent according to the authority of *Sreemutty Soorjeemoney Dossee v. Denobundhoo Mullick* (4), as explained in the *Tagore case* (1)."

In *Srimati Kristoromoney Dossee v. Maharajah Norendro Krishna* (11) the same principles were re-stated with reference to the defeasance of a prior absolute interest by a subsequent event, though the ultimate result of the will was to give to the testator's half-brothers an estate for life in remainder expectant on the death of the daughter who was given the first life interest.

In 1898 in the case of *Amrito Lall Dutt v. Surnomoni Dasi* (12), the argument for which the appellants now contend was accepted by Trevelyan, J., though Maclean, C. J. and Macpherson, J. found it unnecessary to express any opinion on the matter. From his judgment it sufficiently appears that Trevelyan, J. considered that the doctrine to which he assented was to be found in the *Tagore case* (1):

"According to that (Hindu) Law there must, as I

(9) 8 I A 46; 7 C 30; 4 Sar. 225; 10 C L R 349; 5 Ind. Jur. 327 (P O).

(10) 10 I A 51; 9 C 952; 13 C L R 62; 4 Sar. 439; 7 Ind. Jur. 327 (P O).

(11) 16 I A 29; 16 C 383; 5 Sar. 285; 13 Ind. Jur. 90 (P O).

(12) 25 C 662, (690-1); 2 C W N 389.

understand it, be a present beneficiary in order to make a gift valid. There may be a gift *in future* but there must also be a gift *in present*. The law of gifts and of wills is the same, and in order that there may be a valid gift the donor must immediately divest himself of the property in favour of some existing beneficiary, and in the same way with regard to wills there cannot be a gift to a person to come into operation at a future date unless there be a gift to a beneficiary in the *interim*. This is as I understand it merely what was decided in the *Tagore case* (1). In the judgment of that case we find the following: "Their Lordships for the reasons stated are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos* and must either in fact or in contemplation of law be in existence at the death of the testator."

With all respect to this opinion of a distinguished learned Judge, their Lordships think it is open to the objection that the passage quoted is no authority for the doctrine advanced, and their Lordships find no other passage in the judgment of Willes, J. which contains such doctrine.

In *Bai Motivahoo v. Bai Mamoo bai* (13), the judgment of the Board was delivered by Sir Richard Couch. The testator had by his will devised immovables upon certain trusts during the lifetime of his daughter Mamoo and her children: if there were no children, the property was to go to such persons as she might appoint by will. Farran, J. held that the gift to Mamoo was an absolute gift: a Division Bench (Sargent, C. J. and Bayley, J.) on appeal rejected this view but upheld the power of appointment as valid at Hindu Law provided that it was exercised during the lifetime of the tenant for life and that the appointee should have been alive at the death of the testator.

Soorjeemoney's case (4) and the *Tagore case* (1), were considered by the Board, and Sir Richard Couch stressed the passage from the judgment of Willes, J. in the latter case where it was said that wills are generally to be regarded as gifts to take effect upon death "as to the property which they can transfer and the persons to whom it can be transferred." Sir Richard Couch's judgment continued:—

"These appear to their Lordships to be the limits of the analogy between wills and gifts *inter vivos* which have been recognised. They are not aware of any authority in support of Mr. Mayne's contention, as they understood it, that in the present case, there would not be such a transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them to follow, from the first taker being allowed to have only a life interest, that his possession is sufficient to complete the executory bequest which follows the gift for life. The result

(13) 24 I A 93; 21 B 709; 1 C W N 366; 7 Sar. 140 (P O).

of the decisions is that, according to settled law, if the testator here had himself designated the person who was to take the property in the event of Mamoo dying childless, the bequest would be good. The remaining question is whether his substituting Mamoo and giving her power to designate the person by her will is contrary to any principle of Hindu Law. There is an analogy to it in the law of adoption. A man may by will authorize his widow to adopt a son to him, to do what he had power to do himself, and although there is here a strong religious obligation, their Lordships think that the law as to adoption shows that such a power as that now in question is not contrary to any principle of Hindu Law. Further, they think that the reasons which have led to a testamentary power becoming part of the Hindu Law are applicable to this power, and that it is their duty to hold it to be valid. But whilst saying this they think they ought also to say that in their opinion the English Law of powers is not to be applied generally to Hindu wills."

It is contended for the appellants that by this decision the Board introduced a requirement extending the analogy of gifts beyond the two matters mentioned by Willes, J., and making the validity of limitations to take effect after the testator's death upon an uncertain event depend upon whether or not by his will he has interposed a life estate so as to have provided a first taker under the will whose possession is "sufficient to complete the executory bequest". The exact effect of the judgment upon this point is not altogether plain. It may be observed that, until this case, it had not at any time been held by the Board or even suggested in any of the cases before the Board that the Hindu Law as to conditional limitations was to be operated by a fiction imputing to the devisee the possession of a previous taker under the will. In a well-known text book—West and Buller; "Hindu Law", 3rd ed. 1884—the learned authors had contended that an executory devise as distinguished from a remainder could not properly be received into the Hindu system (p. 217). As regards remainders they appear to have thought that these could be reconciled with Hindu legal principles if the entry or acceptance of the taker of the immediate particular estate might enure for the benefit of the remainderman. The learned authors were well aware that *Soorjeemoney's case* (4), had permitted executory bequests and indeed were under no illusions as to the fictitious character of the doctrine which applies to wills the notion of a resignation by the previous holder and a simultaneous release of the physical detention (or delivery) to the donee (p. 218-9). Sargent, C. J. in the High Court rightly interpreted these reflections as showing that both remainders and executory devises are "opposed to the strict notions of

a gift", and had refused to regard that consideration as conclusive.

Whatever might be said of the *Tagore case* (1), if taken by itself, the Board in *Sir Richard Couch's* judgment is noting that the analogy between gifts and wills at Hindu Law is one as to which certain limits have been recognised. This would seem to mean that save as regards the property which may be disposed of and the person who is capable of taking, the analogy according to the authorities was inapplicable or at least was so far unauthorised. Their Lordships do not gather from the judgment that *Sir Richard Couch* intended to remove or extend the limits to which he refers or to lay down principles to govern cases of a character not then before the Board. On the contrary, he would appear by his observation about the possession of the first taker to be answering on its own premises an argument about transfer of possession and saying that the authorities do not bear it out; with the result that it becomes unnecessary to interfere with or to go beyond the limits to which he has referred.

Mr. Mayne's argument as to the impossibility of "transfer of possession" does not clearly appear from the reports, but it had reference doubtless to the fact that the appointee might be anyone alive at the testator's death whether known to the testator or not. It may well have been thought sufficient answer to point out that this uncertainty as to the beneficiary raised no greater difficulty than was present in the case of any gift in remainder upon a condition. In any case the observation made is that "it appears to them to follow from the first taker being allowed to have only a life interest" that his possession was sufficient to complete the executory bequest; but the Board had repeatedly upheld such bequests where they took effect to divest an absolute estate. The principle upon which the Board in the end proceeded was the same as in *Soorjeemoney's case* (4)—not that the strict original theory of the Hindu Law of gift required no extension if it were to cover the case—but that "the reasons which have led to a testamentary power becoming part of the Hindu Law are applicable to this power" and that "the power was not contrary to any principle of Hindu Law." Their Lordships are not of opinion that *Soorjeemoney's case* (4), has been narrowed by this later decision so as to exclude a well-known class of conditional limitations by introducing a doctrine as to the need for a particular estate

to support a limitation made to commence *in futuro*.

In *Bhupendra Krishna Ghose v. Amarendra Nath Dey* (14), *Bhupendra Krishna Ghose v. Amarendra Nath Dey* (15), the High Court at Calcutta again dealt with the question now at issue. A Hindu of Bengal had died sonless in 1907 leaving a will whereby he appointed his wife sole executrix and authorized her to adopt five sons in succession:—

"If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue in such case my estate after the death of my said wife should pass to the sons of my sister *Sm. Benodini Dasee* who may be living at the time of my death."

The widow in 1909 adopted a son who on March 11, 1910, died unmarried; the widow died a few days afterwards not having adopted any other son. The arguments addressed to the High Court and to this Board were exactly those urged for the appellants in the present case and turned on the fact that there was in the will no express gift of any life interest to the widow but a provision for maintenance (Rs. 300 per month) and residence in the family house. Fletcher, J. (pp. 646-7*) as trial Judge referred to *Soorjeemoney's case* (4), saying:—

"It is quite true that in that case the Privy Council were considering the case of an executory devise or a gift over where a previous gift had been made by the will, but there is nothing to my mind from which I can hold that their Lordships considered or meant to infer that if the testator had left a particular interest in property undisposed of, that an executory estate created by his will was *ipso facto* void."

[and again]

"I have heard nothing in the argument to convince me that the supposed rule of Hindu Law that after the succession has opened out the testator is not able to regulate the course of successions in fact exists."

Sir Lawrence Jenkins, C. J. with whom Woodroffe, J. agreed took the same view:—

"The appellant based his contention on two grounds. First, he argued, that if property vests in a full owner under the ordinary Hindu Law of inheritance, then the future devolution of the property from him cannot be disturbed except by a restriction imposed from the beginning. Next, he maintained that if effect were given to the bequest in favour of the sons, there would be such an uncertainty as to who would take, that the property would be in abeyance, and this would contravene a fundamental rule of Hindu Law. I am not much impressed by either of these contentions. The first is founded on

(14) 41 O 642; 24 Ind. Cas. 458; 18 O W N 360; A I R 1914 Cal. 782.

(15) 43 I A 12; 34 Ind. Cas. 892; A I R 1915 PC 101; 19 M L T 97; 20 O W N 169; 30 M L J 110; 23 O L J 169; 14 A L J 167; 3 L W 252; (1916) 1 M W N 73; 18 Bom. L R 347; 43 O 432 (P O).

*Pages of 41 O.—[Ed].

a fallacy, for it assumes that the complete interest in the property has devolved on the full owner. But that is the very point in dispute, for if the bequest is operative, there would be merely a partial intestacy, and only a qualified interest would vest in the widow or adopted son as the case might be. The conditional bequest would not be an attempt to give an unauthorised direction to property vested in a full owner, but simply the curtailment of the interest in that property. Nor do I think the second line of argument possesses any greater merit, for I see no ground for saying that the property would be in abeyance, or that there was any more uncertainty as to the destination of the property than in (*sic*) the necessary consequence of every contingent bequest....

It has been argued that the interest preceding this bequest to the defendants arose by implication under the will: but, whether this be the true view or not, I think the bequest is good. It does not infringe any rule against remoteness, nor are the legatees incapable of taking. It is true that the bequest is contingent, but that does not avoid it (s. 107 and Part XV of the Succession Act). Nor was it fatal to the bequest that it was to take effect, not necessarily at the testator's death, but possibly at a future date. This view is sanctioned by the illustrations to s. 107. It has never been suggested, that an annuity cannot be created by a Hindu will and yet according to Lord Cottenham an annuity of £100 is the gift of 'as many sums of £100 as the donee shall live years': *Belwitt v. Roberts* (16).

And so a bequest of a legacy, or of an estate on a future contingent event, would be good within the meaning of s. 107 of the Succession Act; see the illustrations to that section and *Soorjeemoney Dossee v. Denobundoo Mullick* (4).

But if the future contingent bequest of a sum of money, or an estate, or a farm or a fund all of which are mentioned in the illustrations to s. 107, be sanctioned, why is the bequest in this will bad? It was conceded by Counsel for the petitioner that if the bequest had been of a sum of money it would have been good, unless it was a sum of money that exhausted the whole estate: this it was argued, would have been a fraud on the law. In other words according to the petitioner the validity of the legacy is dependent upon its relative amount. I am unable to perceive any sound principle in this."

Delivering the judgment of the Board, Mr. Ameer Ali said:—

"It is to be observed that the will in this case does not infringe the rules which lay down the limitations on the testamentary powers of a Hindu. The bequest is to persons who were in existence at the time of the testator's death and he does not create any estate unknown to the Hindu Law."

The judgment proceeded to hold that the estate was in the widow for her life, that it could only pass to an adopted son who should survive her or to his male issue if he predeceased her leaving such issue, and that the gift over was good. On this view there was a gift by the will of a prior interest during the widow's life so that the difficulty vanished.

In a recent case [*Bhupendra Mohan Roy*

(16) (1841) 1 Cr. & Ph. 274, (280); 10 L J Ch. (N s) 342; 5 Jur. 979; 10 Sim. 491; 41 E R 495; 51 R R 303.

v. *Srimati Purña Sashi Debi* (17)] the facts, in the view ultimately taken by the Board, raised the present question, but their Lordships have accepted the suggestion of the appellants' Counsel that as it was not fully argued they should not regard that case as precluding the appellants' contention upon this appeal.

Reviewing the authorities and considering them on principle their Lordships are of opinion that the rule which the Board in *Soorjeemoney's case* (4) thought necessary to the existence of effective testamentary power and which was explained in the *Tagore case* (1) with reference to the Hindu Law of gift is not restricted by further conditions intended to meet or to placate a theory which regards immediacy of effect as a necessary feature of every disposition of property. In truth, inheritance is not donation, and a bequest is not a donation *de praesenti* between living people. It is to be recognised that the Hindu Law has been greatly influenced by the notion of "relinquishment in favour of a sentient being" as the basis of a gift and of inheritance, but this principle has not, as their Lordships read the previous decisions, been allowed to arrest the development of the Hindu Law of wills. The doctrine that there must be acceptance at the time of relinquishment has different values according as it is applied to gifts *inter vivos* or is extended by analogy to bequests or inheritance, though by a theory of some refinement heir and donee were once thought to be equally governed by the same principle. The theory, as has been shown from the judgment of Peacock, C. J. in the *Tagore case* (1) is sometimes put by saying that the estate cannot remain in abeyance.

"Thus it appears that property in the heir must arise immediately upon the death of the ancestor in the same manner as the property of the donee arises immediately upon relinquishment by the donor."

[*Ganendra Mohan Tagore v. Upendra Mohan Tagore* (1)]. And Mr. Mayne says of the author of the *Mitakshara* :

"Apparently, in the view of Vijnanesvara, acceptance was necessary to complete a gift because, according to a Hindu lawyer, property can never be in abeyance. It cannot pass out of one until it is received by another."

[*Hindu Law and Usage*, 6th ed., 1900, para. 376, p. 484]. But it must needs be

(17) 66 I A 205; 183 Ind. Cas. 199; 1939 O W N 722; 12 R P O 64; 1939 O L R 513; A I R 1939 P O 222; 5 B R 961; 50 L W 377; (1939) 2 M L J 479; 43 C W N 1149; 70 O L J 209; (1939) A L J 878; 41 Bom. L R 1159; (1939) M W N 1116; (1939) Kar. (P C) 382 Sup. (P C).

admitted that the rigour of this theory, even if it be not destructive of all future gifts is inconsistent with any recognition of contingent or executory bequests. It has effect (save in so far as the Legislature has abrogated it: Hindu Wills Act, 1870, Hindu Disposition of Property Act, 1916), to limit the class of persons who are capable of taking under a will, restricting it to persons who either in fact or in contemplation of law are in existence at the death of the testator. But in their Lordships' judgment it does not remain as a further obstruction to the taking by such persons of a beneficial interest known to and permitted by the law. Indeed, if an estate in remainder can be limited to take effect on the natural determination of a life estate and may be so limited upon a condition which may never be fulfilled; if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu Law to be saved by refusing to recognise a limitation to take effect upon condition in the future because it lacks "support" from a particular estate.

It cannot be disputed that if a conditional limitation is invalid, the interest, unless otherwise disposed of by the will, must go to the heir. But if limited interests are to be recognised, their Lordships see no reason to hold that because a prior interest goes to the heir as such a conditional limitation or any other limitation is bad at Hindu Law.

The principle of Hindu Law which prevents an estate being in abeyance is an important doctrine of the law of inheritance and it has important consequences as regards adoption. The rule is that the right of succession vests immediately on the death of the owner. Apart from the case of a child *en ventre sa mere* or of an adopted child, the estate once vested in an heir will not be divested by the subsequent birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner [*Kalidas Das v. Krishna Chandra Das* (18), *Kally Prosonno Ghose v. Gocool Chunder Mitter* (19), *Nilcomul Lahiri v. Jotendro Mohan Lahiri* (20)].

In like manner, though the doctrine is not really the same, delivery in some sense is necessary at Hindu Law to distinguish the completed gift from the mere promise.

(18) 2 B L R 103; 11 W R 11 (F B).

(19) 2 C 295.

(20) 7 O 178; 8 O L R 401.

But neither of these doctrines nor yet the principle that a man cannot devise an interest of a nature and quality unknown to the Hindu Law (e. g. descendible in a manner unknown to that law) conflict with the principle that where there is a will the heir can as such take only that part of the testator's property which is not disposed of by the will. "He will take by descent and by his right of inheritance whatever is not validly disposed of by the will and given to some other person" [Sir Barnes Peacock in the *Tagore case* (1). Their Lordships are in full agreement with Fletcher, J. and Jenkins, O. J. [*Bhupendra Krishna Ghose v. Amarendra Nath Dey* (14) *supra*], in rejecting the contention that a testator's directions to regulate the devolution of his property though within the limits laid down by the law will fail if the heir takes any interest immediately upon the death of the testator. This contention is not warranted by anything in the Board's judgment in the *Tagore case* (1), and, as Jenkins, O. J. noticed, is founded on a fallacy; for it assumes that the complete interest in the property has devolved on the heir, which is the very point in dispute. Full weight must also be given on this part of the argument to the consideration that not only are testators allowed to dispose of limited interests—as Sir Robert Collier said "limited interest are common enough" [*Srimati Kristoromoney Dossee v. Maharajah Norendro Krishna Bahadoor* (11) at 31*])—but that there is no distinction in Hindu Law for the present purpose between movable and immovable property. On this point also the reasoning of Jenkins, O. J. appears to their Lordships to have much force. Its cogency is independent of any inference which might be drawn from assumptions made by the Indian Legislature in the Hindu Wills Act, 1870—an enactment passed after the *Tagore case* (1), had been decided in the High Court but before it had been dealt with by the Judicial Committee.

The careful arguments of learned Counsel on both sides in the present case have made clear different implications of the principle, so often appealed to, that an estate cannot remain in abeyance.

The result, however, is that the objections taken on behalf of the appellants to the bequest to the Roopchand Dhur Trust fail and their Lordships must humbly advise His Majesty that this appeal

should be dismissed. The appellants will pay the costs of respondent No. 1.

D.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *Giles & Hunter.*

Solicitor for Respondent No. 1.—Messrs. *Morgan, Price Marley & Rugg.*

MADRAS HIGH COURT

Criminal Appeal No. 103 of 1938

August 9, 1938

LAKSHMANA-RAO, J.

PUBLIC PROSECUTOR—APPELLANT

versus

MOTURU APPALANARASAYYA

—RESPONDENT

Railways Act (IX of 1890), ss. 122, 132—Complaint by Railway authorities, if necessary, for conviction under s. 122.

An accused who is found guilty of an offence under s. 122, Railways Act cannot be acquitted on the ground that the prosecution was not on the complaint of the Railway authorities as required under s. 132 of the Act. 96 Ind. Cas. 983 (1), relied on.

Gr A. against the acquittal of aforesaid respondent by Stationary Sub-Magistrate Gudivada, in C. C. Nos. 184 and 185 of 1937.

Facts.—The accused were charged by the Railway Police for crossing the Railway line in Gudivada Railway Station while proceeding from the first platform to the second platform in spite of warning from the Railway Police Constable—an offence under s. 122, Railways Act. The accused while admitting having crossed the line under certain circumstances objected to the jurisdiction of the Police to file a chargesheet without a written complaint from the station authorities as required by s. 132, Railways Act (offences cognizable by the Railway Police are enumerated in s. 131, Railways Act and s. 122 is not one among them). The Sub-Magistrate while finding the accused guilty of the offence under s. 122, Railways Act, acquitted the accused on the ground that the prosecution was not on the complaint of the Railway authorities as required under s. 132 of the said Act. Against this order of acquittal the Public Prosecutor has appealed.

Public Prosecutor *in person.*

Mr. A. Lakshmayya, for the Respondent.

Judgment.—The view of the Stationary Magistrate that there was no proper complaint in this case is opposed to the decision

in *Public Prosecutor v. Ratnavelu Chetty* (1) and on the evidence the respondent would unquestionably be guilty under s. 122, cl. (1), Railways Act. The order of acquittal is therefore set aside and the respondent is convicted under s. 122, cl. (1), Railways Act. The offence is technical and the respondent is sentenced to pay a fine of one rupee with simple imprisonment for one day in default.

N.-S.

Order set aside.

(1) 49 M 525; 96 Ind. Cas. 983; A I R 1926 Mad. 885; 27 Cr. L J 1031; 52 M L J 210; (1927) M W N 43; 25 L W 248 (F B).

NAGPUR HIGH COURT

Miscellaneous Appeal No. 81 of 1937

September 16, 1938

BOSE, J.

BISESAR—APPELLANT

versus

JAIRAM—RESPONDENT

Succession Act (XXXIX of 1925), ss. 388 (1) (2), Proviso, 384 (1)—Inferior Court invested with powers under sub-s. (1), if becomes District Court—Court of Subordinate Judge at Bilaspur invested with powers under s. 388 (1), also Additional District Court attached to District Court at Raipur—Succession certificate granted by him—Appeal held lay to the District Court and not to High Court.

The inferior Court invested with the powers under s. 388 (1), Succession Act does not become a District Court but merely exercises certain functions of the District Judge under Part X of the Succession Act. The Court remains the Court as it formerly was. 171 Ind. Cas. 371 (1), distinguished.

A Judge who granted a succession certificate was an Additional District Judge sitting at Bilaspur attached to the District Court at Raipur, as well as a Subordinate Judge of the First Class at Bilaspur. He signed as Subordinate Judge of the First Class at Bilaspur. The Court of the Subordinate Judge First Class at Bilaspur was invested with the powers referred to in s. 388 (1) of the Succession Act by the Local Govt. by a Notification and thus the jurisdiction of the Raipur District Court in the Bilaspur area had been taken away by the Notification and conferred upon the Subordinate Judge of the First Class at Bilaspur.

Held, that the Judge could only have exercised the powers under Succession Act, in his capacity as Subordinate Judge First Class and not as an Additional District Judge. The appeal therefore lay to the District Court and not to the High Court.

Misc. A. from an order of the Court of the Subordinate Judge, First Class Bilaspur, dated January 23, 1937.

Rai Bahadur D. N. Chaudhury, for the Appellant.

Mr. G. R. Deo, for the Respondent.

Order.—A preliminary objection is raised

to the effect that the appeal in this case does not lie to the High Court.

The proceedings out of which the appeal arises are under the Indian Succession Act and are for the grant of a succession certificate. The petition was allowed and the non-applicant has appealed here.

The difficulty arises because the learned Judge who granted the petition, Mr. C. S. Dube, is an Additional District Judge sitting at Bilaspur attached to the District Court at Raipur, as well as a Subordinate Judge of the First Class at Bilaspur. The question is whether he granted the certificate in these proceedings in his capacity as Additional Judge to the District Court at Raipur or as a Subordinate Judge of the First Class at Bilaspur. He has signed as Subordinate Judge of the First Class. But I agree that that is not conclusive though of course it is an element to be taken into consideration.

Under s. 384 (1) of the Indian Succession Act appeals from an order of a District Judge granting a certificate under Part X of the Act lie to the High Court, but under s. 388 (1) the Local Govt. is given power to invest, by notification, any Court inferior in grade to a District Judge, with power to exercise the functions of a District Judge under Part X. Sub-s. (2) of s. 388 then states:

"any inferior Court so invested shall, within the local limits of its jurisdiction have concurrent jurisdiction with the District Judge in the exercise of all the powers conferred by this Part upon the District Judge and the provisions of this Part relating to the District Judge shall apply to such an inferior Court as if it were a District Judge."

Then follows this important proviso which governs the matter now before me

"provided that an appeal from any such order of an inferior Court as is mentioned in sub-s. (1) of s. 384 shall lie to the District Judge, and not to the High Court."

The Court of the Subordinate Judge First Class at Bilaspur has been invested with the powers referred to in s. 388 (1) of the Indian Succession Act by the Local Govt. by a Notification No. 1287-1130-V, published in the *Central Provinces Gazette* of June 18, 1932. It is clear then that the jurisdiction of the Raipur District Court in the Bilaspur area has been taken away by the Notification and conferred upon the Subordinate Judge of the First Class at Bilaspur.

In these circumstances no Judge of the Raipur District Court would have jurisdiction to entertain an application under the Indian Succession Act for the grant of a succession certificate in the Bilaspur area.

That jurisdiction is conferred, as I have shown, within the Bilaspur area upon the Subordinate Judge of the First Class at Bilaspur. Therefore when Mr. Dube, exercised powers under the Indian Succession Act relating to the grant of a succession certificate, it is clear he could only have done so in his capacity as Subordinate Judge, First Class and not as an Additional District Judge. As I have said he signed in his capacity as a Subordinate Judge First Class and therefore it is clear that he purported to exercise his functions in that capacity. Therefore the appeal lies to the District Court and not here.

It is argued on behalf of the appellant that s. 388 (2) speaks of an inferior Court, and it is urged that once a Court of the Subordinate Judge, First Class is invested with the powers of a District Judge it ceases to be an inferior Court. Apart from the fact that this would render the proviso to s. 388 (2) meaningless it is clear from sub-s. (1) that the inferior Court so invested with the powers does not become a District Court but merely exercises certain functions of the District Judge under Part X of the Indian Succession Act. The Court remains the Court of the Subordinate Judge, First Class. This distinguishes the present case from my decision in *Zumbarlal Chhotelal v. Sitaram* (1) upon which the learned Counsel for the appellant relies. There was no question of an inferior Court to the District Court being invested with powers to exercise certain functions which would otherwise have been exercised by the District Court but the case of an appointment of an Additional Judge to the District Court.

I quite agree that if the Notification referred to above had not been issued by the Local Govt. then of course Mr. Dube could only have acted in his capacity as an Additional Judge to the District Court at Raipur and then my ruling would have applied. But as I have shown the Local Govt. is invested with authority to take away the functions which would otherwise be exercised by the District Judge at Raipur under s. 388 (1) of the Indian Succession Act and it having done so, Mr. Dube had no other capacity in which to act in matters relating to the grant of succession certificates except that of a Subordinate Judge of the First Class.

The appeal is therefore returned to the appellant for presentation to the proper

(1) 1 I L R 1937 Nag. 219 (221); 171 Ind. Cas. 371; A I R 1937 Nag. 80; 10 R N 109.

Court. I am asked to make it clear that the appeal was being prosecuted here in good faith and that therefore the provisions of s. 14 of the Lim. Act should be applied. That, however, is a matter which is beyond my province at the moment. It is true the dual capacity in which Mr. Dube acts is confusing and may in certain circumstances mislead litigants and even their legal advisers. But that is a matter which must be considered by the Court to which the appeal will now be presented. I have no jurisdiction to deal with it at this stage.

As regards costs I think it fair that each party should bear its own costs so far as this Court is concerned. As I have said, the position is confusing and litigants and even members of the Bar might quite easily be misled. It is not a matter which often arises and therefore not one which would normally be within the knowledge and cognisance of the general public and the Bar.

s.

Order accordingly.

MADRAS HIGH COURT

Criminal Revision Case No. 646 and

Petition No. 614 of 1938

December 9, 1938

LAKSHMANA RAO, J.

In re AVIDI VEERASAMI—PETITIONER
Arms Act (XI of 1878), s. 19 (f)—*Servant of gun licensee carrying gun to his master's house—If guilty under s. 19 (f).*

Servant of a gun licensee who was merely carrying the gun to the house of the master under his orders cannot be convicted under s. 19 (f), Arms Act.

Or. R. to revise the judgment of the Sub-Divisional First Class Magistrate, Peddapur, in C. O. No. 25 of 1938.

Mr. V. Viyanna, for the Petitioner.

The Public Prosecutor, for the Crown.

Order.—The petitioner is the servant of a gun licensee and the Sub-Inspector found the gun of his master with him. The explanation is that he was merely carrying the gun to the house of the master under his orders and the conviction of the petitioner under s. 19 (f), Arms Act, cannot be sustained. It is therefore set aside and the fine if levied will be refunded.

N-S.

Conviction set aside.

CALCUTTA HIGH COURT

Civil Revision Case No. 919 of 1938

June 29, 1939

S. K. GHOSE, J.

ANIL KUMAR ROY CHAUDHURY

AND OTHERS—DECREE-HOLDERS—

PETITIONERS

versus

AHAMMED ALI SARKAR AND OTHERS—

OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, r. 22—Judgment-debtor putting in appearance and asking for adjournment of sale—Want of notice under r. 22, if can be pleaded to set aside sale—One of judgment-debtors dying at time of execution—One of sons substituted while another left out—Validity of sale for want of notice as regards latter's share—Bengal Tenancy Act (VIII of 1885), s. 174—Application under—Question whether sale must be set aside for want of notice under O. XXI, r. 72, Civil Procedure Code (Act V of 1908), does not arise.

Want of service of notice under O. XXI, r. 22, Civil P. C., cannot be pleaded if the judgment-debtors had put in their appearance and repeatedly asked for adjournment of the sale and obviously with the knowledge of the sale. 131 Ind. Cas. 702 (1) and 143 Ind. Cas. 299 (2), relied on.

Where at the time of the execution, one of the judgment-debtors has died and one of his sons is substituted for him but another son is left out, the sale must be held to be void for want of notice under O. XXI, r. 22, Civil P. C., in so far as the share of the latter son is concerned. But as regards the shares of other judgment-debtors the sale cannot be held to be void. 133 Ind. Cas. 670 (3), relied on.

The question that the sale must be held liable to be set aside for want of notice under O. XXI, r. 72, Civil P. C., does not arise when application is under s. 174, Ben. Ten. Act.

C. R. Case issued from an order of the Sub-Judge, Pabna, dated March 25, 1938.

Mr. Gunendra Krishna Ghose, for the Petitioner.

Messrs. Bhut Nath Chatterjee and Obaidul Haque, for the Opposite Party.

Order.—The present petitioners are decree-holders-auction-purchasers in execution of a rent decree. The sale was originally fixed on June 16, 1930, on which date the judgment-debtors-opposite parties applied for an adjournment waiving service of fresh sale proclamation, and the adjournment was granted. Thereafter several more adjournments were granted on similar conditions. The sale took place on September 17, 1930 and was confirmed on March 23, 1931. On February 1, 1937 the judgment-debtors opposite-parties made an application under s. 174, Ben. Ten. Act, for setting aside the sale. The Munsif dismissed the application finding that there was

no fraud or material irregularity, and that the application was barred by limitation. On appeal the learned Subordinate Judge came to a similar finding but nevertheless he set aside the sale on a single ground, namely, that it was void for want of notice under O. XXI, r. 22, Civil P. C. Against that order the present rule has been obtained.

It is pointed out on behalf of the petitioners that want of service of notice under O. XXI, r. 22, Civil P. C., cannot be pleaded in view of the fact that the judgment-debtors put in their appearance and repeatedly asked for adjournment of the sale and obviously with the knowledge of the sale. This contention is supported by the decision in *Chandra Nath Bagchi v. Nabadwip Chandra Dutt* (1). A similar view has been taken by other High Courts, *Bimalanandhan Prasad v. United Refineries (Burma) Ltd.*, 143 Ind. Cas. 299 (2), which is a decision of the Rangoon High Court. For the opposite parties it is pointed out that one of the judgment-debtors, Sabet Ali, died at the time of the execution of the decree, and one of his sons, Javed Ali, was substituted for him in the application for execution, but another son Ahammed Ali who is opposite party No. 1 in the present rule, was left out. It is contended that the sale must be held to be void for want of notice under O. XXI, r. 22 Civil P. C. in so far as the share of Ahammed Ali opposite party No. 1 is concerned: *Manindra Chandra v. Rahattannessa*, (3). This view must be accepted. It is further contended for the opposite parties in this Court, that the entire sale must be held liable to be set aside for want of notice under O. XXI, r. 72, Civil P. C. But the application was under s. 174, Ben. Ten. Act, and so this contention does not arise for decision. In the result I maintain the order of the lower Appellate Court declaring the sale to be a nullity in so far as the share of Ahammed Ali, opposite party No. 1, is concerned. As regards the other shares, I set aside the order of the Subordinate Judge and direct that the application for having the sale set aside be dismissed in so far as those shares are concerned. The Rule is made absolute to this extent. No order as to costs.

D.

Rule partly made absolute.

(1) 35 O W N 9; 131 Ind. Cas. 702; A I R 1931 Cal. 476; 53 O L J 329; Ind. Rul. (1931) Cal. 494.

(2) 143 Ind. Cas. 299; A I R 1933 Rang. 52; 11 R 79; Ind. Rul. (1933) Rang. 57 (2).

(3) 35 O W N 220; 133 Ind. Cas. 670; A I R 1931 Cal. 555; 58 O 825; 53 O L J 46; Ind. Rul. (1931) Cal. 734.

MADRAS HIGH COURT

Criminal Appeal No. 270 of 1938

December 1, 1938

WADSWORTH, J.

CROWN PROSECUTOR—APPELLANT

versus

T. SELLAMUTHU—RESPONDENT

Penal Code (Act XLV of 1860), s. 206—Accused judgment-debtor immediately after giving undertaking to Court not to transfer certain property, transferring it—Case falls under s. 206.

The word "fraudulently" in the I. P. O., ordinarily connotes firstly, an element of deceit or secrecy and secondly, an intention to cause injury. Where the accused judgment-debtor immediately after giving an undertaking to the Court not to transfer certain property, transfers the same in favour of his son by a sale deed with the knowledge that his son would be in a position to claim the property as his own, the intention to cause injury clearly exists in such a case and the case falls under s. 206, I. P. O., it does not matter whether or not the creditor might by taking troublesome proceedings in the Civil Court to circumvent the transfer.

Or. A. against the acquittal of the aforesaid respondent by Third Presidency Magistrate, Egmore, Madras, in C. O. No. 168 of 1938.

Mr. K. V. Ramaseshan, for the Appellant.

Mr. K. Sanjiva Kamath, for the Respondent.

Judgment.—This is an appeal against an acquittal on a charge under s. 206, I. P. O. The accused was defendant No. 1 in a small cause suit, his son being defendant No. 2. A decree was passed for Rs. 231 in favour of the plaintiff—P. W. No. 4 here—against the accused the suit being dismissed as against the son. In execution of the decree a cow belonging to the accused was attached. A claim petition was filed by the wife of the accused. The claim was allowed on May 14, 1936, on the undertaking given by the accused that he would not for three months thereafter alienate a piece of land owned by him. On May 25, 1936, the accused executed a registered sale-deed in respect of the property covered by this undertaking in favour of his son the exonerated defendant. After various proceedings this Court filed a complaint under s. 476 (1), Criminal P. O., charging the accused with an offence under s. 206, I. P. O. The defence to the criminal complaint was, firstly, a denial of the undertaking, secondly, a plea that the motive was to satisfy the pressure of his son for the discharge of debts, and thirdly, various legal contentions with which I shall deal separately.

There can be no doubt as to the fact

of the undertaking which is embodied in Court records exhibited. It seems to me most unlikely that the motive of the accused was to satisfy the pressure of his son based on alleged old debts which according to the recitals in the sale-deed are made up of a series of small hand loans mostly made months prior to the date of the sale. The undertaking having been given only a few days before the sale it is incredible that the fact of the undertaking would not have been present prominently in the mind of the accused when he carried out the sale. The son denies that he knew about this undertaking. At any rate he was a party to the litigation and as such he must have known about the decree. On these facts, I find it impossible to agree with the conclusion of the Magistrate that the transfer was not fraudulent. The Magistrate supports his conclusion not by any clear finding of fact that the transfer has not been proved to be fraudulent but by certain legal contentions.

It is no doubt correct that the word "fraudulently" in the I. P. O. ordinarily connotes firstly, an element of deceit or secrecy and secondly, an intention to cause injury. In my opinion there can be no doubt about the latter element in this case. The accused having so recently given this undertaking must have known that the transfer in breach of the undertaking would have the effect of impeding the execution of the decree and he must have intended that it would have that effect. It is to my mind quite immaterial whether it would be possible for the decree-holder by taking other proceedings to defeat that attempt. If there was an intention to prevent this property being taken in execution of the decree and if that intention had as its motive the object of injuring the creditor, it does not matter whether the object was likely to be achieved or not. There remains the question whether there was the ingredient of deceit or secrecy in the act of the accused. It is argued that there could have been no secrecy because there was prompt registration. I do not agree with this contention as a statement of law. Although registration in theory implies publicity, in fact, it can be and frequently is carried out in such a way that the person adversely affected knows nothing about it. The proper way to regard this case is to look at the fact of the transfer along with the immediately preceding fact of the undertaking given to the Court and taking these two

facts together with the other known circumstances to deduce therefrom the intention of the transferor. He knew that his creditor had been lulled into a sense of security by the undertaking given in Court. With this knowledge he almost immediately carried out the transfer in favour of his own son, one who was not likely to publish the fact of the transfer in such a way that it would go to the ears of the creditor. To my mind it is patent that the object of the transferor must have been to deceive his creditor and to injure him by preventing the attachment of this property in execution. His object was to deceive because *firstly*, he promised the creditor in open Court that he would not alienate and then almost immediately afterwards, he transferred to a member of his own family. His object was to injure and to prevent execution against this property because he knew that his son, having been exonerated in the suit, would be in a position to claim the property as his own. To my mind it does not matter whether or not the creditor might by taking troublesome proceedings in the Civil Court circumvent this plot.

I am therefore of opinion that the case falls clearly under s. 206, I.P.C., and that the acquittal of the accused is wrong. I convict him of the offence with which he is charged and sentence him to a fine of Rs. 25 or in default to two weeks' rigorous imprisonment.

N.-S.

Appeal dismissed.

LAHORE HIGH COURT

Criminal Revision No. 883 of 1939

October 12, 1939

RAM LALL, J.

R. S. RATRA—ACCUSED—PETITIONER

versus

GANESH DASS—COMPLAINANT

—RESPONDENT

Penal Code (Act XLV of 1860), s. 415 — Cheating — Deception — When amounts to cheating — Giving post-dated cheque by person having no funds in Bank — Dispute held of civil nature.

Deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or omit to do anything that he would not do or omit to do but for the deception.

Hence giving a post-dated cheque by a person who has no funds to his credit in the Bank does not amount to an offence of cheating when there is no evidence to show that the person to whom the cheque was given parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would

be dishonoured. The dispute in such a case is of a civil nature. 173 Ind. Cas. 14 (1), relied on.

Cr. R. reported by the Sessions Judge, Amritsar, dated June 5, 1939.

Facts.—The complainant Ganesh Dass bought a motor lorry from the accused, Mr. R. S. Ratra which was admittedly returned. It appears that the complainant had paid some money in advance to the accused and disputes arose as to the complainant's right to take back the amount so paid in advance after the lorry had been returned. According to the complainant he had paid Rs. 560 on different dates and the accused promised to return this whole amount in instalments and issued a cheque for Rs. 100 on the Punjab National Bank in payment of the first instalment. As the cheque was dishonoured by the Bank the complainant lodged a complaint of cheating against the accused, who brought a cross-complaint of theft against the complainant for removing certain parts of the lorry in question. Both the complaints were lodged on the same day and the Magistrate has framed a charge of cheating under s. 420, I. P. C., against Mr. Ratra and has charged Ganesh Dass with committing criminal breach of trust under s. 406, I. P. C. The position thus is that on the complaint of a person, who is himself charged with committing criminal breach of trust for removal of lorry parts on the complaint of the accused, a charge of cheating has been framed against the latter for issuing a false cheque in payment of money already received by him. In the present petition we are concerned with the complaint of cheating only, and for the sake of argument I will assume that all the allegations made by Ganesh Dass are correct, although Mr. Ratra by no means admits them to be so.

The complaint is divided into five paragraphs. Paragraph 1 states that a sum of Rs. 560 was due from the accused to the complainant on account of money paid in advance for purchase of the motor lorry. Paragraph 2 recites that out of Rs. 560 the accused gave a cheque to the complainant for Rs. 100 on November 10, 1938, on the Punjab National Bank. In para. 3 it is stated that the cheque was dishonoured by the Bank as the complainant had no funds to his credit. Paragraph 4 states that the accused cheated the complainant by knowingly issuing a false cheque in payment of his debt. Paragraph 5 refers to a notice dated November 9, 1938 received by the

complainant from the accused in which the accused is alleged to have falsely stated that the cheque was post-dated. While giving evidence in Court, the complainant gave details of the different amounts which he paid to the accused, and he referred to certain receipts which had been given to him by the accused. It would appear from the complainant's evidence that he entered into two separate transactions regarding two different lorries. The first transaction took place on June 25, 1938, but it fell through and was replaced by the second transaction which is dated August 26, 1938 and relates to a different lorry. According to the terms of the agreement of sale, the seller was to remain owner of the lorry so long as the price was not paid in full. There is a difference between the parties as to whether the complainant himself returned the lorry or the accused seized the lorry and brought it back by force.

Report.—The accused's case seems to be that he gave the cheque for Rs. 100 to the accused on the distinct promise that he would replace the missing parts of the lorry and that as he failed to do this he stopped payment of the cheque. The full nature of the dispute between the parties and the question whether the accused removed any parts of the lorry or not, are the subject-matter of the accused's complaint, and it is unnecessary for the purpose of this petition to go into that dispute. The accused's grievance is that on the allegations contained in the complaint and in the evidence of the complainant no case of cheating is disclosed against him and the Magistrate was not justified in framing a charge against him. He therefore applies that I should move the High Court to quash the charge in the exercise of its revisional jurisdiction and to discharge him.

The question is whether the facts alleged by the complainant disclose a *prima facie* case of cheating or not. In considering this question I feel that I should refrain from saying anything regarding the merits of the dispute between the parties as this might prejudice either of them in the cross-case or in the present case, if it is allowed to proceed or any civil case that might be brought later. I would therefore confine myself as far as possible to admitted facts. It is common ground that the cheque for Rs. 100 was issued by the accused after the lorry had been returned by the complainant and according to the complainant the payment was made in part refund of the price

which he had paid in advance. The cheque is dated November 10, 1938 and it must have been post-dated because reference is made to it in the notice dated November 9, 1938 which the complainant received from the accused. The accused's statement is that he wrote the cheque on November 2; and the notice mentions that as the removed parts had not been replaced as promised, the payment of the cheque had been stopped. On the complainant's own showing the cheque was given to him in part payment of money already advanced by him and not in consideration of anything done or which he refrained from doing at the time when the cheque was issued. It was pointed out in *Chidambaram Chettiar v. Shanmugham Pillai* (1), that:

"In the offence of cheating there are two elements—deception and dishonest inducement to do or omit to do something. Mere dishonesty is not a criminal offence. To establish an offence of cheating, the complainant would have to show not only that he was induced to do or omit to do a certain act but that this induced commission or omission on his part caused or was likely to cause him some harm or damage in body, mind, reputation or property, which are presumed to be the four cardinal assets of humanity. It was held therefore that a post-dated cheque in payment of goods already received is a mere promise to pay on a future date and a broken promise is not a criminal offence, though it may amount in certain business relations to discreditable behaviour".

In framing the charge against the accused, the Magistrate seems to have assumed that the giving of a cheque in lieu of money due with the knowledge that the drawer had no funds in Bank amounts to an offence of cheating. But this is not a correct view of the law. The essence of the offence consists in fraudulently or dishonestly inducing the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally inducing the person so deceived to do or omit to do anything that he would not do or omit if he were not so deceived. I would assume for the sake of argument that as the accused admits that he had no funds to his credit in the Bank he intended to deceive the complainant by falsely inducing in him the belief that the cheque would be honoured but deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or omit to do anything that he would not do

(1) A I R 1938 Mad. 129; 173 Ind. Cas. 14; 39 Cr. L J 261; (1937) 2 M L J 878; (1937) M W N 999; 46 L W L W 629; 10 R M 512.

or omit to do but for the deception. In the present case there is not a word in the written complaint or in his evidence in Court to show that the complainant parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured.

The Magistrate does not seem to have applied his mind at all to the legal aspect of the case. He probably thought it advisable to decide the two cases together and it seems to me that he framed a charge against the accused for no other reason than this that he had framed a charge against the complainant in the cross-case. In my opinion, on the facts disclosed by the complainant the wrong done to him is a purely civil wrong and no case of cheating is made out. The Public Prosecutor agrees in this view and he does not support the charge. I therefore submit the record to the High Court with the recommendation that the charge against the accused be quashed and that he should be discharged. The record of the cross-case is also forwarded as a connected file.

Mr. *Qabul Chand*, for the Petitioner.

Mr. *Mohammad Monir*, Assistant Advocate-General, for the Respondent.

Order.—On the facts as narrated in the order of reference made by the learned Sessions Judge, Amritsar, it appears to me that the dispute is more or less of a civil nature and therefore can best be decided by a Civil Court. I accordingly accept the recommendation made by the learned Sessions Judge and direct that the petitioner be discharged. The learned Assistant to the Advocate-General does not object to the above order.

s.

Reference accepted.

CALCUTTA HIGH COURT
Criminal Reference No. 75 and
Criminal Revision No. 526 of 1939
June 9, 1939

S. K. GHOSH, J.

EMPEROR—PROSECUTOR

versus

BANDE ALI SHEIKH AND OTHERS—ACCUSED
Penal Code (Act XLV of 1860), s. 379—Land attached under s. 88, Criminal Procedure Code (Act V of 1898)—Person removing crop from it is guilty under s. 379.

Where land is attached under s. 88, Criminal P. C., and actual possession is taken by posting a constable on the spot, a person removing standing crop from such land is guilty under s. 379, I. P. C. *Queen-Empress v. Abayya* (1), distinguished.

Messrs. *Santosh, K. Basu and Jyotish Ch. Pal*, for the Petitioners.

Mr. *Anil Chandra Roy Chowdhury*, for the Crown.

Order.—Eleven persons were convicted under ss. 379 and 188, I. P. C., and each of them sentenced to pay a fine of Rs. 40, in default to undergo rigorous imprisonment for seven weeks. These persons then petitioned to the Sessions Judge against conviction. The learned Judge rejected the petition except with regard to four of the petitioners, namely Bande Ali Sheikh, Derajtulla Sheikh, Asimuddin Sheikh and Ajer Sheikh. As regards them the learned Judge has made a reference recommending that they should be acquitted of the charges in respect of which they have been convicted on the ground that they were not parties to the proceedings under s. 145, Criminal P. C., out of which the prosecutions arose. For the reasons stated by the learned Judge I accept the reference and direct that these persons be acquitted of the charges under ss. 379 and 188, I. P. C. The fines, if paid, should be refunded.

As regards the remaining seven petitioners the question is whether the convictions and sentences passed thereunder should be maintained. It appears that on account of a dispute regarding paddy growing on a plot of land the Sub-Divisional Magistrate of Kustia instituted proceedings under s. 145, Criminal P. C., and attached the land in dispute describing it by its *touzi* number and mentioning "2 annas 6 pies portion." This however causes no difficulty because it is admitted that this is a separate portion and there is no dispute as to the identity of the land attached. Subsequently, it is said, the accused party entered upon the land and reaped and took away the standing crops therefrom and thereby disobeyed the order of attachment. In these circumstances they have been convicted as mentioned above. It is contended first that the proceedings under s. 145, Criminal P. C., were not validly instituted because the land is in the joint possession of the parties. As a matter of fact it was not found that the land was in the joint possession of the parties but the question is immaterial,

having regard to the stage at which the order of attachment was issued. There was a dispute likely to cause a breach of the peace concerning the land and therefore the first condition of instituting a proceeding as under sub-s. (1) of s. 145, Criminal P. C., was fulfilled. Thereafter under sub-s. (4) the Magistrate was to enquire as to possession and it is under the second proviso to that sub-section—the Magistrate having considered that it was a case of emergency—that he was empowered to attach the subject-matter of dispute pending his decision under that section. This is what was done in this case and therefore the objection that is now raised is of no avail.

The next contention is that the petitioners could not properly be convicted under s. 379, I. P. C., though they might be convicted under s. 424, I. P. C. This is on the authority of the case reported in *Queen-Empress v. Abbaya* (1). That however, was a case of attachment by the Civil Court and it was pointed out that the possession remained with the owner, only he was forbidden to alienate or charge the crops. It was also pointed out that where that was not the case theft could be committed by the owner of crops under attachment removing them. In the present case as pointed out by the learned Judge the attachment was under s. 88, Criminal P. C., and actual possession was taken which was evidenced by the fact that there was a constable posted at the spot and while he was there the crops were taken away. The argument that standing crops were not attached but only the land was attached is of no avail as the dispute was about the standing crops and land must be taken here to include the crops. It seems to me therefore that the conviction of the seven petitioners is correct. The Rule is therefore discharged.

s.

Rule discharged.

(1) 22 M:151; 8 M:L J 259.

MADRAS HIGH COURTCriminal Revision Case No. 595 and
Petition No. 566 of 1938

November 30, 1938

LAKSHMANA RAO, J.

MANDAVALLI SATYANARAYANA-
MURTHI—PETITIONER

versus

KOTHA MANIKYALA RAO—RESPONDENT
Penal Code (Act XLV of 1860), s. 405—Conviction of partner for breach of trust.

Section 405, I. P. C., applies to partners and a partner can be convicted of criminal breach of trust. 136 Ind. Cas. 493 (2), relied on, 145 Ind. Cas. 416 (1), not followed.

Facts.—The petitioner and respondent were partners and the petitioner was the capitalist partner and the accused was the managing partner who managed the business, kept the cash book, maintained accounts and was in charge of the cash. Suspicions having arisen of the respondent having misappropriated partnership funds the accounts were examined and the complaint was filed in respect of several items. The trial Court framed a charge against the respondent in respect of three items. The defence of the respondent was that ss. 403 to 409, I. P. C. are not intended to apply to partners and the decision in *Bhupendra Nath v. Girdhari Lal* (1), was cited in support of it. As against it, the decision in *Jagannath v. Emperor* (2), was cited. The trial Court relied on *Bhupendra Nath v. Girdhari Lal* (1) and acquitted the accused under s. 258 (1), Criminal P. C.

Mr. V. Subramaniam, for the Petitioner.

Mr. P. Satyanarayana Rao, for the Respondent.

The Public Prosecutor, for the Crown.

Order.—The view of the Joint Magistrate that a partner cannot be convicted of criminal breach of trust under any circumstances is erroneous and the order of acquittal cannot be sustained. It is, therefore, set aside and there will be a re-trial in accordance with law by such other Magistrate as the District Magistrate may direct.

N.S.

Order set aside.

(1) A I R 1933 Cal. 582; 145 Ind. Cas. 416; (1933) Cr. Cas. 953; 34 Cr. L J 958; 60 C 1316; 37 C W N 982; 6 R O 106.

(2) A I R 1932 Bom. 57; 136 Ind. Cas. 493; (1932) Cr. Cas. 81; 33 Cr. L J 317; 33 Bom. L R 1518; Ind. Rul. (1932) Bom. 189.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 228
of 1939

October 4, 1939

DAVIS, J. C. AND LOBO, J.
JAMNADAS THAROOMAL—
APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Bombay Municipal Boroughs Act (XVIII of 1925), ss. 80, 81—Individual notice under s. 81 proved—Presumption that notice under s. 80 was properly given—Penal Code (Act XLV of 1860), s. 186—Duty of prosecution—Evidence Act (I of 1872), s. 114—Applicability to criminal cases.

If it is proved, that individual notice was given under s. 81, Bom. Municipal Boroughs Act the presumption as to official or legal acts under s. 114, Evi. Act, should be raised and it should be presumed that public notice was properly given of the assessment list, under s. 80, and that all formalities required for the proper assessment of the tax were followed by the Municipality. *Municipality of Sholapur v. Sholapur Spinning and Weaving Co., Ltd.* (1), relied on.

The prosecution have to prove their case when they ask that a person should be convicted for the obstruction of a public servant in the discharge of his public functions. They must show that a public servant was discharging public duties imposed upon him by law. 146 Ind. Cas. 43 (2) and *Queen-Empress v. Dalip* (3), relied on.

Section 114, Evi. Act applies not only to civil suits but also to criminal cases.

Cr. R. App. to revise the judgment of the Resident Magistrate, Larkana, dated June 5, 1939

Mr. Kishinchand J. Bijlani, for the Applicant.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, J. C.—This an application in revision against the order of the Resident Magistrate, Larkana, in which he fined the applicant Rs. 40 for an offence under s. 186, I. P. C., in that he obstructed a public servant, that is to say a servant of the Larkana Municipality, in the discharge of his public functions as such, that is, in the collection of drainage tax. This revision application has been argued before us on two points; *firstly*, it was said that it was not proved that the tax was lawfully imposed by the Municipality, in other words that in this particular case there was no public notice of the assessment list within the meaning of s. 80, Bom. Municipal Boroughs Act of 1925, but as the learned Magistrate clearly points out, even actual individual notices to the applicant were issued under s. 81 of the Act, which are Exs. G and H on the record and it appears

to us that if as it is clearly proved, individual notice was given under s. 81 the presumption as to official or legal acts which may be raised under s. 114, Evi. Act, should be here raised and particularly as there was oral evidence on behalf of the Municipality to the effect that the public notice of the assessment list under s. 80 had been given. Reference may be made to the case in *Municipality of Sholapur v. Sholapur Spinning and Weaving Co. Ltd.* (1), which applied the presumption under s. 114, Evi. Act to the proceedings of the Municipality. It is true that that judgment relates to a civil case, but it is news to us, as the learned Advocate says, that s. 114, Evi. Act, applies only to civil and not to criminal cases. In fact the first illustration to s. 114, Evi. Act, applies to a criminal case. We think therefore that the first objection has failed and it must be held proved that public notice was properly given of the assessment list, and that all formalities required for the proper assessment of the tax were followed by the Municipality.

The second objection taken was that the Municipal servant who collected the tax and who was obstructed in the discharge of his public functions was not an officer of the Municipality within the meaning of s. 105 (2), Bom. Municipal Boroughs Act; but this is an objection taken for the first time in revision, although, of course, the prosecution have to prove their case when they ask that a person should be convicted for the obstruction of a public servant in the discharge of his public functions. They must show that a public servant was discharging public duties imposed upon him by law. This is the view taken by this Court in *Emperor v. Bhopo* (2), which followed the Allahabad case in *Queen-Empress v. Dalip* (3). But there is nothing whatever upon the record to show that this complainant who was a servant of the Larkana Municipality entrusted with the duty of collecting this drainage tax was not an officer of the Municipality within the meaning of s. 105 (2). It was not suggested to him in his cross-examination that he was not, and the case proceeded finally to judgment upon the assumption that he was. Again, we think, there is every justification in this case for the application of s. 114, Evi. Act, and for presuming, in this case, that the official act was regularly performed and

(1) 20 B 732.

(2) 27 S L R 209; 146 Ind. Cas. 43; A I R 1933 Sind 174; (1933) Cr. Cas. 538; 34 Cr. L J 1147; 6 R S 53.

(3) 18 A 246; A W N 1896, 48.

that this Municipal servant was an officer of the Municipality properly entrusted with the collection of this drainage tax within the meaning of s. 105 (2). We see therefore no reason to interfere in revision and dismiss this application accordingly.

s. *Application dismissed.*

PATNA HIGH COURT

Criminal Revision Application No. 670
of 1939

February 1, 1940

FAZL ALI AND MEREDITH, JJ.

SAGUNI MISSIR—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 211—Petition to Assistant Superintendent of Police charging certain persons with commission of cognizable offence—Inquiry by Sub-Inspector in charge of thana—Case found maliciously false—Offence under s. 211, if committed—Magistrate taking cognizance of offence under s. 211—Subsequent protest petition by accused rejected—Procedure, if proper.

Where upon a petition by the accused to the Assistant Superintendent of Police charging certain persons of commission of a cognizable offence, he directs an enquiry and having received a report from the Sub-Inspector in charge of the thana that the case was maliciously false makes a complaint against the accused for prosecuting him under s. 211, I. P. C., the complaint is proper and an offence is committed even though the offence complained of was enquired into by the Sub-Inspector. A cognizable offence can be enquired into either by the Police Officer in charge of the Police Station or by any officer to whom he was subordinate and within whose jurisdiction the offence was said to have been committed. The Assistant Superintendent of Police having taken action on the petition and directed an enquiry, was in a position to get the offender punished.

Where after the Magistrate has taken cognizance of the offence upon such complaint the accused files a protest petition stating that he is ready to prove the case set up by him with a prayer that the matter may be enquired into by any Magistrate before any order is passed on the Police report and the petition is rejected by the Magistrate on the ground that as he had already taken cognizance of the offence it was too late to modify that order, the procedure followed by the Magistrate is proper one. 152 Ind. Cas. 847 (2) (1), relied on.

Or. R. App. from an order of the Additional Sessions Judge of Patna, dated November 6, 1939.

Syed Ali Khan, for the Petitioner.

Mr. Mehdi Imam for the Assistant Government-Advocate and Mr. K. K. Banarji, for the Opposite Party.

Fazl Ali, J.—This is an application under ss. 435 and 439 of the Criminal P. C. by one Saguni Missir, who has been convicted under ss. 211 of the I. P. C. and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 50.

It appears that for some time past a dispute has been going between the petitioner and one Jamuna Jha with regard to a temple situated in Patna City in front of the petitioner's house. On May 17, 1939, one Mathura, who is said to be a friend of Jamuna Jha, brought a case under s. 324 against Chuni Kahar and other persons who, according to the prosecution, belonged to the party of the petitioner. Chuni Kahar and others were at first released on bail, but subsequently their bail bonds were cancelled on June 27, 1939. On that very day the petitioner lodged a *saneha* before the Assistant Sub-Inspector of Police at Khajekalan Police Station in which it is recorded that four persons, namely, Jagmohan, Mathura, Parmeshwar and Khapta Kahar, had abused him in front of his house. On June 28, the petitioner went with his *mukhtear* and filed a petition before the Assistant Superintendent of Police to the effect that eight persons including the four who had been mentioned in the *saneha* had come on the evening of June 27, to the temple which was the subject of dispute between him and Jamuna and others, had the lock of its entrance door broken and removed one *mukat* (crown) from the idol installed in the temple and some other articles of worship, and also threatened to break his limbs if he intervened. The prayer which was made in the petition was that the Assistant Superintendent of Police "may be pleased to depute some unconcerned responsible officer to institute a case and make an enquiry at the spot, as the petitioner is ready to prove his case."

The Assistant Superintendent of Police thereupon directed an enquiry and ultimately the Sub-Inspector in charge of the thana reported that the case was maliciously false. Upon this the Assistant Superintendent of Police made a complaint to the Sub-Divisional Officer for prosecuting the petitioner under s. 211 of the I. P. C. on June 12. On that very day the Sub-Divisional Officer recorded the following order:

"A complaint under s. 211 of the I. P. C. received. Cognizance taken. Issue warrant of arrest bailable for Rs. 500 against the accused for 27th."

It appears that on the same day the petitioner filed a protest petition before the Sub-Divisional Officer in which, after

briefly narrating the incidents regarding which he had filed a petition before the Assistant Superintendent of Police and stating that he was ready to prove the case, he prayed that

"the report of the Police be put up and the matter may be enquired into by any Magistrate before any order is passed on the report".

The Magistrate directed this complaint to be put up with connected papers, on the next day, and on that day he rejected the petition stating that he had already passed final orders upon the complainant of the Assistant Superintendent of Police before the petition was filed, and it was too late now to modify that order. The learned Sub-Divisional Officer further remarked that the petitioner would have a chance of proving his case in the proceeding already instituted. After that the Sub-Divisional Officer proceeded to try the petitioner and convicted him under s. 211 of the I. P. O. The petitioner appealed to the Sessions Judge, but his appeal was dismissed.

Both the Courts below have concurrently found that the allegations made by the petitioner in his petition to the Assistant Superintendent of Police were maliciously false and they have given good reasons in support of their finding. The only question which therefore arises upon this application is whether the conviction of the petitioner is vitiated by any error of law.

The first point of law raised by the learned Advocate appearing for the petitioner is that as the Assistant Superintendent of Police himself neither could nor did enquire into the case, no offence under s. 211 of the I. P. O. was committed merely by reason of the fact that the petition, dated June 28, was filed before him. It is not suggested that the petition made on that day did not disclose a cognizable offence, but it is contended that only the Sub-Inspector in charge of the Police Station could enquire into that offence and therefore though an offence under s. 211 might have been committed if an information had been lodged before the Sub-Inspector, no such offence has been committed, because the petitioner approached the Assistant Superintendent of Police. In my opinion the contention is not sound. The offence being a cognizable one, it could be enquired into either by the Police Officer in charge of the Police Station or by any officer to whom he was subordinate and within whose jurisdiction the offence was said to have been committed. The Assistant Superintendent of Police did take action on this petition and directed an

enquiry, and it cannot be said that he was not in a position to get the offender punished. It also appears on the evidence in the case that a regular Police case was instituted upon the petitioner's application to the Assistant Superintendent of Police and the persons named as accused in that petition were arrested and subsequently released on bail. Thus, the first contention raised on behalf of the petitioner must fail.

The second contention is that the petitioner having filed a protest petition, which amounted to be complaint before the Magistrate, the latter had no jurisdiction to order his prosecution without disposing of his complaint. Both the Courts below have, however, pointed out that the protest petition was filed after the Magistrate had taken cognizance of the case under s. 211 of the I. P. O. and therefore the procedure of the Magistrate was not open to any objection. This view is fully supported by the decision of this Court in *Daroga Mahto v. The King-Emperor* (1). In my opinion there is no ground for interfering with the conviction of the petitioner, and in view of the fact that the petitioner has in this false case implicated not only Jamuna with whom he had a dispute but also most of the persons who had figured as prosecution witnesses in the criminal case brought by Mathura against Chuni Kahar and others, I consider that the sentence which has been passed on him is by no means severe.

I would, therefore, dismiss this application.

Meredith, J.—I agree.

s. *Application dismissed.*

(1) 13 Pat. 789; 152 Ind. Cas. 847 (2); A I R 1934 Pat. 573; 7 R P 236; 15 P L T 756; 36 Cr. L J 200.

CALCUTTA HIGH COURT

Criminal Revision No. 540 of 1939

July 27, 1939

McNAIR AND KHUNDKAR, J.J.

KRISHNA KAHAR—ACCUSED—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 162—Statements by witnesses to investigating officer at time of identification of accused—Admissibility—Evidence Act (I of 1872), s. 118—Infant witness—His competency, if must be tested before his examination.

The statements made by prosecution witnesses, to the investigating officer at the time when they

picked out the accused as the person who had committed the offence are hit by the prohibition contained in s. 162, Criminal P. O., and are inadmissible. 158 Ind. Cas. 843 (1), 84 Ind. Cas. 451 (2) and 92 Ind. Cas. 439 (3), relied on.

Section 118, Evi. Act, vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. This discretion must be exercised in a judicial manner. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of s. 118, Evi. Act. 20 Ind. Cas. 741 (b), relied on. *Sheikh Fakir v. Emperor* (4), not followed.

Mr. Anil Chandra Roy Chaudhury, for the Petitioner.

Mr. Lalit Mohan Sanyal, for the Crown.

Khundkar, J.—This is a rule calling upon the District Magistrate of the 24-Parganas to show cause why the conviction of and sentence passed upon the petitioner should not be set aside. The petitioner was convicted under s. 379, I. P. O., for having stolen a necklace from a small girl, who is prosecution witness No. 1. An appeal by the petitioner against his conviction was dismissed by a First Class Magistrate. The rule is confined to three grounds which are as follows: (1) that the trial has been vitiated by the admission of inadmissible evidence, namely, the identification, before the investigating officer which forms the main basis of the judgments of both the Courts; (2) for that the trial is vitiated by the admission of testimony on oath or otherwise of little children who themselves admitted that they did not know the difference between truth and falsehood; (3) for that in view of the age and antecedents of the petitioner the sentence is much too severe. The case for the prosecution may be briefly stated:

On November 10, 1938, at about 3 p. m., two children, P. W. No. 1, Amina Dassi, a girl of 5, and her cousin Amia, a boy of 7, were returning home after having purchased some sweets at a shop in the village. As they were passing along the side of a tank, the accused suddenly appeared and snatched away a gold necklace from the neck of P. W. No. 1. The prosecution alleged that both the children recognized the accused at this time and also when he was running away. The theft was witnessed also by P. W. No. 4, who chased the accused but failed to catch him. It is further alleged that another witness, P. W. No. 7, saw P. W. No. 4 in the act of chasing the accused. Shortly after the

occurrence P. W. No. 4 and P. W. No. 3 who is the father of P. W. No. 2 and the uncle of P. W. No. 1, came across the petitioner near the Police Station to which they were proceeding for the purpose of lodging an information. They took him to the Police Station and charged him with the offence. His person was searched but the necklace was not found. During the course of the investigation the investigating officer held a test identification parade at which the two children, P. Ws. Nos. 1 and 2, picked out the petitioner from a number of other persons. The argument advanced before us in support of this rule is thus presented: the case for the prosecution rests on the evidence of the two children, P. Ws. Nos. 1 and 2, and of P. W. No. 4. In accepting the evidence of the children the Courts below have relied strongly upon the result of the test identification parade just referred to. It is contended that the evidence of this test identification is inadmissible, and further that the evidence of the children should have been expunged, because they were not competent to testify as witnesses within the meaning of s. 118, Evi. Act. Mr. Roy Chaudhury, on behalf of the petitioner, has argued that if the evidence of the test identification and the testimony which the children bore, are excluded, the evidence which remains is totally insufficient to support the conviction. It is pointed out that the only remaining evidence consists of the testimony of P. W. No. 4 which, according to the prosecution, was corroborated by the testimony of P. W. No. 7.

Now in regard to the test identification parade held by the investigating officer, it is not disputed that it was conducted during the investigation of the case under Chap. XIV, Criminal P. O. It is contended that the statements made by P. Ws. Nos. 1 and 2 to the investigating officer at the time when they picked out the accused as the person who had stolen the necklace are hit by the prohibition contained in s. 162 of the Code. Reference has been made in this connection to a number of cases. In *Krishna Chandra v. Emperor* (1) it has been very clearly laid down that the evidence of a test identification held by the Police in course of investigation, that is to say, a statement expressed or implied, made to the Police by way of identifying the accused is inadmissible in law in view

(1) 39 C W N 488; 158 Ind. Cas. 843; A I R 1935 Cal. 311; (1935) Cr. Cas. 462; 36 Cr. L J 1470; 62 C 918; 8 R O 221.

of the provisions of s. 162, Criminal P. C. In *Harendra Nath v. Emperor* (2) it was held that a number of statements made to the investigating officer by witnesses at a time when they were purporting to identify an accused person by pointing him out were wrongly admitted in evidence. In *Keramat Mandal v. Emperor* (3) it would appear that during the investigation one of the witnesses accompanied the investigating officer to certain places which she pointed out to him. At p. 526* of the report there occurs this observation:

"The statements that were made by the witness to the Police Officer and the fact of pointing out the places to him ought to have been kept back from the jury, as such facts were not brought out in evidence on behalf of the defence as provided by s. 162 of the Code."

Apart from other objections of a general nature to the practice of permitting test identifications to be conducted by Police Officers, we have no doubt that in the facts of the present case the identification of the petitioner by P. Ws. Nos. 1 and 2 before the investigating officer amounted to statements which are rendered inadmissible by the provisions of s. 162 of the Code. The second branch of the contention advanced on behalf of the petitioner relates to the competency of the two children as witnesses. Section 118, Evi. Act is in these terms:

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

This section relates to capacity to give legal testimony, and vests a discretion in the Court to decide whether a person of tender years possesses or lacks such capacity by reason of that person's power of understanding and of giving rational answers to the questions put. Strangely enough in the present case the record of the deposition of prosecution witness No. 1 is followed by a note made by the learned Magistrate which is in these terms:

"The witness is a minor, her answer was a running 'yes' to every question put to her—even to contradictory questions."

If this observation means anything, it certainly indicates that the witness was unable to discriminate between the meanings of many of the questions which she

was called upon to answer. We have just referred to the fact that the section vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. It cannot be disputed that this discretion must be exercised in a judicial manner. In *Sheikh Fakir v. Emperor* (4) the broad proposition was laid down that before a child of tender years is asked any questions bearing on the *res gestae*, the Court should test his capacity to understand and give rational answers, and his capacity to understand the difference between truth and falsehood, and the Judge should form his opinion as to the competency of the witness before his actual examination commenced. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of s. 118, Evi. Act. In our judgment, the true rule has been stated in *Nafar Sheikh v. Emperor* (5). At p. 151* of the report there is a quotation from the judgment in *Wheeler v. United States* (6) which is in these terms:

"The decision of this question (whether the child witness has sufficient intelligence) primarily rests with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial Judge will not be disturbed in review, unless, from that which is preserved, it is clear that it was erroneous."

Immediately after the quotation just repeated there appears in the judgment in *Nafar Sheikh v. Emperor* (5) the following sentence:

"The mere circumstances that the Sessions Judge did not interrogate the witnesses before their examination began, with a view to test their capacity does not, in the view I take of the true effect of s. 118, Evi. Act, invalidate the trial."

But the judgment goes on to hold that the circumstances of the case made it plainly desirable that such a course should have been pursued. It is clear that the learned trial Magistrate's own impression of the witnesses, intelligence was such as to make it incumbent upon him to question her himself for the purpose of ascertaining her power of understanding and of giving rational answers. He has not done so, and

(2) 40 O L J 313; 84 Ind. Cas. 451; A I R 1925 Cal. 161; 26 Or. L J 307.

(3) 42 O L J 524; 92 Ind. Cas. 439; A I R 1926 Cal. 320; 27 Or. L J 263.

* Page of 42 O L J.—[Ed.]

(4) 11 O W N 51; 4 Or. L J 412.

(5) 18 O W N 147; 20 Ind. Cas. 741; A I R 1914 Cal. 276; 14 Or. L J 485; 41 O 408; 18 O L J 552.

(6) 159 U S 523.

* Page of 18 O W N.—[Ed.]

from the note which he has recorded we are left in hesitation and doubt as to whether this child witness had the capacity to depose. In the circumstances stated we are not prepared to say that the evidence of P. W. No. 1 should be admitted and accepted.

There is no observation by the learned Magistrate of a similar nature with regard to the evidence of the other child witness, that is, P. W. No. 2. We have been through the evidence of this witness with great care, and we find that his story virtually is that he recognized the accused from behind when the latter was running away with his back towards the child. It is true that this witness says immediately afterwards that he also recognized the accused when he was snatching away the necklace. We are not prepared to attach much credence to the latter statement because it has the appearance of an afterthought. It should be noted that this witness stated that when the accused was in the act of committing the theft, Hare Krishta, that is, P. W. No. 4, called out "Krista, don't snatch it; don't snatch it." Now this statement is not borne out by the evidence of P. W. No. 4 himself. His testimony is to the effect that he heard the child crying out that the necklace was being snatched away, that he then saw the accused in the act of running away and of thrusting the necklace into the pocket of his garment, and that upon that the witness gave chase. The evidence of P. W. No. 4 is said to be corroborated by the evidence of P. W. No. 7. According to the prosecution the latter saw P. W. No. 4 running after the accused. Upon examining his evidence, however, we find that what he actually stated was "I saw Hare Kristo chasing Kristo (looking like this accused)." It is very clear that P. W. No. 7 cannot be taken to have said that he recognized the accused as the man who was being chased by P. W. No. 4.

Against the credibility of P. W. No. 4, two circumstances have been pointed out. The first is that there are materials on the record, which have not been displaced, showing that this witness and the accused were on terms of enmity. The second is that P. W. No. 4 admitted in his evidence that at the time when he heard the child calling out that Kristo was taking away the necklace, he was on the road behind a bend. Now another witness who was examined on behalf of the prosecution, that is P. W. No. 5, has stated in his

testimony that when he heard the child crying out, he also was around that bend in the road and that the place where the child was crying was not visible from where the witness happened at the time to be.

In view of all these circumstances we are not prepared to say that the evidence of P. W. No. 2 coupled with that of P. W. No. 4 provides that margin of safety which is necessary to a conviction for a criminal offence. The rule is accordingly made absolute. The conviction and sentence passed upon the petitioner are set aside and he will be set at liberty forthwith. If he is on bail, he will be discharged from his bail bond at once.

McNair, J.—I agree.

s.

Rule made absolute.

PATNA HIGH COURT

Appeal from Appellate Decree No. 973
of 1938

February 2, 1940

AGARWALA AND ROWLAND, J.J.

RAM SARUP SAH AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

MUKHI SINGH AND OTHERS—DEFENDANTS
—RESPONDENTS

Bihar Money-lenders Act (III of 1938), ss. 11, 8, 7—Duty of Court under s. 11—Parties not appealing with respect to amount decreed by trial Court as principal and interest—Power of Appellate Court to reduce amount—Rule of Damdupat under s. 7, if applies to period subsequent to institution of suit—Discretion under s. 8 not exercised by lower Appellate Court—High Court, if should exercise it.

Section 11, Bihar Money-lenders Act enjoins a duty on the Court, in the class of cases to which it refers to restrict the amount of interest awarded to a sum not in excess of the principal advanced. The only conditions necessary to attract the operation of that section to an Appellate Court are that there shall be a suit by a money-lender, that the suit shall be in respect of a loan and that the appeal shall arise out of such a suit. When these conditions are satisfied the duty of an Appellate Court is plain that it must give effect to the section. Hence in an appeal even if the parties concerned have not raised a point with respect to the amount decreed by the first Court as principal and interest it is open to the Appellate Court to reduce that amount.

The rule of *Damdupat* introduced by s. 7 of the Bihar Money-lenders Act in respect to a claim for interest for the period preceding the institution of the suit does not apply also to the period subsequent to the institution of the suit.

Where the lower Appellate Court has failed to exercise its statutory discretion under s. 8, in the matter, it is open to the High Court to pass an order in respect to interest subsequent to the date of the institution of the suit.

A. from a decision of the Subordinate Judge at Chapra, dated July 28, 1938.

Messrs. S. K. Husnain and Harnarayan Prasad, for the Appellants.

Messrs. Rajeshwari Prasad and G. K. Mukharji, for the Respondents.

Agarwala. J.—This is an appeal by the plaintiffs from a decision of the Subordinate Judge of Chapra modifying a decision of the Munsif. The facts were as follows: Defendants 1st party executed a mortgage in favour of the plaintiffs on July 21, 1923, to secure redemption of a loan of Rs. 500. The rate of interest prescribed by the bond was 2 per cent. per mensem with six monthly rest. At the date of the institution of the suit, on January 20, 1936, the amount outstanding for principal and interest was Rs. 8,492-2-6. The plaintiff abandoned his claim as to Rs. 4,992-2-6 and sued for a recovery of the remaining Rs. 3,500. Defendants Nos. 4 to 29 were subsequent transferees or mortgagees of the hypothecated property. Defendants Nos. 8, 9 and 15 claimed priority over the plaintiff's mortgage. In 1917, there had been a *zarpeshgi* bond to defendants Nos. 8 and 9 for Rs. 175 and in 1922 another *zarpeshgi* in favour of the same defendants for Rs. 200. On April 7, 1924, defendants Nos. 8 and 9 advanced Rs. 768 to redeem a previous mortgage in favour of one Rambharosa and Ramkalar, the brothers of the present plaintiff. On May 27, 1925, there was a mortgage to defendants Nos. 8 and 9 for Rs. 1,200 to pay off all these previous encumbrances. The claim of defendant No. 15 was that on July 4, 1925, he had advanced Rs. 800 on a mortgage to pay off a previous mortgage of April 7, 1923. The first Court disallowed the claim of defendant No. 15 to priority and as to the claim of defendants Nos. 8 and 9 allowed it only to the extent of Rs. 375, that is to say, in respect of the previous *zarpeshgis* of 1917 and 1922. Against the decision of the first Court an appeal was preferred by defendants Nos. 8, 9 and 15, defendants Nos. 8 and 9 challenging the decision of the trial Court with respect to the sum of Rs. 768 and defendant No. 15 with respect to Rs. 800. The appeal was dismissed so far as the claims of defendants Nos. 8, 9 and 15 to priority were concerned, but the Appellate Court gave effect to s. 11 of the Money-lenders Act, 1938, which prohibits a Court, in a suit brought by a money-lender, in respect of a

loan, to pass a decree for the amount of interest for the period preceding the institution of the suit which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of the loan advanced, that is to say, the plaintiff's claim was reduced to Rs. 500 principal and Rs. 500 interest. The Appellate Court in its judgment made no provision for interest after the date of the institution of the suit up to the date of grace nor for interest subsequent to the date of grace although the trial Court had awarded interest at the bond rate up to the date of grace and interest at 6 per cent. per annum for the later period. The order of the Appellate Court with regard to cost was that the judgment and decree of the lower Court were modified and the "plaintiff's suit decreed modifiedly with costs corresponding to success". The decree that has been drawn up in pursuance of the Appellate Court's judgment has awarded to defendants Nos. 8, 9 and 15 the costs of the appeal based on the amount of reduction in the decretal amount.

In second appeal it is contended on behalf of the plaintiffs-appellant that as there had been no appeal by any of the parties concerned with respect to the amount decreed by the first Court as principal and interest it was not open to the Appellate Court to reduce that amount. Even if the matter were to be decided solely with reference to the provisions of O. XLI, r. 33, of the Civil P. C., I should not be prepared to hold that the power of the Appellate Court to modify the decree with regard to the amount decreed by the trial Court was barred. But in the present case the matter is put beyond controversy by the provisions of s. 11 of the Money-lenders Act. That section enjoins a duty on the Court, in the class of cases to which it refers to restrict the amount of interest awarded to a sum not in excess of the principal advanced. The only conditions necessary to attract the operation of that section to an Appellate Court are that there shall be a suit by a money-lender, that the suit shall be in respect of a loan and that the appeal shall arise out of such a suit. When these conditions are satisfied the duty of an Appellate Court is plain that it must give effect to the section:

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement,"

which is the opening phrase of the section.

I would, therefore, overrule the first objection of the learned Advocate for the plaintiffs-appellant.

With regard to interest from the date of the institution of the suit to the date of grace, the learned Advocate for the plaintiffs-appellant contends that he should be awarded interest at the bond rate as decreed by the trial Court. Section 8 of the Money-lenders Act empowers either the original Court or the Court of Appeal or revision to re-open a transaction between a money-lender and his debtor, to take an account between the parties and to relieve the debtor of all liability in respect of any interest in excess of nine per centum simple per annum in the case of a secured loan and twelve per centum simple per annum in the case of an unsecured loan. The learned Advocate for the respondents contends that this Court should not interfere with the decision of the Court below with regard to the interest subsequent to the date of the institution of the suit inasmuch as that would be interfering with the discretion conferred on the Court by s. 8. There is no indication in the judgment of the Court below, however, that it has exercised any discretion with regard to interest subsequent to the date of the institution of the suit. What does appear from the judgment of the Appellate Court is that it proceeded on the assumption that the rule of *Damdupat* introduced by s. 7 of the Act in respect to a claim for interest for the period preceding the institution of the suit applies also to the period subsequent to the institution of the suit. The language of s. 7 itself, however, is clearly against this view. The language of s. 7 of the Money-lenders Act differs completely from that of s. 6 of the Sonthal Parganas Regulation III of 1872, which prohibits a Court in the Sonthal Parganas from decreeing interest on any loan or debt in excess of the one-fourth of the principal sum if the period be not more than one year, or in excess of the principal of the original debt or loan in other cases. In the Regulation there are no words of limitation as there are in s. 7 of the Money-lenders Act restricting the rule to the period preceding the institution of the suit. The Court of Appeal below having failed to exercise its statutory discretion in the matter, it is open to us to pass an order in respect to interest subsequent to the date of the institution of the suit.

It was suggested by the learned Advocate for the respondent that this was not a case in which we should exercise this discretion in view of the absence of circumstances justifying re-opening of the transaction between the mortgagee and the mortgagor. The terms of the bond, however, themselves invite such interference. It is a secured loan and it may be assumed that the mortgagee was satisfied that the security which he accepted was sufficient to ensure repayment of the debt. In spite of this security the interest which he demanded was 2 per centum per mensem with six monthly rest, which is considerably in excess of the commercial rate even for unsecured loans. In these circumstances, in my opinion, we are justified in exercising the discretion conferred upon the Court by s. 8 and I would, therefore, direct that in the decree that is to be prepared the rate of interest for the period from the date of the institution of the suit till the expiry of the period of grace shall be 12 per centum simple per annum and after the date of grace at 6 per centum per annum simple, on the amount due at the date of grace.

The last point raised by the plaintiffs-appellants is with regard to the decree for costs. With regard to this the order will be that the plaintiffs will have their costs throughout on the amount decreed and the defendants will bear their own costs. The decree of the Appellate Court is set aside and a decree will now be prepared in accordance with rr. 2 and 4 of O. XXXIV, with interest at the rate stated above. Period of grace three months from to-day.

Rowland, J.—I agree.

s.

Decree set aside.

LAHORE HIGH COURT

Civil Revision Petition No. 546 of 1936

March 16, 1937

BHIDE, J.

HASAN DIN—PLAINTIFF—PETITIONER
versus

THE SECRETARY OF STATE FOR INDIA—
DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 6, 7—Petition for leave to sue in forma pauperis—Collector performing functions of Government Pleader under s. 6 forwarding report of Tahsildar that petitioner was pauper—Whether itself evidence in case—Government Pleader opposing application—Jurisdiction of Court to decide matter on evidence.

A report of the Tahsildar that the petitioner who applied for leave to sue *in forma pauperis* was unable to pay the court-fees, forwarded to the Court by the Collector who has been appointed to perform the functions of the Govt. Pleader under r. 6, O. XXXIII, Civil P. C., in not in itself evidence in the case. It is for the Govt. Pleader who appears for the Secretary of State in the case to decide whether to accept the report of the Tahsildar which, was merely forwarded by the Collector, or to oppose the application made by the petitioner. Where he chooses the latter course and the Court after discussing evidence comes to the conclusion that the petitioner is not pauper it has not acted with any material irregularity in the exercise of its jurisdiction.

C. R. P. of the order of the Subordinate Judge, First, Class, Lahore, dated May 21, 1936.

Mr. Mahbub Ilahi, for the Petitioner.

Dewan Ram Lal, The Govt. Advocate, for the Respondent.

Judgment.—This is a petition for revision of the order of Lala Ganga Bishen, Subordinate Judge, 1st Class, dismissing an application for permission to sue *in forma pauperis*.

The learned Subordinate Judge has discussed the evidence of the petitioner and come to the conclusion that he had failed to establish that he was unable to pay the necessary court-fee on the plaint. So far as the finding of fact is concerned there is no ground for interference in revision; but it is alleged on behalf of the petitioner that the Collector had reported that the petitioner was unable to pay the court-fee and, in the circumstances, the Court had no jurisdiction to enter upon any further enquiry in the matter as the defendant in this case was the Secretary of State for India in Council. This objection was not taken in the Court below. But apart from this it does not appear to me to have force. It is true that under O. XXXIII, r. 6, Civil P. C. notice has to be sent to the Govt. Pleader and in the present instance the Collector of the district who has been appointed to perform the functions of the 'Govt. Pleader' under that rule forwarded a report of the Tahsildar to the effect that the petitioner Hassan Din was not in a position to pay court-fee. But this position was apparently not accepted by the Govt. Pleader who appeared on behalf of the Secretary of State for India in Council. The report of the Tahsildar is not in itself evidence in the case as pointed out by the learned Subordinate Judge. It was for the Govt. Pleader who appeared in the case to decide whether to accept the report of the

Tahsildar which was merely forwarded by the Collector, or to oppose the application made by the petitioner. He apparently chose the latter course.

In my opinion, the learned Subordinate Judge cannot be said to have acted with any material irregularity in the exercise of his jurisdiction. I, therefore, dismiss this petition with costs.

s.

Petition dismissed.

PATNA HIGH COURT

Criminal Reference No. 48 of 1939

January 31, 1940

MBREDDITH, J.

In the matter of MADAN KISHORE AND
ANOTHER

Penal Code (Act XLV of 1860), s. 188—Accused having knowledge of order under s. 144, Criminal Procedure Code (Act V of 1898), disobeying it—Irregularity in promulgation of order—Effect—Knowledge of accused of order which he is charged with disobeying must be proved—Essentials for conviction under s. 188—Criminal Procedure Code (Act V of 1898), s. 144 (3)—Scope—Order to general public prohibiting them from doing certain acts "within limits of Nawadah Union Committee," held sufficiently described particular place, within meaning of s. 144 (3).

Even if there has been irregularity in the method of promulgation of the order under s. 144, Criminal P. C., that in itself would not make it *ultra vires*, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it. It is not enough in such cases to prove that the order has been duly promulgated. There must also be positive evidence that the accused had knowledge of the order which he is charged with disobeying. 63 Ind. Cas. 865 (1), 99 Ind. Cas. 36 (2) and 100 Ind. Cas. 830 (3), relied on. [p. 136, col. 2.]

For a conviction under s. 188, I. P. C., there must clearly be something more than mere disobedience of the order. It must also be shown that obstruction, annoyance or injury, danger to human life etc., have been caused or might have been caused. Where there is a finding that the disobedience of the order was risky to the public peace the conviction of the accused under s. 188 is justified. [p. 137, col. 1.]

Sub-s. (3) of s. 144, Criminal P. C., has nothing to do with the nature of the order, but is merely one of the four sub-sections which refer to the manner of promulgation and to the duration of an order under sub-s. (1). [p. 138, col. 1.]

Where an order is passed under s. 144 to the public generally, prohibiting them from doing certain acts "within the limits of Nawadah Union Committee," the order sufficiently describes a particular place within the meaning of s. 144 (3) when the limits of the Union Committee are clearly and specifically defined. 134 Ind. Cas. 1237 (4) and 134 Ind. Cas. 344 (5), not followed, 154 Ind. Cas. 637 (6), referred to, 167 Ind. Cas. 234 (7), followed.

Ref. made by the Additional Sessions Judge at Gaya.

Mr. Sarjoo Prasad, In support of the Reference.

The Assistant Government Advocate, Against the Reference.

Judgment.—This is a reference under s. 438 of the Criminal P. C. by the learned Additional Sessions Judge of Gaya, recommending that the conviction and sentence passed against two persons, under s. 188 of the I. P. C. should be set aside. These two persons, Madan Kishore and Badri Lal, were convicted under s. 188, I. P. C. and sentenced to pay fines of Rs. 25 each, or, in default, to undergo simple imprisonment for one month each in the following circumstances :—

On July 10, 1939, there was a stabbing case in the town of Nawadah as a result of which there was considerable tension between the Hindus and the Mubammadans of the town. The Sub-Divisional Magistrate of Nawadah thereupon promulgated an order under s. 144, Criminal P. C. forbidding the assembly of five or more persons in any public place, street, or thoroughfare within the limits of the Nawadah Union Committee, and forbidding the carrying by any person within those limits of any *lathi* or weapon of offence. This order was promulgated the same day at about 7.45 p. m. by beat of drum and was to remain in force for one week.

On the following morning, July 11, the dead body of the person, who had been stabbed, was carried in procession under police protection for the purpose of cremation. Some distance behind this procession these two persons, Madan Kishore and Badri Lal, were seen going with three other persons, all five being armed with *lathis*. The police challenged them and attempted to arrest them. The other three slipped away, and the two persons, already mentioned, were arrested. They were subsequently charged under s. 188, tried and convicted as already described, upon a complaint in writing made by the Sub-Divisional Magistrate. At the trial the accused pleaded, first, that they were not aware of the order because they had been away at Rajgir when it was promulgated; secondly, they denied that they had carried *lathis* and thirdly, they challenged the validity of the order.

Four points have been mentioned in the letter of reference, in regard to which the learned Judge considers that the Magistrate was wrong; and these four points have

been taken by Mr. Sarjoo Prasad who appears in support of the reference. The first is, that the order under s. 144 was not properly published having regard to the provisions of s. 134, sub-s. (2) of the Criminal P. C. which as appears from the second paragraph of s. 144, applies to orders under that section as well as to orders under s. 133. Section 134 (2) provides that :

"If such order cannot be so served (the reference is to personal service), it shall be notified by proclamation published in such manner as the Local Govt. may by rule direct and a copy thereof shall be stuck-up at such place or places as may be fittest for conveying the information to such person".

In the present case it does not appear that a copy or copies of the order were affixed in public places for the information of the public. It is argued for the Crown that the reference to such sticking up of copies in s. 134 (2) is meant to apply only to cases where the order is directed against individuals and not against the public generally. This argument is based on the fact that the last words of the clause are "to such person", which it is argued, can relate only to cases where the information is to be conveyed to a particular person as opposed to the public frequenting a particular place. There may be some doubt upon this point, and I do not consider it is necessary to decide the question because Mr. Sarjoo Prasad concedes that even if there has been this irregularity in the method of promulgation of the order, that in itself would not make it *ultra vires*, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it. Mr. Sarjoo Prasad has taken this point, he says, chiefly as bearing upon his second point—the question of knowledge; and indeed it is clear that whether necessary or not, affixing copies in conspicuous places would be a desirable means of conveying an order of this nature to the notice of the public who may not all be present in the place when the order is promulgated by beat of drum.

The second point then is, that it is not proved that these two persons actually had any knowledge of the promulgation of the order. Several rulings have been cited in which it has been laid down that it is not enough in such cases to prove that the order has been duly promulgated. There must also be positive evidence that the accused had knowledge of the order which he is charged with disobeying. These cases are *Emperor v. Abdullah* 63

Ind. Cas. 865 (1); *Ramdas v. Emperor* (2) and *Sheikh Abdul v. King-Emperor* (3). There can be no doubt about the correctness of this proposition and it is not challenged. But it is urged that in the present case there is a finding of knowledge and it is based on definite materials. The accused persons led some evidence to show that they were in Rajgir, but the Magistrate did not accept it and has criticised both the witnesses examined on the point. It is clear that he intended to find, even if he did not express himself very clearly, that at the time of promulgation the accused must have been in the town, and he comments on the evidence of the Sub-Inspector, Nawadah, as to how he promulgated the order. This witness stated that he himself promulgated it by beat of drum in all the streets and lanes of the town. The Magistrate remarks that the police in promulgating the notice had moved about the streets of the town in a car which had to move slowly and to halt at places. It is pointed out that evidence of knowledge can rarely be direct evidence, in most cases knowledge can only be proved by circumstantial evidence. The question of knowledge must generally be a matter of inference. As I have said, the Magistrate has not expressed himself very clearly; but I think there can be no doubt that he did mean to make this inference of knowledge from the circumstances, and the circumstances were such that he was entitled to make the inference. The second point, like the first, therefore, fails.

The third point is based on the wording of s. 188, I. P. C. which lays down that :

"Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order, with certain property in his possession or under his management disobeys such direction shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, be punished with simple imprisonment etc. etc. and if such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment etc. etc."

As the section is worded, it is pointed out there must clearly be something more than mere disobedience of the order. It must also be shown that obstruction, annoyance

or injury, danger to human life etc., etc. have been caused or might have been caused, and, it is said, that there is no such finding in the present case. Here again, however, there is a finding, though it might have been more precise. The Magistrate observed that the disobedience on the part of the accused was certainly risky. By this, in my view, he clearly meant risky not to the accused themselves but to the public peace, and the circumstances were such as to justify this finding. There was a clear state of communal tension. One man had been stabbed to death, a curfew order had been considered necessary, and it had been found necessary to forbid the carrying of *lathis*. Many instances come to mind where communal riots have arisen from very small initial causes. In circumstances like these it can hardly be argued that when five persons appear behind a procession of the kind described, armed with *lathis*, each one of them was not besides disobeying the order also a potential menace to peace and a danger to the public. In these circumstances the third point, in my view also fails.

The last contention is based on the wording of s. 144, cl. (3), Criminal P. C. which runs as follows :

"An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place."

Here we are dealing with an order to the public generally; and it is argued that "within the limits of the Nawadah Union Committee" does not sufficiently describe a particular place within the meaning of s. 144 (3). In support of this proposition two Bombay rulings have been cited: *Motilal Gangadhar Kabre v. Emperor* (4), where it was laid down that an order prohibiting the public generally and certain persons named therein from taking part in a procession within the whole of certain municipal limits and all public places within such limits, does not conform to the requirements of s. 144 (3) and is beyond the powers of a Magistrate; and secondly, *D. V. Belvi v. Emperor* (5), where a similar view was taken. To adopt this view, would, I consider, unduly narrow and restrict the operation of s. 144 in a way not contemplated by the Legislature when framing the section. I see no reason why

(1) 63 Ind. Cas. 665; 22 Cr. L J 705.

(2) A I R 1927 Cal. 28; 99 Ind. Cas. 36; 44 O L J 250; 54 O 152; 28 Cr. L J 4.

(3) A I R 1927 Cal. 306; 100 Ind. Cas. 830; 31 O W N 340; 45 O L J 202; 28 Cr. L J 350.

(4) A I R 1931 Bom. 513; 134 Ind. Cas. 1237; 33 Bom. L R 1178; (1931) Cr. Cas. 945; 33 Cr. L J 75; Ind. Rul. (1932) Bom. 21.

(5) A I R 1931 Bom. 325; 134 Ind. Cas. 314; 33 Bom. L R 673; (1931) Cr. Cas. 581; 32 Cr. L J 1144; Ind. Rul. (1931) Bom. 456.

the limits of the Union Committee, if clearly and specifically defined, should not be considered as describing a particular place. The view adopted in those two Bombay rulings was not followed in a later Bombay case *Sorab Shavaksha Batlivala v. Emperor* (6), where it was held that an order directed to the public when frequenting public or private streets in a particular city is sufficiently definite as to place to comply with the requirements of s 144. A Lahore case *Abdul Karim v. The Crown* (7), goes very much further. There it was held that the whole district of Lahore might be considered "a particular place" within the meaning of s. 144 (3), Criminal P. C. Their Lordships further observed that the argument advanced was, in their opinion, based on a mistaken interpretation of sub-s. (3) of s. 144. This subsection, they considered, has nothing to do with the nature of the order, but is merely one of the four sub-sections which refer to the manner of promulgation and to the duration of an order under sub-s. 1. My own views coincide with those of their Lordships of the Lahore High Court, as expressed in that case.

In my opinion there is nothing in any of the four points made in the letter of reference and argued before me, which would justify interference with this conviction. The reference is, therefore, discharged and the convictions will stand.

s. *Reference discharged.*

(6) A I R 1935 Bom. 33; 154 Ind. Cas. 637; 36 Bom. L R 1129; (1935) Or. Cas. 68; 7 R B 359; 36 Or. L J 549.

(7) 17 L 515; 167 Ind. Cas. 284; A I R 1937 Lah. 80; 38 P L R 964; 9 R L 474; 38 Cr. L J 354 (2).

CALCUTTA HIGH COURT

Criminal Jurisdiction

June 15, 1939

NABING RAO, J.

EMPEROR—PROSECUTOR

versus

MAKHAN LAL DUTT AND OTHERS

—RESPONDENTS

Evidence Act (I of 1872), s. 163—Applicability to criminal trials—Signed statements of witnesses to Police made use of by Counsel for accused to contradict witnesses in cross-examination—Entire statements excluding irrelevant portions should go in as evidence.

Section 163, Evi. Act, is applicable to criminal trials as well as to civil actions. Where therefore the Counsel for the accused make use of the signed statements of the witnesses in the Police diary at the cross-examination in order to contradict their evi-

dence at the trial, the entire signed statement of the witness to the Police excluding only such portions as are not relevant to the case should go in as evidence. This would bring on the record those parts of the signed statement which were corroborative of the witness's evidence at the trial. 127 Ind. Cas. 657 (1), followed. 74 Ind. Cas. 261 (2), explained.

In this case however, it was held that in the particular circumstances, the accused could not be compelled to give as evidence the signed statement in question as there was no formal notice or requisition from the accused calling for the document and while producing the Police diary the Govt. Counsel said that he would not rely on the strict technicality meaning thereby that he would not require the Counsel for the accused to put the document in evidence.

Mr. A. K. Basu, (Govt. Counsel) and Mr. Shekar Kumar Basu, for the Crown.

Messrs. M. N. Banerjee and Dhiren De, for the Accused (Makhan Lal Dutt).

Messrs. A. C. Mukherjee, M. Banerjee and Santosh Kumar Basu, for other Accused.

Judgment.—In the course of the examination of the prosecution witness Rati-pati Banerjee, P. W. No. 2 in this Court, a question has been raised whether the signed statement made by him to the Investigating Police Officer on January 17, 1939, comes within the scope of s. 163, Evi. Act, and whether the accused can be required to give it as evidence in the circumstances mentioned in that section. It may be explained at the outset that s. 162, Criminal P. O., has no application to the case because the Code does not apply to the Police in the town of Calcutta unless expressly made applicable to them, and there has been no notification making the section so applicable (see s. 1, sub-s. 2 of the Code).

The circumstances in which the question has arisen are briefly these: After the witness had been examined-in-chief and while he was under cross-examination by Mr. Banerjee representing accused Nos. 6 and 7, learned Counsel asked him whether he had made certain statements to the Police, evidently intending to use the witness's statements during the investigation for the purpose of contradicting his evidence at the trial. One of the statements said to have been made by him during the investigation was specifically put to him, namely that he heard on April 12, 1937 that Haripado had already died. This was put to him after Counsel had inspected the Police diary produced by the learned Govt. Counsel. Later, Mr. S. K. Basu, in cross-examination on behalf of accused Nos. 2, 4 and 5, put to the witness another statement said to have been made by him before the Police, the statement, namely that on April 10, 1937 the witness had a call through Dhananjoy

Naskar of Sahebpur to examine Haripado Sardar. This also was done after learned Counsel had inspected the Police diary. The two isolated statements put to the witness on behalf of accused Nos. 2, 4, 5, 6 and 7 happen to be part of the witness's signed statement to the Police, but the signed statement contains other statements not yet admitted in evidence. It is contended by the learned Govt. Counsel that by virtue of s. 163, Evi. Act, he is now entitled to require Counsel on behalf of these accused persons to give the whole of the signed statement as evidence, omitting only those portions which are not relevant. Section 163 provides:

"When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so".

So far as the legal point is concerned, I think I am bound by the decision in *Government of Bengal v. Santiram Mandal* (1), in which it was held that s. 163, Evi. Act, is applicable to criminal trials as well as to civil actions. I see no conflict between the decision in that case and the decision in the earlier case in *Suresh Chandra Ghose v. Emperor*, 24 Cr L J 757 (2), in which it was held that an accused person has the right to see the statements recorded by the Investigating Police under s. 47-A, Calcutta Suburban Police Act, and use them for purposes of contradiction in accordance with s. 145, Evi. Act. Ordinarily therefore I would have ruled in the present case that the entire signed statement of the witness to the Police excluding only such portions as are not relevant to the case should go in as evidence. This would have brought on the record those parts of the signed statement which were corroborative of the witness's evidence at the trial, in addition to those brought on the record by Counsel for the accused as being contradictory of that evidence, but no others. For example, the signed statement contains an expression of the witness's opinion as to the age of the deceased Haripado Sardar. The witness not having been asked to express any opinion on this point at the trial his previous expression of opinion to the Police would not be admissible under any section of the Evi Act. It is not corroborative, because there is nothing to corroborate.

(1) 58 C 96; 127 Ind. Cas. 657; A I R 1930 Cal. 370; (1930) Cr. Cas. 634; 32 Cr. L J 10; Ind. Rul (1930) Cal. 865.

(2) 24 Cr. L J 757; 74 Ind. Cas. 261; A I R 1924 Cal. 542.

In other words it should be treated as irrelevant. It is not contended by the learned Govt. Counsel that s. 163, Evi. Act, attracts even those parts of the document which are not relevant to the case.

I have said that ordinarily I should have taken the course indicated above, but in this particular instance there has been some confusion. In the first place there was no formal notice or requisition from the accused calling for the document. Even if this defect be ignored on the ground that there was what was understood to be a notice or requisition, a further fact has to be considered. The typed transcript of the Court's proceedings of June 14 shows (*vide* portion below Ques. 135) that when the learned Govt. Counsel produced the Police diary, he indicated that although Counsel for the accused were not entitled to look at the diary, nevertheless, where, as on this particular occasion, a direct contradiction was sought to be made out he would not "rely on the strict technicality." This may have given the impression, although the impression was perhaps unintended, that he would not require Counsel for the accused to put in the document as evidence. In view of these special circumstances I rule that the accused cannot in this particular instance be compelled to give as evidence the signed statement in question, but this is, of course, without prejudice to the Gov. Counsel's right to re-examine the witness in accordance with law.

S.

Order accordingly.

PATNA HIGH COURT

Criminal Revision No. 699 of 1939

February 2, 1940

DAVLE, J.

BHUNESHWAR PRASAD AND OTHERS—
PETITIONERS

versus

ROMMOY ROY—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 144, 145—No real dispute as to possession—Imminent danger of breach of peace—Order under s. 144 is proper—Order under s. 145, when becomes necessary.

It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute requires to be decided on evidence that resort to s. 145, Criminal P. C., becomes necessary; and for this purpose the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. Where there is no such real dispute, orders under s. 144 are not improper. There may even be occasions where an order is first

appropriately passed under s. 144 and the proceeding is afterwards converted into one under s. 145 in order to pass an even more appropriate and permanent order.

Where A is in possession of the land and continuing it and B is trying to take the possession of the same land and the Police report that there is imminent danger of a breach of the peace an order under s. 144 is proper one as there is no real dispute about possession at all. 68 Ind. Cas. 149 (1) and 115 Ind. Cas. 683 (2), distinguished.

Cr. R. from an order of the Deputy Commissioner, Hazaribagh, dated October 30, 1939.

Sir Sultan Ahmad and Mr. Brahmadeva Narain, for the Petitioners.

Sir M. N. Mukherji and Mr. S. C. Mazumdar, for the Opposite Party.

Judgment.—This is an application in revision against an order passed in proceedings under s. 144 of the Criminal P. C. The original order which was passed *ex parte* against the petitioners is dated August 24, 1939. The petitioners thereupon appeared before the Magistrate and asked him to rescind the order. This application was refused by the Magistrate on October 10, 1939, though the opportunity was seized to make some small amendments in the order. Against this order of October 10, the Deputy Commissioner was moved in revision, and on the 30th of that month he rejected that petition. The petitioners applied to this Court on December 18 in revision against the order of the Sub-Divisional Magistrate which the Deputy Commissioner had declined to interfere with.

It appears that lot Itkhori was a *khorphosh jagir* under the Ramgarh Raj; and it is stated on behalf of the petitioners, representing some servants and some tenants of the Ramgarh Raj, that such grants are resumable on failure of the male line of the grantee. The last holder of the Itkhori lot *khorphosh* was Degnarain Sahi, and it is common ground that he died on July 18, last. In 1934-36 the opposite party before me, representing one Buto Kristo Roy, purchased six villages of the lot from Degnarain Sahi, and it is common ground that the purchaser came into actual possession. The case of the opposite party is that Degnarain has left a son. The case of the petitioners, on the other hand, is that Degnarain left no issue and that consequently on his death the Ramgarh Raj became entitled to resume possession of the *jagir*, and that it succeeded in doing so peacefully by

publishing notices under s. 51 of the Chota Nagpur Tenancy Act. The order of the Sub-Divisional Magistrate as finally settled by him concerns, I understand, these six villages out of the *jagir*. About a month after the death of Dagnarain, Buto Kristo Roy began to move the authorities against the interference of the Ramgarh Raj with his possession. Police Officers were deputed to Itkhori to see that the peace was preserved. The Magistrate himself appears to have been at Itkhori on August 24, when he directed the Senior Police Officer deputed there to report clearly "in respect of which properties the Ramgarh Raj people wanted to exercise acts of possession and who has been in possession of these properties". The result was a Police report that there was an imminent danger of a breach of the peace as the employees of the Ramgarh Raj would "certainly do some overt acts to take possession over the villages" which had been coming on in the possession of Buto Kristo Roy. In his order of October 10, the learned Sub-Divisional Magistrate says:

"In fact, at the time of arguments it was clearly stated on behalf of the second party (that is to say, the petitioners before me) that B. K. Roy has been in direct and sole possession of the aforesaid six villages... that the second party had not so far exercised any act of possession except making a proclamation under s. 51 of the Chota Nagpur Tenancy Act, that the second party wanted to take possession peacefully by accepting rent from those tenants who offered it voluntarily and that so no action under s. 144, Criminal P. C., was necessary. The learned Magistrate referred to the Police report, which was endorsed by the Inspector of Police, that the second party wanted forcibly to dispossess B. K. Roy, and he found it impossible to think that Buto Kristo Roy who had purchased these villages for a very big sum of money would tamely allow the second party to dispossess him."

He came to the conclusion that all the members of the second party had been acting jointly and severally forcibly to dispossess the first party, and he therefore affirmed his *ex parte* order under s. 144 (2) with certain modifications which do not require any specific mention.

It has been contended by Sir Sultan Ahmad who appears on behalf of the petitioners that the Sub-Divisional Magistrate had completely misunderstood the petitioners, for they could not have pleaded themselves out of Court by conceding that they had not so far exercised any act of possession except making the proclamation under s. 51 of the Chota Nagpur Tenancy Act and by adding that they wanted to take possession peacefully by accepting rent from those tenants who offered it voluntarily.

In support of the contention that the Magistrate must have misunderstood the petitioners, learned Counsel has referred me to para. 10 of the petition in revision made by these petitioners to the Deputy Commissioner. It seems to me, however, that the misunderstanding, if any, is of little consequence in the circumstances of this case. There is no dispute that Buto Kristo Roy was in possession down to the death of Degnarain, and the Deputy Commissioner, no less than the Sub-Divisional Magistrate, has found it impossible to think that Buto Kristo Roy would have allowed himself tamely and quietly to be put out of possession by whatever tactics may have been adopted by the petitioners. Sir Sultan Ahmad points out that the petitioners before me are not all employees of the Ramgarh Raj, but include some tenants as well. The mere fact that the Ramgarh Raj has got a few tenants on its side does not by any means indicate that the Ramgarh Raj is in peaceful possession of these *khorphosh* villages, or even make out a fair case of a *bona fide* dispute as regards possession. The Ramgarh Raj may, if Degnarain has died without issue, be entitled to resume possession, but unless the transferee from Degnarain chooses voluntarily to walk out (which one need hardly say is unlikely to a degree), the Raj will have to sue to recover possession from him.

Sir Sultan Ahmad has urged that this was not a case to which s. 144 should have been applied at all. As I have already indicated, there was an apprehension of a breach of the peace which the Police reported as an "imminent danger of a breach of the peace", and though the dispute did refer to the possession of these *mauzas*, it was not a case where, under the principles laid down in *Shebalak Singh v. Kamar-ud-din Mondal* (1) and *Mahant Lachman Das v. Ramchhabila Missir* (2), it was obligatory on the Magistrate to drop the proceeding under s. 144 and proceed to act under s. 145 of the Criminal P. O., for his finding (endorsed by the learned Deputy Commissioner) is perfectly clear that there was not a *bona fide* dispute about possession at all and that what had happened was that while Buto Kristo Roy was continuing his possession the Ramgarh Raj was trying to take it by means which it

(1) 2 Pat. 94; 68 Ind. Cas. 149; (1922) Pat. 241; 3 P. L. T. 573; 4 U. P. L. R. (Pat.) 37; 23 Cr. L. J. 549; A. I. R. 1922 Pat. 435; 1 Pat. L. R. 2 Cr.

(2) 10 P. L. T. 542; 115 Ind. Cas. 683; 30 Cr. L. J. 510; A. I. R. 1929 Pat. 415; Ind. Rul. (1929) Pat. 235.

called peaceable but which appeared to the Police and the Magistrates to be very likely to lead to breach of the peace. It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute requires to be decided on evidence that resort to s. 145 becomes necessary; and it must be remembered that for this purpose the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. The judicial pronouncements already referred to are clear that where there is no such real dispute, orders under s. 144 are not improper. There may even be occasions where an order is first appropriately passed under s. 144 and the proceeding is afterwards converted into one under s. 145 in order to pass an even more appropriate and permanent order. But this is not a case of that kind; and though I can quite believe that the petitioners did not intend by their Pleader to say to the Magistrate what the Magistrate took him to mean, his decision really turns not so much on what the Pleader stated as on facts which to use the term adopted in *Lachman Das's case* (2) can be called transparent.

Sir Sultan Ahmad has also argued that the petitioners have not been given an opportunity of proving that they are in fact in possession; but the answer to this is that the case was not put on that footing either before the Magistrate or before the Deputy Commissioner, for the contention only means that there should have been proceedings under s. 145 rather than a final order under s. 144. The initial contention before me was that there was no dispute such as to warrant an order under s. 144, and this fails in view of the definite Police report received and accepted by the Sub-Divisional Magistrate.

From this point of view it does not seem necessary to deal with the contention of Sir Manmatha Nath Mukherji for the opposite party that the period of two months for which the order of the Magistrate was to remain in force runs from the date of the *ex parte* order and has expired long ago—indeed this is not disputed by the other side—and that this Court should therefore not entertain the application in revision. As I have already shown, the application fails on the merits.

The application is dismissed.

s.

Application dismissed.

ALLAHABAD HIGH COURT

Second Appeal No. 1623 of 1936

August 16, 1939

THOM, C. J. AND GANGA NATH, J.

BHAGWATI PRASAD—DEFENDANT—

APPELLANT

versus

DULLAN SINGH,—PLAINTIFF AND ANOTHER
—DEFENDANTS—RESPONDENTS.

Mortgage—Sub-mortgage—No notice of sub-mortgage to original mortgagor—Sub-mortgagee bound by state of accounts between mortgagor and mortgagee—Suit by mortgagee on mortgage—Compromise decree—Sub-mortgagee obtaining decree on his mortgage and purchasing mortgaged property—Suit by heirs of original mortgagor for possession—Sub-mortgagee held could claim only amount given by compromise decree.

The sub-mortgagee stands in a no higher position than, the mortgagee. He is bound by the state of account between the mortgagor and the mortgagee. He must take the accounts as they in fact stand subsequent to creation of security unless and until he protects himself by giving notice to the mortgagor. *De Lisle v. Union Bank of Scotland* (6), relied on, 45 Ind. Cas. 769 (2), distinguished.

M mortgaged certain property to J and J mortgaged the same property with some other property to P. M, however, had no notice of this sub-mortgage. J brought a suit on his mortgage and a compromise decree was passed which he did not execute. Subsequently P obtained a decree against J and in execution thereof purchased the property. The heirs of M brought a suit for possession of the mortgaged property to which P pleaded that he was not bound by the decree in J's suit and that the security still subsisted:

Held, that the decree in J's suit fixing the state of account between J and M, though a compromise decree was binding upon P. That though the security subsisted for certain purposes after the passing of a decree, it subsisted only in respect of the decretal amount and hence P was not entitled to claim the total amount due on his sub-mortgage. 65 Ind. Cas. 151 (1), distinguished.

S. A. from the decision of the Additional Sub-Judge, Farruknabad, dated June 1, 1935.

Mr. Jagdish Swaroop, for the Appellant,

Mr. Lalita Prasad, for the Respondents.

Thom, C. J.—This is a defendant's appeal in a suit for possession of certain zamindari property. The property in suit was mortgaged by one Manohar Singh in the year 1905. The mortgage was a usufructuary mortgage in favour of Jwala Singh. The plaintiff Dullan Singh claims the property as a reversioner. The contesting defendant Bhagwati Prasad, Vakil, is a sub-mortgagee of Jwala Singh's mortgagee rights. In the year 1921, the mortgagee Jwala Singh instituted a suit for sale against Manohar Singh. During the pendency of the suit Manohar Singh died and his minor son Ajab Singh was brought upon

the record. The dispute between the parties was eventually compromised and decree was passed in terms of the compromise. The decree was one under O. XXXIV, r. 5, and the decretal amount was Rs. 450. The defendant Bhagwati Prasad took a mortgage of Jwala Singh's mortgagee rights as already observed and also over other property of Jwala Singh in the year 1913. He brought a suit upon his mortgage against Jwala Singh and Mst. Bhagwani Kunwar, the widow of the said Ajab Singh, in the year 1926. This suit was decreed *ex parte*. In execution of the decree the property mortgaged by Manohar Singh was auctioned and purchased by Bhagwati Prasad in the year 1929. In this year, the plaintiff Dullan Singh filed a suit against Bhagwani Kunwar and Jwala Singh praying for possession of Manohar Singh's property including the property mortgaged. He averred that after the death of Antu Singh, the grandson of Manohar Singh, he was entitled to possession as reversioner. The suit was contested by Mst. Bhagwani Kunwar alone. The defence however failed and decree for possession was granted to the plaintiff. Dullan Singh thereafter applied for mutation and discovered that the name of the contesting defendant in the present suit, Bhagwati Prasad, had already been recorded in the respect of the property. He has in these circumstances prayed in the present suit for possession. The contesting defendant has pleaded that the plaintiff is not entitled to decree except upon the payment of the total amount due upon the sub-mortgage in his favour. The learned Civil Judge in the lower Appellate Court granted a decree in favour of the plaintiff conditional on payment by the plaintiff of the sum of Rs. 450, the amount of the decree in the suit by Jwala Singh on his mortgage.

In appeal it was contended for the defendant that the decree in Jwala Singh's suit was not binding upon the defendant. Learned Counsel maintained that despite the final decree in Jwala Singh's suit which was passed on October 28, 1922 the security still subsisted and the defendant, i. e., sub-mortgagee, was entitled to the benefit of that security. In support of his contention that the security still subsisted despite the passing of a final decree in a mortgage suit learned Counsel for the appellant referred to the case in *Sukhi v. Ghulam Safdar Khan* (1). In that case it was decided by

(1) A I R 1922 P C 11; 65 Ind. Cas. 151; 43 A 469; 48 I A 465; (1921) M W N 445; 14 L W 162; 26 O W N 279; 42 M L J 15; 30 M L T 175; 24 Bom. L R 590 (P O).

the Privy Council, that

"when a prior mortgagee brings the property to sale in execution of a decree on his mortgage without impleading the puisne mortgagee to the suit, the rights of the puisne mortgagee are not affected by the sale. But if the puisne mortgagee brings a suit on his mortgage, the auction-purchaser in execution of the prior mortgage decree, can use the prior mortgage right as a shield, and claim payment of the amount due under the prior mortgage decree, where the puisne mortgagee seeks a decree for sale in his favour."

The dispute in that case did not concern the rights of a sub-mortgagee but those of a purchaser at an auction in execution of a decree on a prior mortgage. In determining the rights of a sub-mortgagee different considerations apply. Furthermore, in our judgment, it does not follow that because the security subsisted despite the passing of a final decree the defendant is entitled to claim the total amount due upon his sub-mortgage. The security no doubt subsists for certain purposes after the passing of a decree but it subsists only in respect of the decretal amount. The finding of the lower Appellate Court in the present case is that the mortgagor had no notice of the sub-mortgage. The suit of 1921 was compromised in ignorance so far as the mortgagor was concerned of the sub-mortgagee's rights. The lower Appellate Court has further found that there was no fraud or collusion on the part of the mortgagor and the mortgagee. In these circumstances in our judgment the plaintiff is entitled to take his stand upon the decree.

The suit which was filed by Jwala Singh was in our judgment incompetent. Jwala Singh was a usufructuary mortgagee. He was not entitled to maintain a suit for sale of the mortgage property. Nevertheless he filed such a suit and in that suit he obtained a decree under O. XXXIV, r. 5 for the sum of Rs. 450. This sum was not paid by the mortgagor. Jwala Singh allowed the decree in his favour to become a dead letter and remained in possession of the mortgage property. In these circumstances we are satisfied that in equity the plaintiff who has succeeded to the property is entitled to recover possession of the property on payment of the sum of Rs. 450. If this suit had been directed against Jwala Singh he could have had no answer to the plaintiff's claim. In equity no doubt he could have claimed to retain possession until the sum of Rs. 450 was paid to him despite the fact that he had allowed his decree to become time-barred. The sub mortgagee stands in a no higher position than Jwala Singh, the mortgagee. He is bound by what has been

referred to in a number of cases as the "state of account" between the mortgagor and the mortgagee. In this connection we would refer to Gour on the Law of Transfer of Property, Edn. 6, p. 889. In para. 1418 the learned author observes:

"The original mortgagor is entitled to sue the sub-mortgagee for redemption, and conversely the sub-mortgagee may sue the mortgagor for recovery of his money from the mortgaged property. The sub-mortgage is extinguished by the payment of the mortgage debt by the mortgagor, if he has no notice or knowledge of the sub-mortgage, and acts in good faith; similarly payments made under these circumstances towards the mortgage-debt to the mortgagee will reduce the same *pro tanto* so far as the sub-mortgagee is concerned; but no payment made with notice or knowledge of the sub-mortgagee will discharge wholly or partially the mortgage-debt due to the sub-mortgagee. Following these principles, a sub-mortgagee of property is entitled to retain its possession against the original mortgagor until the amount due on the sub-mortgage is paid off, and he is not bound to seek his remedy against the original mortgagee. The sub-mortgagee cannot get anything more than the amount due to the original mortgagee at the time when the mortgagor learns of the sub-mortgage."

In *Papala Chakrapani Chetti v. Lachimi Achi* (2) it was held that:

"Where a mortgagor in ignorance of the existence of a sub-mortgagee executes in substitution of the original mortgage, two mortgages covering two distinct portions of the property, whereby the original mortgage is discharged the sub-mortgagee's rights under his sub-mortgage are not affected by the two mortgages executed in substitution of the original mortgage."

Learned Counsel relied upon this decision. We are not called upon in deciding this appeal to consider whether this decision is sound or not, the circumstances of the present case being quite different. It is to be noted however that in the course of their judgment Wallis, C. J. and Napier, J. observed that:

"In *Matthews v. Wallwyn* (3) it was held that the only rights of a mortgagor without notice of the assignment are that the assignee holds subject to the account between him and the original mortgagee. This latter proposition was re-affirmed in *Chambers v. Goldwin* (4). This principle applies both to payments made prior to the assignment and to those subsequent to it: *vide* Halsbury's Laws of England, Vol. 21, p. 179 and *Dixon v. Winch* (5) where the limits of the doctrine were considered."

In this connection we would refer further to the case in *De Lisle v. Union Bank of Scotland* (6). In that case which was decided in the Court of Appeal in England

(2) 35 M L J 309; 45 Ind. Cas. 769; A I R 1919 Mad. 1082; (1918) M W N 249; 23 M L T 300.

(3) (1798) 31 E R 62; 4 Ves. Jur. 118.

(4) (1804) 32 E R 600; 9 Ves. Jur. 254; 7 R R 181.

(5) (1900) 1 Ch. 736; 69 L J Ch. 465; 82 L T 437; 48 W R 612; 16 T L R 276.

(6) (1914) 1 Ch. 22; 83 L J Ch. 166; 109 L T 727; 58 S J 81; 30 T L R 72.

Phillimor, L. J. in the course of his judgment observes :

"The transferee of a mortgage takes it on the footing that the amount said to have been advanced on the security has been advanced, but with the knowledge that since the creation of the mortgage the debt may have been reduced. He is not bound by the true state of the account between mortgagor and mortgagee at the date of the mortgage, because the statement as to the original loan cannot be falsified; but as to all transactions subsequent to the creation of the security he must take the accounts as they in fact stand unless and until he protects himself by giving notice to the mortgagor."

It is further remarked in the same judgment that the assignee of the mortgagee rights must allow any repayment or any discharge made at any time after the execution of the sub-mortgage until he protects himself by giving notice to the mortgagor. Now, in the present instance, the state of the accounts shows that the sum due by the mortgagor under his mortgage is Rs. 450. Learned Counsel for the appellant conceded that if this sum had in fact been paid by the mortgagor to the mortgagee then his defence must fail. He has maintained however that the learned Civil Judge in the lower Appellate Court having reached the conclusion that no payment was made under Jwala Singh's decree the security subsisted in respect of the full amount due under the sub-mortgage. In our judgment this argument is unsound. The sub-mortgagee is bound by the state of the account. It cannot be disputed that the decree of October 28, 1922 fixed the state of the account between the mortgagor and the mortgagee. The decree fixing the state of the account is no doubt a compromise decree but it is nonetheless binding upon the parties. It creates equitable rights both for the mortgagor and the mortgagee and it is not permissible at this stage in the absence of any allegations of fraud or collusion to go behind the decree and to examine the considerations which induced the parties to conclude the compromise. After the passing of the decree in 1922 there can be no doubt that the plaintiff would have been entitled to recover from the mortgagee the mortgage property upon the payment of the decretal amount and in our view the fact that the property is now in the possession of the sub-mortgagee does not alter the legal position. The amount due under the mortgage having been reduced by payment or by decree the sub-mortgage security is *pro tanto* restricted, the sub-mortgagee having failed to give notice of the mortgage to the mortgagor. The learned Civil Judge has granted a decree of possession of the

property in suit conditional upon the payment of Rs. 450 to the appellant. In our judgment this decision is sound.

We would observe in conclusion that in the sub-mortgage of 1913 Jwala Singh not only mortgaged his mortgagee rights under Manohar Singh's mortgage but other property also. This property has been auctioned by the appellant in execution of his decree in the year 1929. We have no information before us as to the amount realized by the sale of this property and accordingly whether more than the sum of Rs. 450 is due under the sub-mortgage. In the result the appeal fails. The appeal is dismissed with costs.

s.

Appeal dismissed.

MADRAS HIGH COURT Special Bench.

December 5, 1939

LEACH, O. J. GENTLE AND KRISHNASWAMI

IVENGAR, J. J.

In the matter of SRI K. SRINIVASA RAO
FIRST GRADE PLEADER, COIMBATORE

Legal practitioner—Professional misconduct—Court having reason to believe that practitioner may have been guilty of professional misconduct—If can allow proceedings to be dropped on agreement between complainant and practitioner or on wish of complainant—Legal Practitioners Act (XVIII of 1879), s. 13—Appointment of tribunal to make enquiry—Approval of tribunal, if can be given ex post facto—Tribunal not validly constituted—Acquiescence whether makes it lawful—High Court directing District Judge to enquire into charge of professional misconduct—District Judge, if has power under s. 3-A, Madras Civil Courts Act (III of 1873), to direct Additional District Judge to make enquiry without reference to High Court.

Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter.

The Legal Practitioners Act in s. 13 contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand the inquiry cannot be lawful. The suggestion that approval of a tribunal may be given *ex post facto* is repugnant to the spirit of the Act and the wording of s. 13.

If the tribunal which conducted the inquiry under s. 13 was not validly constituted acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain.

There is nothing in the Legal Practitioners Act, which directs the District Judge to hold the inquiry. The act leaves the matter entirely in the hands of the High Court. The High Court and

not the Act nominates the tribunal. Therefore, when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the order of the High Court. Before the District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. The Madras Civil Courts Act, s. 3-A does not provide it. Where, therefore, the High Court directs the District Judge to hold an inquiry into a charge of professional misconduct, he has no power of delegation and cannot direct the Additional District Judge to hold an enquiry without making a reference to the High Court.

Notice under s. 13 (b) of the Legal Practitioners' Act issued to Sri K. Srinivasa Rao, 1st Grade Pleader, Coimbatore calling upon the said Mr. K. Srinivasa Rao to show cause why he should not be dealt with under disciplinary jurisdiction of the High Court for grossly improper conduct in the discharge of his professional duty in that he acting as Pleader for one G. Thimmappa in I.P. No. 32 of 1926 on the file of the District Court, Coimbatore (Insolvency of one Balakrishna Mudaliar) received from the Official Receiver of Coimbatore two sums of money namely Rs. 2,223-7-2 and Rs. 2,038-2-7 as dividends on April 10, 1930 and August 11, 1931 respectively and kept the said Thimmappa in ignorance without intimating to him of the fact of the receipt of the above sums; that he misappropriated the said sums for his own use and thereby rendered himself liable for professional misconduct under the provisions of the Legal Practitioners Act.

The Advocate-General, in support of the notice.

Mr. T. R. Venkatarama Sastri for Mr. M. Krishna Bharati, for the Pleader.

Leach, C. J.—The respondent is a Pleader practising in the Coimbatore District. In February 1937 one G. Thimmappa a merchant residing and carrying on business in Bellary presented a petition to this Court in which he charged the respondent with professional misconduct. The Court considered that the charges made called for inquiry and passed an order directing the District Judge of Coimbatore to hold the inquiry, the case falling within s. 13 of the Legal Practitioners Act. When the matter came before the District Judge the petitioner filed a statement in which he said that he was satisfied that the respondent, who had been his Pleader for a considerable time, had not acted *mala fide*; and that his claim had been settled by the respondent and he wished to withdraw the petition. In the

circumstances the District Judge thought it unnecessary to proceed with the enquiry and submitted the record to this Court with his remarks. This Court considered that the District Judge should have proceeded with the enquiry, notwithstanding that the petitioner had expressed a desire to withdraw the petition. Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter.

By an order dated March 7, 1939 the Court remanded the case to the District Judge with direction to proceed. Without reference to this Court the District Judge directed the Additional District Judge to hold the inquiry, which he did, and his report is now before us. Mr. Venkatarama Sastri on behalf of the respondent has raised a preliminary objection. He says that inasmuch as the inquiry has been conducted not by the District Judge, who was directed to hold the inquiry, but by the Additional District Judge, it is unlawful and the Court cannot take action on it. In other words, he says that the District Judge, having been ordered to hold the inquiry, could not delegate his power to the Additional District Judge and that this Court is precluded from giving approval *ex post facto* to the inquiry conducted by the Additional District Judge. The learned Advocate-General has contended that if the Court is satisfied with the report it can take action on it. He has also contended that the District Judge had full power by reason of s. 3-A of the Madras Civil Courts Act, 1873 to transfer the matter to the Additional District Judge. Further he has said that inasmuch as the respondent did not take objection to the Additional District Judge holding the inquiry when the matter was in the District Court but appeared and took part in the proceedings throughout he cannot now be allowed to raise objection.

I will deal first with the argument advanced by the learned Advocate-General that the finding of a tribunal of inquiry can be accepted notwithstanding with the tribunal was not appointed by the Court for the purpose. The opening clause of s. 13 of the Legal Practitioners Act is in these words:

"The High Court may also, after such inquiry as

it thinks fit, suspend or dismiss any Pleader or Mukhtar holding a certificate as aforesaid."

It is said that the words "after such inquiry as it thinks fit" leave it open to the Court to give approval *ex post facto*. I am unable to accept this argument. The Act contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted before hand the inquiry, in my opinion, cannot be lawful. I regard the suggestion that approval of a tribunal may be given *ex post facto* as being repugnant to the spirit of the act and the wording of s. 13.

The argument that because no objection was raised in the District Court to the Additional District Judge conducting the inquiry he cannot be allowed to raise the objection now is also one which I cannot accept. If the tribunal which conducted the inquiry was not validly constituted acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain.

The only argument which goes for serious consideration is the argument that s. 3-A of the Madras Civil Courts Act give the District Judge power to direct the Additional District Judge to conduct the inquiry. That section reads as follows:—

"When in the opinion of the High Court, the state of business pending before the Judge of any District Court (hereinafter called the District Judge) so requires, the Local Govt. may appoint one or more Additional District Judges to that Court for such period as they may deem necessary.

The Additional District Judges so appointed shall discharge all or any of the functions of the District Judge, under this act or any other law for the time being in force which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge."

Therefore the Additional District Judge may lawfully deal with matters which come within the Province of the District Judge under the Act or any other law for the time being in force. The Civil Courts Act only refers to Civil Suits and appeals from Judges subordinate to the District Judge. The matter now before us is neither a suit nor an appeal. The learned Advocate-General has, however, said that the present case falls within the words "or any other law for the time being in force." I consider that the Legislature had here in mind acts such as the Indian Companies Act, the Indian Divorce Act and the Succession Act, which confer upon the

District Judge jurisdiction in specified matters. If there were a clause in the Legal Practitioners Act which directed the District Judge to hold the inquiry in a case like the present one he certainly would have power under s. 3-A of the Madras Civil Courts Act to assign the inquiry to the Additional District Judge, but there is nothing in the Legal Practitioners Act which directs the District Judge to hold the inquiry. The act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the order of the High Court. Before the District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. Certainly the Madras Civil Courts Act does not provide it. In my opinion, the District Judge having been directed by this Court to hold the inquiry he had no power of delegation. No doubt he thought that he had authority under s. 3-A of the Madras Civil Courts Act to transfer the duty to the Additional District Judge, but I consider that in so doing he erred. It would have been a different matter if he had received the sanction of this Court before hand but he directed the Additional District Judge to hold the inquiry without making any reference to this Court.

It follows from what I have said that I am not prepared to read s. 3-A of the Madras Civil Courts Act in the way suggested by the learned Advocate-General and I feel bound to uphold the preliminary objection raised on behalf of the respondent. The findings of the Additional District Judge will be set aside and the District Judge directed to hold a fresh inquiry into the allegations made against the respondent and present his own report to this Court in due course. In order to prevent any misunderstanding I would add that this Court has not considered the findings of the Additional District Judge and will deal with the charges against the respondent merely on the report of the District Judge when it is submitted.

Gentle, J.—I agree.

Krishnaswami Iyengar, J.—I agree.

N.S.

Order accordingly.

ALLAHABAD HIGH COURT

First Appeal No. 117 of 1935

September 5, 1939

IQBAL AHMAD AND BAJPAI, J.J.

Chaubey MANGAN LAL—PLAINTIFF—

APPELLANT

versus

Chaubey BRAHM DUTT AND ANOTHER—

DEFENDANTS—RESPONDENTS

Agra Pre-emption Act (XI of 1922), s. 4, cls. (1) and (7)—Resumed muafi-holder, whether a co-sharer—His status.

The resumed *muafi*-holder of specific plots of land with specific Govt. revenue in a village, without the right of having any interest in the joint lands of the *mahal* or the administration of its affairs is not on the same footing as a co-sharer and his status is in no case better than that of a petty proprietor without the right of having any interest in the joint lands of the *mahal* or in the administration of its affairs. 122 Ind. Cas. 178 (1) and 170 Ind. Cas. 769 (2), distinguished.

F. A. from the decision of the Additional Sub-Judge, Agra, dated October 9, 1934.

Messrs. G. S. Pathak, Kanta Prasad and Shiv Charan Lal, for the Appellant.

Mr. M. L. Chaturvedi, for the Respondents.

Bajpai, J.—This is an appeal by Chaubey Mangan Lal whose claim for pre-emption has been dismissed by the learned Additional Civil Judge of Agra. Defendant No. 2, Chaubey Gulzari Lal, sold certain *zamindari* property specified at the foot of the plaint to Chaubey Brahm Dutt, defendant No. 1, and the plaintiff Chaubey Mangan Lal alleged that he was a co-sharer in *Mauza* Ohandarpur where the property sold was situate and that his name was recorded in the *khewat*. Defendant No. 1 was said to be a stranger. It is not necessary for the purposes of the present appeal to go into the other allegations of the plaintiff or to discuss the various pleas taken in the written statement excepting one, namely, that the plaintiff was not a co-sharer in *Mauza* Ohandarpur as required by the Agra Pre-emption Act and that at the most he could be called a petty proprietor of only particular plots. For that reason the defendant vendee alleged that the plaintiff was not entitled to maintain the suit. The Court below has upheld this contention of the defendant and has dismissed the plaintiff's suit. In appeal before us, it is contended that the view taken by the Court below is incorrect. Two documents are relevant for the decision of this issue. The first document is the *wajib-ul-arz* of the village prepared in 1285 *Fasli* and printed at p. 17 of our record, and the second one is

the *khewat* for the same year which has not been printed but a typed copy of which has been supplied to us.

Before we discuss the evidentiary value of these two documents, it is necessary to refer to certain provisions of the Agra Pre-emption Act. There is no doubt that on the sale of a share of *zamindari* if any *wajib-ul-arz* prepared prior to the commencement of the Act records a custom; contract or declaration recognizing or declaring a right of pre-emption, then a right of pre-emption shall be deemed to exist and under s. 12 of the Act co-sharers in the *mahal* in which the property is situate and co-sharers in the village will have the right to pre-empt. Under s. 4, cl. (1) "co-sharer" means

"any person, other than a petty proprietor, entitled as proprietor to any share or part in a *mahal* or village whether his name is or is not recorded in the register of proprietors," and under s. 4, cl. (7) "petty proprietor" means

"the proprietor of a specific plot of land in a *mahal*, who as such is not entitled to any interest in the joint lands of the *mahal*, or to take part in the administration of its affairs."

It is thus clear that every person who is entitled as proprietor to a share or part in a *mahal* or village will have the right to pre-empt unless he is only a petty proprietor and as such petty proprietor is not entitled to any interest in the joint lands of the *mahal* or to take part in the administration of its affairs, his proprietary right extending only over specific plots of land in the *mahal*. The question that we have got to decide is whether the plaintiff is a mere petty proprietor as held by the Court below within the meaning of cl. (7) of s. 4 or whether he is a co-sharer within the meaning of cl. (1) of s. 4. Now we come to a discussion of the two documents mentioned in an earlier portion of our judgment. The *wajib-ul-arz* which is printed at p. 17 of our record consists of four chapters. Chapter I relates to the nature of the *mahal* and property and customs. Chapter II, deals with the rights of share-holders *inter se* on the basis of custom and agreement. Chapter III relates to the rights of under-proprietors and the fourth deals with the rights of tenants in general. It is clear that the under-proprietors are relegated to Chap. III and their rights are mentioned in a chapter of its own. At this stage we might mention that it is common ground that the plaintiff is the son of Genda Lal and is entered in the *khewat* against Serial No. 3 under the

heading of resumed *muafi*-holders. His proprietary interest extends over 14 *bighas* 8 *biswas* of land with a Govt. revenue of Rs. 15-13-3.

From the *wajib-ul-arz* it appears that there is no joint land in which the plaintiff might be considered to have any interest. The *khevat* does not speak of any *shamilat* land. Our attention was not drawn by learned Counsel for the appellant to any piece of evidence from which we could infer that the plaintiff was entitled to any interest in the joint lands of the *mahal*. All that was argued was that he was entitled to take part in the administration of its affairs. A reference to the *wajib-ul-arz* shows that in the case of the appointment of a *patwari* which occurs under Chap. I a *patwari* is appointed with the consent of co-sharers (*hissedar*). When we come to the custom as regards the distribution of profits we see that a provision is made that the *lambardar* shall distribute the profits after payment of Govt. revenue and village expenses to the *hissedar* in accordance with the share entered in the *khevat*. When we come to the custom regarding the appointment of the *lambardar*, we find that when the *lambardar* dies the new *lambardar* is to be appointed with the consent of the *hissedar*. The translation of the *wajib-ul-arz* on our record is not very accurate. At several places where the original *wajib-ul-arz* speaks only of *hissedar* in the singular the translation is co-sharers in the plural. Under Chap. II, para. 4 we have the usages relating to the management of culturable fallow lands and of rights appertaining thereto and the provision is that the "management in respect of culturable fallow land is made through *lambardar* in consultation with the co-sharer" and the same is to be found when we deal with the responsibilities of co-sharers regarding village expenses. Here too, it is provided that the village expenses are incurred in the following way through the *lambardar* that credit is allowed by the *hissedar* in proportion to his share entered in the *khevat*. It is not necessary to pursue this point any further. The matter is made clear beyond any doubt when we come to para. 13 of Chap. II where a reference is made to the custom regarding the right of pre-emption. The provision there is that "if any co-sharer wants to dispose of his property, he should transfer it first to the next co-sharer (*hissedar sani*)."
The accurate translation would probably be the second co-sharer.

We have dealt at some length with the *wajib-ul-arz* because the proprietors were really two in 1285 *Fasli*, namely, Ram Das, son of Nand Kishore, and *Mst.* Kokla, wife of Mul Chand, a predeceased son of Nand Kishore. The entire *wajib-ul-arz* is so worded that there is a mention of *lambardar* and co-sharer. This shows that there were only two co-sharers in the villages and the rights of only these two co-sharers were being discussed in the *wajib-ul-arz* and the appointment of the *patwari* and the *lambardar* also rested on that basis. It is thus evident that the above two proprietors alone had a right in the administration of village affairs. The plaintiff's predecessor is a resumed *muafi*-holder and when we come to Chap. III which deals with the rights of under-proprietors—the expression in the vernacular is *kabizari mathat*—it is said that there is no *muafi* land but there are two resumed *muafi* holdings one of them being that of the predecessor of the present plaintiff, and there is one provision here which runs counter to the provision in the case of proprietors. As we mentioned before a right of pre-emption is given to the *hissedar sani* if one co-sharer wants to dispose of his property, but in the case of resumed *muafi* the proprietors have got all sorts of powers of transfer. They seem to be on a different level from a "co-sharer."

We have made it clear from what we have said above that the plaintiff or his predecessor had no interest in the joint lands of the *mahal* and we have been endeavouring to show that the plaintiff or his predecessor were not entitled to take part in the administration of its affairs. The plaintiff could not have any hand in the appointment of the *patwari* or the appointment of the *lambardar*, nor could he have been asked to pay the village expenses. It is however argued strenuously that the liability to pay Govt. revenue was joint and that fact, according to the appellant, is enough to take the plaintiff out of the category of such petty proprietors who are not entitled to pre-empt. It is said that that in itself is taking part in the administration of the affairs of the *mahal*. Our attention in this connection is drawn to the *khevat* of 1285 *Fasli* where the Govt. revenue of the resumed *muafi* land and of the ordinary *zamindari* is lumped up at the bottom and the contention is that that is an important circumstance in order to decide the crucial point whether the plain-

tiff has a right to take part in the administration of the affairs of the *mahal*.

Our attention has been drawn to *Sheo Balak Ram v. Mathura Prasad* (1) and *Prahlad Prasad v. Chameli Kuar* (2). In these two cases the plaintiff was held entitled to pre-empt, but a reference to the facts of the two cases will show that the liability to pay Govt. revenue jointly was not the deciding factor and the history of the title of the plaintiffs was traced and it became abundantly clear that the predecessors of the plaintiffs in the two cases were co-sharers in the strict sense of the term. It is no doubt true that in certain places the learned Chief Justice Sir Shah Muhammad Sulaiman said that it might be necessary to find out whether a person takes part in the administration of the affairs of the *mahal* if the liability to pay Govt. revenue is joint. On behalf of the respondents, our attention was drawn to a decision of their Lordships of the Privy Council in *Ramjimal v. Riazud Din* (3) and to a decision of a Bench of this Court in *Munna Lal v. Bahadur Lal* (4). There is nothing of importance in the Privy Council case which might have a bearing so far as the point under discussion is concerned, but the dictum of two learned Judges of this Court in *Munna Lal v. Bahadur Lal* (4) is undoubtedly to the effect that the joint responsibility of revenue is not at all a relevant factor in deciding the status of a co-sharer. It is not necessary for us to commit ourselves to this latter view because we have shown above that the entire scheme of the *wajib-ul-arz* points unhesitatingly to the conclusion that the resumed *muafi*-holder was not to be on the same footing as a co-sharer and that his status was in no case better than that of a petty proprietor without the right of having any interest in the joint lands of the *mahal* or in the administration of its affairs. The *khewat* also shows that the 20 *biswas* were all entered against Ram Das and *Mst.* Kokla and they alone had management of the unculturable land. The two *khewats* of resumed *muafi*-holders related only to specific plots of land with specific Govt. revenue entered against them. We have given the case our anxious consideration and we have come to the con-

clusion that the view taken by the Court below is correct. We accordingly dismiss this appeal with costs.

D.

Appeal dismissed.

RANGOON HIGH COURT

Criminal Revision No. 774-A of 1939

October 25, 1939

MOSELY, J.

THE KING—PROSECUTOR

versus

MAUNG KYI NYO—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 106—Expression "offences involving breach of peace," meaning—Conviction of accused under s. 294, Penal Code (Act XLV of 1860)—Order under s. 106, when can be made.

The expression "offences involving a breach of the peace" in s. 106, Criminal P. O., means offences in which the commission of a breach of the peace is a necessary ingredient, or offence the commission of which has actually led to a breach of the peace (irrespective of the party by which that breach is committed). It is impossible to construe the word 'involve' as equivalent to the words 'likely to lead to.' The mere use of abusive language in a public place is not of itself a breach of the peace, though of course it is likely to lead to one. It is not one of the offences affecting the public tranquillity mentioned in s. 103. The words "breach of the public peace" have not only in popular usage but in law, the significance of a disturbance of the peace by something more than mere abusive or obscene words, that is to say, by resort, if not to actual violence, to threats of it. In other words, the word 'peace' is used as a synonym for security rather than for tranquillity. Where therefore an accused person is convicted of an offence under s. 294, I. P. C., an order under s. 106 cannot be made unless there is a finding that active criminal intimidation or assault, etc., have actually occurred in consequence of the obscene abuse.

[Case-law discussed.]

Mr. E. W. Lambert, Government-Advocate, for the King.

Order.—The respondent was convicted of the offence of using obscene words to the annoyance of others in a public road, an offence under s. 294, I. P. C., and was sentenced to a sentence of fine, it was also ordered that he entered into a bond under s. 106, Criminal P. O., to keep the peace for six months. The case has been taken up on revision of this Court's own motion in order to consider the legality of the order to enter into a bond. Section 106, Criminal P. O., is as follows:

"Whenever any person accused of any offence punishable under Chap. VIII, I. P. C., (other than an offence punishable under s. 143, s. 149, s. 153-A or s. 154 thereof) or of assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of commit-

(1) (1930) A L J 343; 122 Ind. Cas. 178; A I R 1930 All. 117; Ind. Rul. (1930) All. 210; 14 R D 102.

(2) (1937) A L J 751; 170 Ind. Cas. 769; A I R 1937 All. 529; 10 R A 203, 1937 A L R 774.

(3) (1935) A L J 973; 157 Ind. Cas. 423; A I R 1935 P O 169; 8 RPC 30; 1935 O L R 511; 1935 A L R 867; 1 B R 825 (P O).

(4) (1939) A L J 337.

ting criminal intimidation, is convicted of such offence . . . and such Court is of opinion that in is necessary to require such person to execute a bond for keeping the peace, such Court may . . . order him to execute a bond. . . ."

Section 106 of the Code of 1882 enabled bonds to be taken

"whenever any person accused of rioting, assault or other breach of the peace, or abetting the same or assembling armed men, or taking other unlawful measures with the evident intention of committing the same, or any person accused of criminal intimidation by threatening injury to person or property is convicted of such offence."

Section 106 of the Code of 1898 is similar to s. 106 of the Code of 1882 except that for the words "other breach of the peace" the words "involving a breach of the peace" are substituted. The words "involving a breach of the peace" and the expression "breach of the peace" itself have been the subject of numerous and conflicting decisions. The words themselves are vague and susceptible of more than one interpretation. The matter has been dealt with in four old rulings of the Chief Court of Lower Burma and of the Court of the Judicial Commissioner, Upper Burma, all under the Code of 1898. In *Crown v. Wet Taung* (1) the question was considered whether a person convicted of an offence under s. 504, I. P. O., could be ordered to keep the peace under s. 106, Criminal P. O. Section 504, I. P. O., says that

"whoever intentionally insults, and thereby gives provocation to, any person intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished. . . ."

It was said in *Crown v. Wet Taung* (1) that such an offence may, but does not necessarily, involve a breach of the peace and that even if a breach of the peace occurs, it is not the person accused under s. 504, I. P. O. who is guilty of it. I do not think that the question by which party the breach of the peace is caused is material in considering whether a person convicted under s. 504, I. P. O. can be ordered to give a bond under s. 106, Criminal P. O. In fact I am of the opinion that the word "involve" was expressly used with that consideration in view. I note that in *In re Kuppa Reddiar* (2) the same view as in *Crown v. Wet Taung* (1) was taken, and it was said that it is of the essence of the offences specified in s. 106 that in committing the offence of which the offender is found guilty he necessarily has also broken the peace. *Crown v. Wet Taung* (1)

(1) 1 L B R 262.

(2) 47 M 846; 81 Ind. Cas. 920; A I R 1924 Mad. 808; 25 Cr. L J 1096; 47 M L J 232; 20 L W 481.

was briefly followed in *King-Empero v. Ma Hla Bon* (3) a case where a bond has been ordered on a conviction under s. 294 I. P. O. It was said there that obscene abuse does not necessarily involve a breach of the peace. In *King-Emperor v. Ni Kur Ya* (4) Irwin, J. who had been a member of the Bench which decided *Crown v. Wet Taung* (1) discriminated an offence under s. 294 from one under s. 504 and said that uttering obscene abuse in a public place to the annoyance of others could amount to a breach of the peace if there was a finding to that effect. He was of the opinion that the public peace could be broken by angry words as well as by blows or deeds. An older ruling *Queen-Empress v. Nga So Pe* (5) to the opposite effect was not referred to.

Chapter VIII, I. P. O. alluded to in s. 106, deals with certain offences against the public tranquillity, namely, unlawful assembly and rioting and offences connected therewith, and also affray. Section 294 occurs in Chap. XIV. The expression "offences involving a breach of the peace" in my opinion, means offences in which the commission of a breach of the peace is a necessary ingredient, or offence the commission of which has actually led to a breach of the peace (irrespective of the party by which that breach is committed). This I note, is the view taken in *Jib Lal Gir v. Jog Mohan Gir* (6). This has been followed by the Calcutta High Court in a series of cases, the last of which is *Abdul Gafur v. Mohamed Mirza* (7). *Jib Lal Gir v. Jog Mohan Gir* (6) was under the Code of 1898, and it was therefore also held there that a breach of the peace would be involved if unlawful acts were done with the evident intention of committing an offence involving a breach of the peace. The change in the Code has, I think, been overlooked in some of the subsequent cases, and it was held in *Abdul Gafur v. Mohamed Mirza* (7), for example; that "offences involving a breach of the peace" include not only offences in which a breach of the peace is an essential element and in which a breach of the peace has actually occurred, but include also cases of offences in which an evident intention to commit a breach of the peace is expressly found. I do not

(3) 2 L B R 125.

(4) 1 U B R 4; 1 Cr. L J 555.

(5) (1893-1900) L B R 50.

(6) 26 C 576.

(7) 58 C 659; 134 Ind. Cas. 1187; A I R 1931 Cal 645; (1931) Cr. Cas. 845; 33 Cr. L J 82; 35 C W N 1150; Ind. Rul. (1932) Cal. 62.

think that such a construction is possible under the present reading of s. 106.

In *Emperor v. Manik Rai* (8) Sir George Knox, J., held that the words "involving a breach of the peace" mean not only offences which necessarily involve a breach of the peace, or in which a breach of the peace forms an ingredient, but include such an offence as in common knowledge is ordinarily or probably the occasion of a breach of the peace. It was said that the word "involve" connotes the inclusion, not only of a necessary, but also of a probable feature, circumstance, antecedent condition or consequence. To my mind it is impossible to construe the word "involve" as equivalent to the words "likely to lead to."

It was also said that the object of s. 106 was to prevent breaches of the peace taking place, and not merely to follow up breaches of the peace which had already taken place. But that will not justify a more extended construction of the meaning of the expression than the words themselves allow. In *Emperor v. Yacoub Sayed Lallamian* (9) Heaton, J., said that the expression "offences involving a breach of the peace" covered two classes of cases. The first class, he said, is where a breach of the peace in fact has occurred. The other class is where the definition of the offence involves a breach of the peace, as it does in one of the two classes of cases which occur under s. 104, that is the class of case where the insult is perpetrated with the intention or knowledge that it is likely to give provocation which will cause another person to break the public peace. In other words, it was said that an offence involving a breach of the peace was identical with an offence "intended or known to be likely to give provocation which would cause another person to break the peace." If so, there would seem to be no reason for the differentiation in the language of s. 504, I. P. O., and s. 106, Criminal P. O. Heaton, J., also remarked that it was a possible view that a breach of the peace could be constituted by words without being necessary to come to the infliction of blows, or that the mere use of language, if it is violent enough, is a breach of the peace. This view was tentatively approved in an Allahabad case, *Raja Ram v. Emperor*, 37 Cr. L. J. 385 (10), where

it was said that using abusive language and being generally disorderly at a Railway Station might amount to a breach of the peace.

I think that the correct view was taken in *Sadho Ram v. Emperor* (11), where it was said that an offence under s. 504 involves only an intention to provoke a breach of the public peace, or knowledge that the provocation given is likely to cause such a breach, and that such an offence is not one involving a breach of the peace; and in *Abdulla v. Emperor* (12), where it was held that an offence under s. 297 (trespassing on burial places) was not an offence involving a breach of the peace, as such breach was not an ingredient in the offence, nor had any breach of the peace actually taken place. I would hold then that the words "involving a breach of the peace" denote offences where either a breach of the peace was a necessary ingredient in the offence committed, or where a breach of the peace has actually been committed during the course of the commission of the offence by one party or the other. I do not think that the mere use of abusive language in a public place is of itself a breach of the peace, though of course it is likely to lead to one. It is not one of the offences affecting the public tranquillity mentioned in s. 105. The section itself provides for cases where threatening words amount to criminal intimidation, or where threatening gestures amount to an assault. In my opinion the words "breach of the public peace" have not only in popular usage but in law, the significance of a disturbance of the peace by something more than mere abusive or obscene words, that is to say, by resort, if not to actual violence, to threats of it. In other words, the word 'peace' I consider is used as a synonym for security rather than for tranquillity. I would hold that where an accused person is convicted of an offence under s. 294, an order under s. 106 cannot be made unless there is a finding that active criminal intimidation or assault, etc., have actually occurred in consequence of the obscene abuse.

In the present case it would appear that the respondent might have been convicted of criminal intimidation as well as of the use of obscene language, though he was not charged with it. For this reason, as this revision was initiated by this Court on its

(8) 33 A 771; 11 Ind. Cas. 589; 8 A L J 925.
(9) 43 B 554; 51 Ind. Cas. 783; A I R 1919 Bom. 150;
20 Cr. L J 543; 21 Bom. L R 270.
(10) 37 Cr. L J 385; 160 Ind. Cas. 1088; A I R 1936
All. 140; (1936) Cr. Cas. 139; (1936) A L J 82; 1936 A
L R 224 (2); 8 R A 709.

(11) 7 Luck 573; 135 Ind. Cas. 691; A I R 1932 Oudh
33; (1932) Cr. Cas. 65; 33 Cr. L J 193; 8 O W N 1236;
Ind. Rul. (1932) Oudh 51.
(12) 2 L 279; 63 Ind. Cas. 869; A I R 1921 Lah. 96;
93 P L R 1921.

own motion, on the principle enunciated in *King-Emperor v. Tha Byaw* (13), there will be no interference with the order of the lower Court.

s.

Order accordingly.

(13) 4 L B R 315; 9 Cr. L J 15.

ALLAHABAD HIGH COURT

Second Appeal No. 316 of 1937

October 25, 1939

BENNET AND VARMA, JJ.

DALJIT SINGH—APPELLANT

versus

HARKISHAN LAL SAH AND BROS.—

PLAINTIFF AND OTHERS—DEFENDANTS—

RESPONDENTS

Principal and surety—Limitation—Time against surety, when runs—Surety guaranteeing payment of money due on mortgage if same is not realized from mortgaged property—Limitation against surety, when runs—Deed—Construction—Surety bond—Surety guaranteeing payment due on mortgage—Interest on that amount also held included—Hindu Law—Debt—Father—Surety debt—Liability of son—Pious obligation.

The question as to when time began to run, so far as the surety is concerned, has to be decided on the terms of the contract of guarantee in each case.

Where the undertaking given by the surety to the mortgagee is that if the latter's money is not realized from the property mortgaged by the mortgagors, then the mortgagee would be entitled to realize the money, from the surety. The clear intention of the parties is that the mortgagee is first to proceed against the mortgaged property and is to take every step that could be taken against it to realize his money, and that it is only when he fails to realize the whole amount due to him from the mortgaged property that he is to proceed against the surety.

Where the contract of guarantee for payment of amount advanced on mortgage runs: "if your money is not realized from the said mortgaged property..... then you shall be entitled to realize your money, from my person and property," the phrase 'your money' means, 'whatever is due to you' which includes interest on the principal amount of the mortgage.

Under the Mitakshara the son is liable to pay the debt incurred by the father, as the result of being a surety for payment of money lent and for delivery of goods. This liability of the son, however, is not higher than the pious obligation that rests on him for the payment of his father's personal debts, and is limited to his interest in the joint family property.

S. A. from the decision of the District Judge, Kumaun, dated October 27, 1936.

Mr. B. L. Dave, for the Appellant.

Mr. A. Sanyal, for the Respondents.

Varma, J.—The appellant Daljit Singh was defendant No. 4 in the suit which

was for the enforcement of a simple mortgage dated October 27, 1922 executed by defendants Nos. 1 to 3 in lieu of an advance of Rs. 922-8-0 in favour of the plaintiff firm. The mortgagors, defendants Nos. 1 to 3, did not contest the suit. The appellant contested it on various grounds. The Courts below have decreed it and have provided in the decree that it shall be executed against the mortgagors and the mortgaged property in the first instance and that if the whole of the amount due to the plaintiff firm is not realized by sale of the mortgaged property.

"whatever amount remains due after the sale of the mortgaged property shall be recovered from the property of Daljit Singh, defendant, to the extent of Rs. 922-8-0."

As stated above, the mortgage deed in suit was executed on October 27, 1922. On the same day Tilok Singh, father of the appellant, executed a deed in favour of the mortgagee in these terms:

"I Tilok Singh execute this surety deed in favour of you, Lala Harkishan Lal Sah and brothers.....to the effect that since Har Singh had mortgaged with you together with house and all his rights and interest if your money is not realized from the said mortgaged property then you shall be entitled to realize your money, Rs. 922-8-0, from my person and property and I shall have no objection to it. I have therefore executed this deed of surety in order that it may serve as evidence."

No specific property belonging to Tilok Singh was anywhere mentioned in this deed and there is nothing to show that any charge was created on any property. This deed was registered. Tilok Singh is dead and his son, the appellant, has been impleaded by the plaintiff as a defendant on the allegation that he is liable to fulfil the obligation incurred by his father. The mortgage deed fixed a term of one year for payment. The suit was instituted on October 30, 1935. The Courts were closed from October 27 to 29, 1935 on account of Diwali, and so the suit was within 12 years from October 27, 1923 when the period of one year fixed in the mortgage deed for payment expired.

The first point raised on behalf of the appellant is that the suit against him was barred by time. It is argued that no charge having been created by Tilok Singh on any specific property, it was only a personal liability that was incurred by him. The learned Judge in the lower Appellate Court has accepted this contention of the appellant, and in our opinion his decision on this point is correct. But from that it does not follow that the contention of the appellant that time began to run so far as

he was concerned from October 27, 1923 and that the suit should have been brought within six years from that date, is correct. The question as to when time began to run, so far as the surety was concerned, has to be decided on the terms of the contract of guarantee in each case. The undertaking given by Tilok Singh to the mortgagee was that if the latter's money was not realized from the property mortgaged by the mortgagors, then the mortgagee would be entitled to realize his money Rs. 922-8-0 from the surety. It seems to us that the clear intention of the parties was that the mortgagee was first to proceed against the mortgaged property and was to take every step that could be taken against it to realize his money, and that it was only when he failed to realize the whole amount due to him from the mortgaged property that he was to proceed against the surety. That being so, the argument that the suit against the surety had to be brought within six years from October 27, 1923 cannot be accepted. We hold therefore that the suit was not barred by time as against the appellant.

Next, it has, somewhat inconsistently with the first argument, been urged that the suit against the appellant is premature. In our opinion, this argument is without force. Section 128, Contract Act provides that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Here there is no contract to the contrary. That being so, the plaintiff firm was justified in impleading the surety also in the suit which it brought against the principal debtors. As mentioned above, the decree passed by the Courts below provides that the property mortgaged by the principal debtors shall be sold first, and that if the whole of the amount due to the decree-holder is not satisfied the decree shall be executed against the property of Daljit Singh to the extent of Rs. 922-8-0. Thus, the appellant's interests have been fully safeguarded.

The next point raised by the learned Counsel for the appellant is that under the deed executed by Tilok Singh he had undertaken to pay to the mortgagee the principal money alone and no interest. He urges that the present claim being for the recovery of a sum of Rs. 2,173-13-9, which includes interest, the Courts below were not right in passing a decree in the terms in which they have done and that it should be made clear that the appellant is not

liable to pay any interest whatsoever. The argument is that if the mortgaged property fetches more than Rs. 922-8-0 the appellant should not be called upon to pay anything at all, and that it is only when the property fetches less than Rs. 922-8-0 that he can be called upon to make good the deficiency to make up Rs. 922-8-0. In our opinion, this argument is not well-founded. The words used in the deed executed by Tilok Singh are: 'If your money is not realized.....' The phrase 'your money' means, 'whatever is due to you.' That includes interest. It seems to us that what the deed means is this; that if the mortgagee was not able to realize the whole amount due to him from the mortgaged property, then in that case Tilok Singh would be liable to make good the deficiency to the extent of Rs. 922-8-0. Accordingly, we hold that this argument put forward on behalf of the appellant is also without force.

The last point urged is that the appellant cannot under the law be made liable personally for the liability undertaken by his deceased father and that it should have been made clear in the decree that he was liable only to the extent of the joint family property in his hands. In our opinion, this contention is correct. Under the Mitakshara the son is liable to pay the debt incurred by the father as the result of being a surety for payment of money lent and for delivery of goods. This liability of the son however is not higher than the pious obligation that rests on him for the payment of his father's personal debts, and is limited to his interest in the joint family property. No authority to the contrary has been shown to us by learned Counsel for the plaintiff-respondents. In the result we dismiss the appeal with costs, subject to the direction that it shall be made clear in the decree that if it has to be executed only against such joint family property, if any, as he may be found possessed of, and not against his person or personal property.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 1138 of 1937

July 3, 1939

SEN, J.

RADHASHYAM CHOUDHURY

AND OTHER—DEFENDANTS—APPELLANTS

versus

GOURINATH ROY, PLAINTIFF

AND OTHERS—Pro forma DEFENDANTS—

RESPONDENTS

Decree—Ex parte—Suit for rent against A, B, C and D—Decree ex parte only against D and suit dismissed against rent—On motion by D to which A, B and C were not parties case remanded for re-trial—Decree then passed against all—A, B and C, if bound by it—Bengal Tenancy Act VIII of 1885, s. 148-B—Suit for rent—What plaintiff must establish.

A suit for rent instituted against A, B, C and D was dismissed as against the first three and was decreed *ex parte* against D on his failure to file a written statement. D filed a motion to which A, B and C were not made parties. The motion was heard and the case was remanded for re-trial. The suit was then decreed against all the four defendants:

Held, that as A, B and C were not parties to the motion they did not consent to the order passed therein and could not appeal against that order. It was open to them to take any objection they chose and to ignore the order passed on the motion. They were in no way bound by that order. Inasmuch as the suit had already been dismissed against A, B and C no decree could be passed against them in the subsequent suit.

It is not sufficient for a plaintiff to establish merely that the defendant is liable to pay a certain amount of rent. He must also establish the identity of the lands of the tenancy. No decree for rent should be passed until the Court is satisfied regarding the identity of the land with respect to which the rent is payable. The Court cannot leave the question of identity open because there can be no tenancy except with reference to a definite piece of land. 114 Ind. Cas. 148 (1) and 1 Ind. Cas. 379 (2), relied on.

A. from the appellate decree of the District Judge, Birbhum, dated March 17, 1937.

Messrs. Hari Prasanna Mukherjee and Bhuthnath Chatterji, for the Appellants.

Messrs. Gour Mohan Dutt and Muktipada Chatterjee, for the Respondents.

Judgment.—This is an appeal by the defendants in a suit for rent. The plaintiffs sued four persons, namely, defendants Nos. 1 to 4, for rent. Defendants Nos. 1 to 3 are the Chaudhury and defendant No. 4 is Nagendra Nath Banerjee. The Choudhury filed a written statement but Banerjee did not file any. The defence taken by the Choudhury was *inter alia* that the plaintiffs did not sufficiently describe the land in the tenancy and therefore it offended against the provisions of s. 148-B, Ben. Ten. Act. On December 3, 1935, the plaintiffs represented to the trial

Court that they did not intend to prosecute the suit as against the Choudhury. The suit was accordingly dismissed as against these defendants with costs. As defendant No. 4 had not filed a written statement the suit was decreed as against defendant No. 4 *ex parte*. From this *ex parte* decree defendant No. 4 filed a motion in the Court of the District Judge on December 23, 1935. It is now established that the Choudhury defendants, that is to say defendants Nos. 1 to 3 were not parties to this motion. After hearing the motion the learned District Judge passed the following order:

"The only point urged before me is that as the *khatian* numbers and the plot numbers are not given in the plaint though Record of Rights has been prepared there has been violation of the mandatory provisions of s. 148, Ben. Ten. Act, and hence the decree is bad. With the consent of both parties the decree of the learned Court below is set aside and the case remanded for re-trial according to law. The plaintiffs will be permitted to make suitable amendments in the plaint and all the defendants will be allowed to contest the suit if they so desire. No order is made as to costs."

After the case had been thus remanded summonses were issued not only on defendant No. 4, but also on defendant's Nos. 1 to 3. After the plaint had been amended by inserting therein certain *dag* numbers as a description of the lands of the tenancy the case was heard. The trial Court decreed the plaintiffs' suit against all the defendants. It held that the plaintiffs had failed to connect some of the plots mentioned in the plaint with the alleged tenancy but it decreed the suit inasmuch as the plaintiffs had succeeded in establishing that there was a relationship of landlord and tenant between the parties and that the defendants used to pay rent at the rate claimed by the plaintiffs. The defendants appealed to the District Judge and the learned Judge came to the same findings and dismissed the appeal. Against this decision the present appeal has been filed. The arguments urged on behalf of the appellants may be divided into two parts. On behalf of defendants Nos. 1 to 3 it is contended that the suit having once been dismissed as against them no decree could be passed against them in the present suit. It was pointed out that they were not parties to the motion before the District Judge and that they were not bound by any order passed therein. On this ground they contend that the decree in any event, cannot be binding on defendants Nos. 1 to 3.

The next branch of the argument is that as the land of the tenancy has not been

identified no decree for rent should be passed as against any of the defendants. I should consider first the argument regarding the contention that no decree should be passed against defendants Nos. 1 to 3. In my opinion this contention must prevail. The suit was dismissed as against these defendants. In the motion they were not parties. Both the Courts below seem to have been under an erroneous impression that the order upon the motion was passed with the consent of these defendants. They also expressed the opinion that as these defendants had not appealed from that order they were bound thereby. Both these views are wrong. These defendants did not consent to any order passed in the motion inasmuch as they were not parties therein. These defendants further could not have appealed against that order for the same reason, namely that they were not parties to the motion.

It was open to them to take any objection they chose and to ignore the order passed on the motion. They were in no way bound by that order. The learned Advocates on behalf of the respondents point out that this point was not taken in the Courts below and that it should be held that these defendants waived this objection. A perusal of the judgments of both the Courts and of the written statement of these defendants satisfy me that in substance this objection was taken. It is true that in the written statement the objection was not taken in so many words but there was an objection taken to the effect that the suit having already been dismissed against them no suit lay. From the judgments it appears that these defendants did object to the suit proceeding as against them. As to the precise manner in which this objection was taken it is not possible to come to any definite conclusion because the arguments have not been set down in full in either of the judgments. But this much is clear, that the defendants were objecting that the order passed in the motion did not affect their rights which they had acquired by virtue of the fact that the suit had been dismissed as against them. I hold therefore that inasmuch as the suit had already been dismissed against defendants Nos. 1 to 3 no decree could be passed against them in the present suit.

I now come to the next point, namely whether any decree could be passed as against defendant No. 4. It is admitted that the plaintiffs have not been able to

identify at least two of the seven plots mentioned in the plaint as forming land of the tenancy. The learned Judge seems to have attached too much importance to the fact that a tenancy existed at a rental of Rs. 6-10-0. It is not sufficient for a plaintiff to establish merely that the defendant is liable to a certain amount of rent. He must establish also the identity of the lands of the tenancy. This was laid down in *Indu Bhusan Basu v. Jatindra Nath Roy* (1). I would also refer in this connection to the case in *Ram Deo Rai v. Newaj Prosad Singh* (2). The learned Judge says that he is not in a position to express a definite opinion in regard to the identity of certain plots of land mentioned in the plaint as appertaining to the tenancy. He adds that he leaves this point open. Now, in my opinion, no decree for rent should be passed until the Court is satisfied regarding the identity of the land with respect to which the rent is payable. The Court cannot leave the question of identity open because there can be no tenancy except with reference to a definite piece of land. In these circumstances, I am of opinion that the plaintiffs' suit is liable to be dismissed on the ground that they have not been able to describe the land of the tenancy with sufficient precision. I accordingly set aside the decree passed by the Court below and dismiss the plaintiffs' suit with costs. The appeal is allowed with costs.

s. *Appeal allowed.*

(1) 32 O W N 214; 114 Ind. Cas. 148; Ind. Rul. (1929) Cal. 512

(2) 10 O L J 196; 1 Ind. Cas. 379.

OUDH CHIEF COURT.

Second Civil Appeal No 16 of 1936

December 21, 1939

THOMAS, C. J. AND YORKE, J.

KAMTA PRASAD AND ANOTHER—

DEPENDANTS—APPELLANTS

versus

OHHATARPAL AND OTHERS—PLAINTIFFS

AND OTHERS—DEPENDANTS—RESPONDENTS

*U. P. Land Revenue Act (III of 1901), s. 44—
Entries in khewat—Whether conclusive—Limitation
—Suit for possession—Entry in settlement records—
Suit beyond six years from this cause of action but
within six years from decree for rent—Suit held
within time.*

Though the entries in the *khewat* should be presumed to be correct, such entries cannot be conclusive evidence under the provisions of s 44 of the U. P. Land Revenue Act. [p. 158, col. 1]

So long as nobody interferes with a man's possession and enjoyment of his share in a property, the fact that his share is inaccurately recorded in the revenue papers does not affect his title to it. Although

the settlement entry gives plaintiffs a cause of action the decree for rent gives them a fresh cause of action and a suit brought within six years of the decree is within time. When plaintiff has got a right, every invasion of that right gives him a fresh cause of action. 4 Ind. Cas. 159 (12) and 55 Ind. Cas. 412 (13), relied on. [p. 161, col. 1.]

S. C. A. against the decree of the Civil Judge, Gonda, dated October 16, 1935.

Mr. K. P. Misra, for the Appellants.

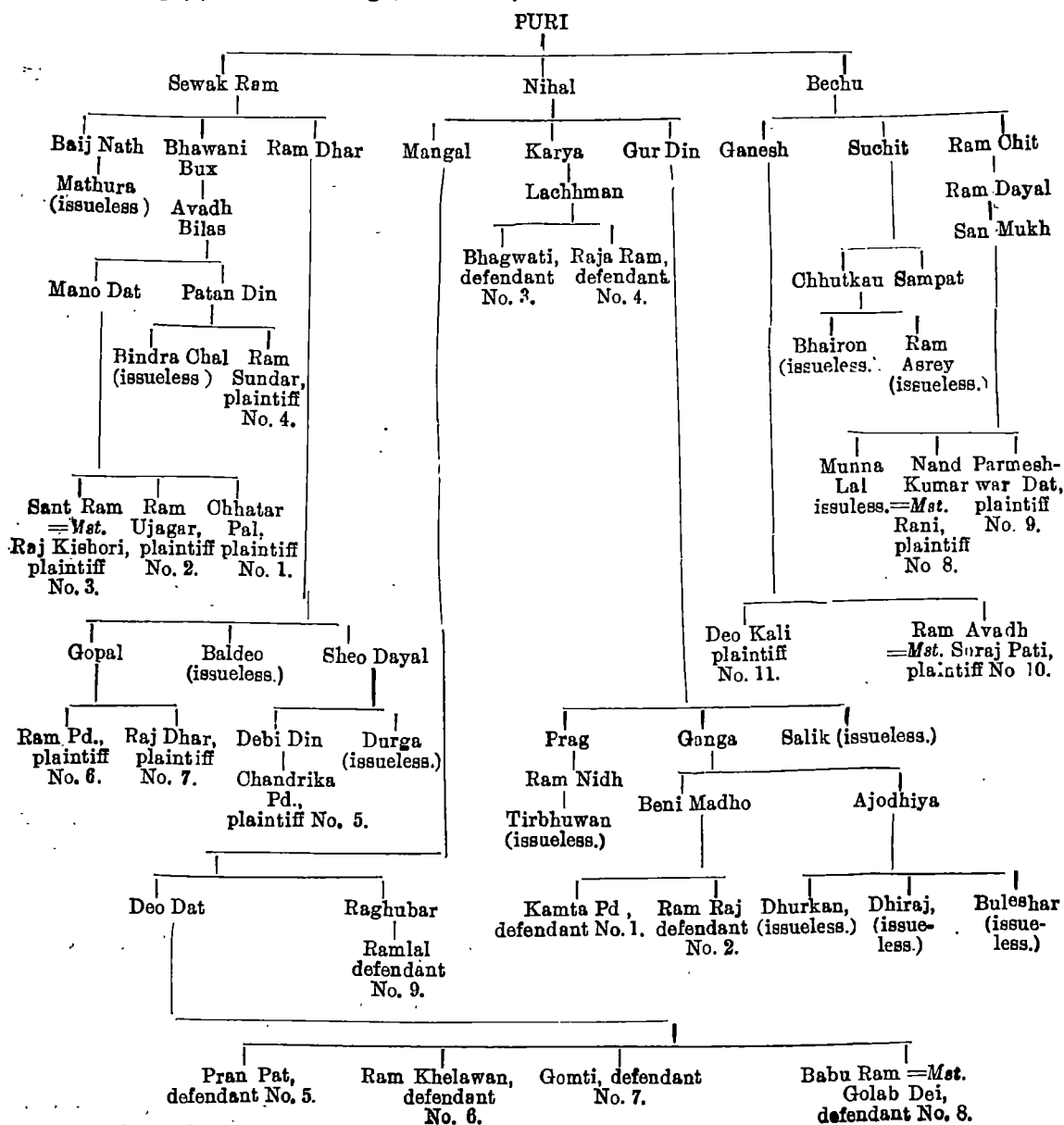
Mr. S. N. Srivastava, for Respondents Nos. 1 to 18.

Judgment.—This is an appeal on behalf of defendants Nos. 1 and 2 against the judgment and decree of the learned Subordinate Judge, (now Civil Judge) of Gonda,

dated October 16, 1935, upholding the decree of the learned Munsif of the same place dated July 27, 1935.

The plaintiffs brought the suit for a declaration that the defendants Nos. 1 and 2 have no share in the under-proprietary *khata* in suit and that they are not bound by the decree for profits in the 2 annas 8 pies share passed in favour of defendants Nos. 1 and 2.

In order to appreciate the facts of the case, it is necessary to give the following pedigree, which has not been disputed before us :



Ramniddh who belonged to the line of Nihal and representing the branches of Sewak Ram, Nihal and Bechu, obtained an under-proprietory decree in the first regular settlement of 1874 in respect of an area of 129 *bighas* 9 *biswas* in village Birpur Bhoj, (*vide* Ex. 27). In the year 1875 he applied for a division of the area into *thoks*, (*vide* Ex. 5), and five different *thoks* were formed as representing different branches of the common ancestor. The *fard hissa kashi* (Ex. 3) shows that the area was divided as follows :

	As.	Pies	krts.
(1) Bhawani Bux and Ram Dhar's line	4	3	4
(2) Ohbutkao and Sampat (of Suchit's line)	2	8	
(3) Ramniddh Ganga and Salik	2	8	
(4) Ram Dayal	2	8	
(5) Mangal and Lachhman of Nihal's line	2	8	
(6) Mathura	1	0	16

Total 16 Annas.

The *khetauni* was prepared on the above basis. It is thus clear that Ramniddh, Ganga and Salik, the predecessors of defendants Nos. 1 and 2, got a 2 annas 8 pies share, that is one-sixth of 129 *bighas* 9 *biswas*. It appears that between the first and second settlement the family somehow lost 27 *bighas* and 2 *biswas* leaving an area of 102 *bighas* and 7 *biswas* only.

In 1890 the superior proprietor of the village, namely the Ajūdhia estate, brought a suit for ejectment against Ramniddh, Ganga and Salik for arrears of rent in respect of an area of 24 *bighas* and 17 *biswas* and obtained a decree, (*vide* Ex. 7), but it appears that the names of these persons continued to remain in the *khewat* as holders of 2 annas and 8 pies share. The defendants Nos. 1 and 2 filed a suit for profits of the above share in the Revenue Court against the plaintiffs, and defendants Nos. 3 to 10. The suit was dismissed, but it was decreed by the Appellate Court, and that decree was upheld by the Chief Court on February 6, 1935.

The plaintiffs, who represent the branches of Sewak and Bechu, brothers of Nihal, who was the father of Gurdin, brought the present suit for a declaration that the defendant Nos. 1 and 2 had no share in the *khata* in suit and that they were not entitled to claim profits from the plaintiffs. The

plaintiffs' contention was that as the predecessors of defendants Nos. 1 and 2 had been ejected by the superior proprietor from their 2 annas 8 pies share, they lost all the right they had in the under-proprietory *khata*.

The defendants Nos. 1 and 2 represent the line of Gurdin and his brother Sahai who died issueless. Sahai's name is not given in the pedigree filed with the plaint, but it is to be found in the pedigree filed at the settlement, (*vide* Ex. 6). They denied the plaintiffs' claim and alleged that the superior proprietor had sued their predecessors Ramniddh and others for ejectment in the representative capacity of all the under-proprietors and thus the area of land in possession of all the co-sharers was reduced, that the defendants Nos. 1 and 2 and their predecessors had all along been in possession of the 2 annas 8 pies share and that they had been receiving profits from other co-sharers, that the suit for declaration without possession was not maintainable and that the claim was barred by limitation. The remaining defendants supported the plaintiffs' claim.

The learned Munsif framed the following issues :

- "1. Have the defendants Nos. 1 and 2 got no share in the plots in suit, as alleged by the plaintiffs ?
2. Is the present suit for declaration not maintainable ?
3. Is the present suit barred by time as alleged in para. 17 of the written statement ?"

The learned Munsif after discussing the oral and the voluminous documentary evidence came to the finding that the defendants, Nos. 1 and 2 held no share in the *khata* in suit. He further on Issue No. 2 held that defendants Nos. 1 and 2 were not in possession of any share and that their names wrongly continued to remain in the *khewat*, therefore the suit for declaration was maintainable and the plaintiffs were not required to sue for possession.

On Issue No. 3 the learned Munsif held that the suit was within time as the period of limitation started from February 6, 1935, when the suit for profits was finally decided by the Chief Court.

On appeal the learned Civil Judge confirmed the findings of the learned Munsif.

We have said that the total area was 129 *bighas* 9 *biswas*. An area of 27 *bighas* and 2 *biswas* was somehow lost, thus leaving an area of 102 *bighas* 7 *biswas*. Out of this an area of 24 *bighas* 17 *biswas* was lost by ejectment in the suit which was brought

by the Ajudhia estate. Thus the total area left was 77 *bighas* 10 *biswas*.

It is contended on behalf of the appellants that the entries in the *khewat* should have been presumed to be correct. We agree with this contention, but such entries cannot be conclusive evidence under the provisions of s. 44 of the Land Revenue Act.

P. W. No. 1, who is one of the plaintiffs, stated on oath that the Ajudhia estate obtained possession of the land which was in possession of defendants Nos. 1 and 2. This statement has been believed by the lower Courts. It is also corroborated by the entries in *khewat kar-i-khas*, (Ex. 2), which refers to an order dated May 31, 1892, by which the names of Ramnidh and others were expunged and the rights in the area were noted to have ceased to exist and extinguished in favour of the *talukdar*. Exs. 8, 9, 10 and 11 are copies of the plaint, written statement, judgment and decree respectively of another ejectment proceeding in which the predecessors of defendants Nos. 1 and 2 and Baleshwar had filed the suit to contest the notice of ejectment served on them by the Ajudhia estate as ordinary tenants. The plots from which they were sought to be ejected were the same as those in which they had lost the under-proprietary rights in the year 1890 as will appear on a comparison of Ex. 2 and Ex. 9 with the help of Ex. 19, the copy of the *farid mutabiqat*. It appears that after the ejectment decree of 1890 the same plots were let out to Ramnidh and others as ordinary tenants.

Exs. A-2 to A-6 are the copies of *khewats* for different years. The appellants rely on them because the names of Ramnidh and his successors are there as holders of the 2 annas 8 pies share in the under-proprietary *khata*, but it is clear to us that the predecessors of defendants Nos. 1 and 2 lost the under-proprietary rights in 1890 but somehow their names were not removed from the *khewats*.

It was contended that the ejectment suit brought by the Ajudhia estate in the year 1890 against Ramnidh and others was brought in a representative character and therefore all the co-sharers should be considered to have been ejected from the area of 24 *biswas* 17 *biswas*. There is no justification for us to accept this contention as there is no evidence in support of it. The note in the remarks column of Exs. 1 and 2 shows that Ramnidh, Ganga and Ajudhia, holders of *khata*s Nos. 3, 4 and 5, were ejected and the numbers of specific

plots are given. There is no doubt that on the application made in 1875 the *khata* was divided into several shares and each branch took possession of its share which was separately assessed to rent.

Ex. A-7 is a copy of an application which Ramnidh and others had made for correction of the entries in the *khewat*. They alleged that they had obtained a decree from the Settlement Court for 129 *bighas* and odd, and that the area in their possession was shown to be only 76 *bighas* and 10 *biswas*.

Ex. A-8 is the judgment passed on that application which shows that they were correctly entered as *qabzadars* and that the area given was correct as they had lost 27 *bighas* at the first settlement and were ejected from 24 *bighas* and 17 *biswas* of land in the year 1890.

Ex. A-9 and Ex. A-10 are the copies of orders in appeal which shows that the appeals were dismissed and the order of the first Court was upheld.

We do not see how these documents help the appellants. Ramnidh tried to get back the land from which he was ejected, but failed in his attempt.

Reference was made by the learned Counsel for the appellants to Exs. A-11, A-12, A-13 and A-14.

Exs. A-11 and A-12 are the copies of judgments in the case for arrears of rent. These documents do not show that Ramnidh or his successors were in possession of any under-proprietary *khata*.

Ex. A-13 is the copy of the judgment of the Commissioner in the same case.

Ex. A-14 is the copy of objections filed by Raj Dhar plaintiff No. 7 and Nand Kumar, predecessor of plaintiff No. 8, in the mutation case which the defendants Nos. 1 and 2 had filed after the death of their father Beni Madho. The objectors had alleged that the names of defendants Nos. 1 and 2 should not be recorded as sharers in the under-proprietary *khata*.

Ex. A-15 is the judgment in that case and shows that the objections were dismissed and the names of defendants Nos. 1 and 2 were entered in the *khewat* as holders of 2 annas 8 pies share. It was held that as the share was entered in the name of Beni Madho, their father, therefore it should be entered in the names of defendants Nos. 1 and 2, and the objectors were directed to seek their remedy in the Civil Court. The order is dated November 9, 1920.

Reference was also made to Exs. A-20, A-16, A-17, A-18, A-19 and A-21.

Ex. A-20 is the report of the Tahsildar in the mutation case.

Ex. A-16 is the judgment passed by one of us sitting singly in the case for profits brought by defendants Nos. 1 and 2. The suit was decreed on the basis of the entry of the names of defendants Nos. 1 and 2 in the *khewat*.

Ex. A-17 is the *khewat* for 1310 *Fasli*. It shows that a 1 anna 4 pies share was mutated in the name of Tirbhuwan Nath after Ramnidh's death.

Ex. A-18 is the *khewat* for 1311 *Fasli* which shows that the names of Baleshwar and Dharaj Ram were entered in place of Dharkan.

Ex. A-19 is the *khewat* for 1317 *Fasli* and shows that the name of Baleshwar was entered in place of Dharaj Ram.

Ex. A-21 is the *khewat* for 1332 *Fasli* and shows that defendants Nos. 1 and 2 held a 1 anna and 4 pies share which Baleshwar held and that mutation of this share was effected in favour of defendants Nos. 1 and 2 on July 24, 1924.

The substance of the chief documents relied on by the learned Counsel for the appellants is that the names of the predecessors of defendants Nos. 1 and 2 were entered in the *khewat* as holders of the 2 annas 8 pies share in the under-proprietary *khata*, while on the other hand the *khetannis* filed and relied on by the plaintiffs, Exs. 12 to 18, 20 to 25, prove that the defendants Nos. 1 and 2 or their predecessors were never in possession of any of the plots in the under proprietary *khata*. There is no doubt in our mind that Ramnidh, Ganga and Ajudhia, the predecessors of defendants Nos. 1 and 2, were ejected from 24 *bighas* and 17 *biswas* of land which formed part of their share and the possession of it went to the Ajudhia estate. Defendants Nos. 1 and 2 lost all the rights they held in that *khata*. As we have said the entries in the *khewats* are not conclusive proof of title and the plaintiffs have discharged the burden and rebutted satisfactorily the presumption raised by such entries.

We may mention that the learned Counsel for the appellants tried to explain the ejectment proceedings, but in our opinion there is no explanation, and the facts are very clear. The suit by the Ajudhia estate for ejectment in 1890 against Ramnidh, Ganga and Ajudhia was not in the representative capacity of all the under-

proprietors. We therefore agree with the finding of the lower Courts that defendants Nos. 1 and 2 have got no share in the plots in suit as alleged by the plaintiffs.

The next point raised by the learned Counsel on behalf of the appellant is the question of limitation. In the year 1920 the appellants applied for mutation of names in place of their father Beni Madho and Raj Dhar, respondent No. 7, and Nand Kumar now represented by *Mst. Rani*, his widow, respondent No. 8, filed objections (*vide* Ex. A-14), but they were dismissed on November 9, 1920, and the objectors were directed to seek their remedy in the Civil Court and mutation was effected in favour of the appellants, (*vide* the judgment Ex. A-15, to which we have already referred). The case of defendants Nos. 1 and 2 is that as the objections were dismissed on November 9, 1920, the period of limitation began to run from that date. Reliance was placed on Art. 120 of the Lim. Act which gives a period of six years for such suits, and the period begins when the right to sue accrues, which, according to the appellant's Counsel, is November 9, 1920. The following cases were relied on, on behalf of the appellants :

1. A. I. R. 1922 Allahabad, 115, (*Gopal Das v. Shri Thakur Ganga Beharji Maharaj*) (1), 2. A. I. R. 1927 Lahore, 119, (*Smail v. Bahab*) (2), 3. A. I. R. 1927 Madras, 568, (*Suryanarayana v. Bullayya*) (3), 4. A. I. R. 1927 Calcutta, 30, (*Abdul Ghafur Chaudhury v. Abdul Jabbar Mia*) (4), 5. 1 P. L. J., 73, (*Sheikh Amiruddin v. Sheikh Saidur Rahman*) (5), 6. 53 Ind. Cas. 595 (*Jahana v. Wali*) (6), 7. (I. L. R. 20 Allahabad, 35 (*Francis Legge v. Rambaran Singh*)) (7), 8. I. L. R. 31 Allahabad, 9. (*Akbar Khan v. Turbaban*) (8) 9. 3 O. W. N., 896, (*Mahabir Pattak v. Jageshar Pattak*) (9).

On reading these cases it will appear that they have no bearing on the question before us. The only case which may be

(1) A I R 1922 All. 114 (2); 66 Ind. Cas. 148; 20 A L J 231.

(2) A I R 1927 Lah. 119; 100 Ind. Cas. 732; 8 L 22; 28 P L R 490.

(3) A I R 1927 Mad. 568; 101 Ind. Cas. 85; 52 M L J 323; 25 L W 367.

(4) A I R 1927 Cal. 30; 97 Ind. Cas. 635.

(5) 1 P L J 73; 35 Ind. Cas. 433; A I R 1916 Pat. 408.

(6) 53 Ind. Cas. 595; 98 P R 1919; A I R 1919 Lah. 417.

(7) 20 A 35; A W N 1893, 193 (F B).

(8) 31 A 9; 1 Ind. Cas. 557; A W N 1908, 252; 5 A L J 637.

(9) 3 O W N 896; 98 Ind. Cas. 750; A I R 1927 Oudh 21.

said to help the appellants to some extent is the case reported in 3 O. W. N., 896 (*Mahabir Pattak v. Jageshar Pattak*) (9).

In the first case (A. I. R. 1922 Allahabad, 115) (*Gopal Das v. Shri Thakur Ganga Behariji Maharaj*) (1), the plaintiff sued in 1919 on the allegation that in 1918 he came to know of the wrong entry. It was argued that the limitation began to run from the date of the wrong entry. It was held that mere entry in the village papers would not of itself give the plaintiff a cause of action.

In A. I. R. 1927 Lahore, 119, (*Smail v. Bahab*) (2), the revenue record showed that the land in suit was entered in the column of ownership in the names of the plaintiffs and the defendants since 1872. In 1897 an attempt was made by the plaintiffs to have the revenue record altered and their names entered not only as in sole possession but as sole owners. This application was rejected. In 1921 one of the defendants applied for partition of the land in suit. The plaintiffs pleaded their title and were referred by the revenue authorities to the Civil Court. It was held that the application for partition was an act of invasion which gave a new cause of action.

This case if anything helps the respondents and not the appellants.

In A. I. R. 1927 Madras, 568, (*Suryanarayana v. Bullayya*) (3), it was held that in a suit for declaration that an entry in the Record of Rights that the defendants are *ryots* with permanent rights of occupancy is wrong is not barred by reason of the fact that the defendants had, in a previous suit more than six years of the institution of the suit for declaration, set up rights of permanent occupancy in the written statement as against the plaintiffs and to their knowledge, the cause of action based on the entry in Record of Rights being an independent one from the one based on such denial.

This case if anything supports the contention of the respondents.

In A. I. R. 1927, Cal. 30, (*Abdul Ghafur Chowdhury v. Abdul Jabbar Mia*) (4), the only cause of action alleged was a wrong entry in the Record of Rights, and it was held that in a suit for declaration limitation would run from the date of final publication of the Record of Rights.

In 1 P. L. J. 73, (*Sheikh Amirud Din v. Sheikh Saidur Rahman*) (5), the suit was under s. 111-A of the Ben. Ten. Act. In the

Record of Rights which was published on November 14, 1905, the plaintiff was shown as a tenant liable to pay rent to the defendant. The defendant obtained a decree for rent against the plaintiff on August 1, 1912. On October 7, 1912 the plaintiff instituted a suit for a declaration that he was a *lakheraj* tenant and that he was not liable to pay rent to the defendants. It was held that the suit was substantially one under the Ben. Ten. Act, 1885, and therefore the cause of action will be from the date of the publication of the Record of Rights.

On a perusal of the judgment it will appear that this case has no bearing on the present case.

It is not necessary to discuss the remaining cases, excepting the case reported in 3 O. W. N., 896, (*Mahabir Pattak v. Jogeshar Pattak*) (9), as we are of opinion that they have no bearing.

In the case reported in 3 O. W. N. (*Mahabir Pattak v. Jogeshar Pattak*) (9), the wrong entry was made at the instance of the plaintiff himself and the application for correction of *khewat* did not give the plaintiff a fresh cause of action. The earlier cases referred to in this judgment were distinguished on the ground that the erroneous entries were made behind the back of the plaintiff.

In the present appeal the entry was made behind the back of all the plaintiffs except plaintiffs Nos. 7 and 8.

This case was distinguished in the case reported in 10 O. W. N., 366, (*Sukhdasi Kuar v. Fateh Bahadur Singh*) (10). At p. 374 it is stated as follows:—

"Lastly it was contended that the suit was barred by limitation ... The plaintiff had no grievance against the entries until the defendants asserted title on their basis for the first time in February 1930. It is this wrong assertion which constitutes the cause of action for the present suit."

The case in 3 O. W. N. 896, (*Mahabir Pattak v. Jogeshar Pattak*) (9), was again distinguished in the case reported in 11 O. W. N. 1297, (*Bhagwati Prasad v. Chauharja*) (11), in which it was held that where it is alleged in the plaint that the plaintiff had been all along in possession of the land in suit and that his application for correction of *jamabandi* had been dismissed by the Revenue Court and a cloud had been cast upon his title, a suit for declaration

(10) 10 O W N 366 (374); 141 Ind. Cas. 316; A I R 1933 Oudh 283; Ind. Rul. (1933) Oudh 237.

(11) 11 O W N 1297; 153 Ind. Cas. 985; 18 R D 560; 7 R O 430; A I R 1935 Oudh 181; L R 15 A (O) 677.

of title brought within time, calculating limitation to begin from the date of the order of the Revenue Court, is not time-barred.

We may again point out that in the mutation proceedings the objections were filed not by all the plaintiffs, but only by Raj Dhar, respondent No. 7, and Nand Kumar, who is now represented by *Musamat Rani*, his widow, respondent No. 8. It is difficult to understand how the suit could be barred against the other plaintiffs who had nothing to do with the mutation proceedings. The cloud against them was cast when the appellants' suit for profits for the years 1336, 1337 and 1338 *Fasli*, was decreed by this Court on February 6, 1935, and if we take this date as the starting of the period of limitation, the suit is within time. In our opinion the decisions reported in 12 O. C., 320 (*Jevanand v. Beni Madho*) (12) and 7 O. L. J., 237, (*Baij Nath Singh v. Arjin Singh*) (13), apply to the present case.

In the case reported in 12 O. C. 320 (*Jevanand v. Beni Madho*) (12), it was held that although the settlement entry gave plaintiffs a cause of action the decree for rent gave them a fresh cause of action and the present suit brought within six years of the decree was within time. When plaintiff has got a right every invasion of that right gives him a fresh cause of action.

In the case reported in 7 O. L. J. 237, (*Baij Nath Singh v. Arjin Singh*) (13), it was held that so long as nobody interferes with a man's possession and enjoyment of his share in a property, the fact that his share is inaccurately recorded in the revenue papers does not affect his title to it.

The finding of the lower Courts is that the plots comprising 77 odd *bighas* of land have all along been in the exclusive possession of the plaintiffs, and the appellants had no interest left in this area. Nor had they ever been in possession of any portion of it, or received any profits before. We therefore agree with the lower Courts that the suit is not barred by limitation.

In the plaint one of the reliefs sought was that

"the defendants Nos. 1 and 2 were not entitled to get and recover from the plaintiffs Rs. 71-8-6, the amount of profits and the costs decreed by the Court of the District Judge, Gonda, in Case No. 51 of 1932, re: *Kamta Prasad and others*, appellants versus *Ram*

(12) 12 O C 320; 4 Ind. Cas. 159.

(13) 7 O L J 237; 55 Ind. Cas. 412; 2 U P L R (J O) 74.

Ujagar and others respondents, decided on January 24, 1933."

This is the case in which the decree for mesne profits passed by the learned Judge was affirmed by this Court on February 6, 1935. The learned Counsel on behalf of the respondents has not pressed for this declaration. He simply stated that he wanted the rights of his clients to be protected in future. He further stated that the amount of profits which had been decreed in favour of defendants Nos. 1 and 2 has been realised by them. Under the circumstances we do not think it necessary to decide the question whether any such declaration can be granted. We have held that the appellants have got no share in the plots in suit as alleged by the plaintiffs and their names were wrongly entered in the revenue papers. It therefore follows that the defendants Nos. 1 and 2 in future cannot get any mesne profits with regard to the disputed land.

Lastly it was half heartedly suggested that the suit for mere declaration was not maintainable. It has been found by the lower Courts that defendants Nos. 1 and 2 were not in possession of any share and that their names were wrongly entered in the *khewat*, and we have agreed with these findings, the suit therefore is maintainable.

We therefore uphold the decree of the lower Appellate Court and dismiss the appeal with costs against defendants Nos. 1 and 2.

D.

Appeal dismissed.

NAGPUR HIGH COURT

Criminal Revision Application No. 105
of 1939

September 12, 1939

NIYOGI AND GRUBER, J.J.

HAZARIMAL AND ANOTHER—ACCUSED—

APPLICANTS

versus

EMPEROR—NON APPLICANT

C. P. Municipalities Act (II of 1922), s. 45 (1)—Interested in contract with Municipality—Night soil auctioned—Deposit of full price, condition of sale—Highest bid accepted—Part of purchase price deposited—Auction-purchaser selling manure to another who paying full price, removing it—Subsequent purchaser cousin of member—Night soil thrown on member's field—Another member helping in removal—Members if "interested" in contract with Committee.

There was an auction sale of night soil manure belonging to a Municipality and one M purchased it for Rs. 625. Under the condition attached to the sale, he had to pay the full price immediately and until payment he was not entitled to remove the material. He paid Rs. 300. He borrowed Rs. 325

from one *N* who deposited that amount with the Municipal Committee. Being unable to pay off the loan, he sold the manure to *N* for Rs. 625 on receipt of Rs. 300 in cash and in adjustment of the loan of Rs. 325. *N* was the natural brother of *H* one of the accused. *N* got permission from the Committee to remove the manure. Thereon the accused got it removed through the Municipal sweepers to *H*'s field. The other accused *G* who was also a member of the Committee, helped the accused *H* by giving Municipal sweepers, in the removal of the manure:

Held, that the contract could not be discharged until the conditions were fulfilled, i. e., by payment of the full price. The transaction could be characterised as a "contract" even after the property in the manure had passed to *M*, the highest bidder, and by the purchase of the manure from *M* after he became owner of it, *H* could be regarded as having become interested in a contract with the Municipal Committee. [p. 164, col. 1; p. 162, col. 2]

Held, also that *G* who simply assisted in the removal of the stuff could be regarded as a person interested in the contract with the Municipal Committee. The word 'interested', in s. 45 (1), C. P. Municipal Act, is to be interpreted in its ordinary wide sense and not confined to interest in money and includes jobbery. 121 Ind. Cas. 819 (2), explained and commented upon. [p. 163, col. 1; p. 164, col. 2.]

Cr. R. App. of the order of the Court of the Sessions Judge, East Berar Division, Amraoti, dated January 12, 1939.

Order of Reference

Niyogi, J.—(June 20, 1939).—This is an application to revise the order of the Sessions Judge, Amraoti, passed in Criminal Appeal No. 269 of 1938 on January 12, 1939.

The applicants Nos. 1 and 2, who are members of the Municipal Committee, Morsi, were convicted of the offence punishable under s. 108, I. P. C., read with s. 45 (1) of the C. P. Municipal Act, and sentenced to pay fines. On appeal the convictions were upheld but the fines were reduced.

The facts are that on February 4, 1938, there was an auction-sale of night soil manure and one Motisa purchased it for Rs. 625. Under the condition attached to the sale, he had to pay the full price immediately and until payment he was not entitled to remove the material. He paid Rs. 300 and on February 16, 1938, he obtained 6 days' time to pay the balance. He borrowed Rs. 325 from one Narayandas who deposited that amount with the Municipal Committee on March 2, 1938. He being unable to pay off the loan, sold the manure to Narayandas for Rs. 625 on receipt of Rs. 300 in cash and in adjustment of the loan of Rs. 325. Narayandas was the natural brother of Hazarimal (applicant No. 1) but became his first cousin by adoption. Applicant No. 2 Matagulam is not related to them.

After having purchased the manure from Motisa, Narayandas got permission from the Municipal Committee to remove it. Thereon the applicants got it removed through the Municipal sweepers to applicant No. 1's field. When the matter was brought to the notice of the Deputy Commissioner, he, after Police enquiry, ordered the prosecution of the applicants. Both the Courts below have found that Narayandas and the applicant No. 1 were joint in estate, that Hazarimal purchased the manure from Motisa with the consent of applicant No. 1, that the applicants, who are members of the Committee, engaged sweepers for the removal of the stuff and that it was taken to and deposited in the field of applicant No. 1. The prosecution contended that Motisa's bid was *benami* for applicant No. 1 but that contention was overruled.

To induce this Court to reverse the finding as to applicant No. 1's consent, it is urged that the statement to that effect made by P. W. No. 3. Motisa was not admissible. It is true that the only evidence to prove the consent was Motisa's (P. W. No. 3's) recounting in the witness-box of Narayandas's statement to him that Narayandas was purchasing the manure with the consent of applicant No. 1 but I cannot accept the contention that it was inadmissible. It was an admission made by Narayandas on behalf of applicant No. 1 who is a party to this proceeding and was therefore admissible under s. 18 of the Evl. Act. The prosecution refrained from examining Narayandas presumably for the reason that he being interested in applicant No. 1 would not say the truth. He could certainly have been examined as a witness for the defence and the omission to so examine him serves to corroborate the truth of Motisa's evidence.

The other findings are also attacked but I see no reason to interfere with them.

Nor do I see any force in the contention that sanction for prosecuting the applicants was necessary under s. 197, Criminal P. O. in view of the ruling in *Dulloomiya v. Tularam* (1).

The important questions which arise in this case are

- (i) whether the transaction can be characterised as a "contract" even after the property in the manure had passed to Motisa, the highest bidder, and whether, by the pur-

(1) 28 N. L. R. 156; 140 Ind. Cas. 711; A. I. R. 1932 Nag. 133; (1932) Or. Cas. 669; Ind. Rul. (1933) Nag. 10; 34 Cr. L. J. 70.

chase of the manure from Motisa after he became owner of it, the applicant No. 1 can be regarded as having become interested in a contract with the Municipal Committee?

- (ii) whether the applicant No. 2 who simply assisted in the removal of the stuff can be regarded as a person interested in the contract with the Municipal Committee?

These questions are of great public importance and are likely to recur. Both parties regard this as a test case. I, therefore, think that a Bench of this Court should pronounce an authoritative opinion on these points.

This case will be submitted to the Hon'ble the Chief Justice for reference to a Bench.

Mr. G. R. Pradhan, with Mr. J. Sen, for the Applicants.

Mr. W. R. Puranik, Advocate-General for the Crown.

OPINION

Niyogi and Gruer, JJ. — (September 4, 1939).—This is a reference made to a Division Bench for the solution of two questions arising out of Criminal Revision No. 105 of 1939.

The two applicants in that revision, Hazarimal and Matagulam, who are members of the Municipal Committee, Morsi, were convicted by a Magistrate, First Class, Morsi, for an offence punishable under s. 163, I. P. C., read with s. 45 (1), C. P. Municipalities Act and sentenced to payment of fines. In appeal to the Sessions Judge, Amraoti, the convictions were upheld although the fines were reduced. Section 45 (1) of the C. P. Municipalities Act reads as follows :

"If any member, officer or servant of a Committee is, without the written permission of the Deputy Commissioner, directly or indirectly interested in any contract with such Committee, he shall be deemed to have committed an offence under s. 163 of the I. P. C."

The facts were that on February 4, 1933, the night soil manure collected by the Municipality was auctioned publicly, and the highest bid, that of one Motisa (Rs. 625) was accepted. Motisa being unable to pay Rs. 325 out of this amount borrowed that sum from Narayandas, who is a cousin of accused No. 1 Hazarimal. Narayandas paid the amount on behalf of Motisa, and Motisa being unable to repay him sold the manure itself on the same day to Narayandas. Narayandas engaged sweepers to dig out the manure and other labourers to remove

it to a field held jointly by himself and his cousins Narayandas and Hemraj. He supervised the work himself while Matagulam who is his friend also engaged labourers for this work and employed sweepers of the committee to dig out the trenches. Amongst other defences it was contended that s. 45 (1), was in terms inapplicable to these facts, and the two questions now before us are framed as below :

"(i) Whether the transaction can be characterised as a 'contract' even after the property in the manure had passed to Motisa, the highest bidder, and whether, by the purchase of the manure from Motisa after he became owner of it, the applicant No. 1 can be regarded as having become interested in a contract with the Municipal Committee?"

"(ii) Whether the applicant No. 2 who simply assisted in the removal of the stuff can be regarded as a person interested in the contract with the Municipal Committee?"

It is argued for the applicants that by the time they took any hand in this matter the contract was already completed and wound up, and so there was no longer any subsisting contract in which they could be interested. Section 64 (2) of the Sale of Goods Act is quoted : the sale was complete as soon as the hammer fell in the auction, and it made no difference that part of the sale price remained to be paid and delivery of the goods had to be obtained. It is said that performance of the contract does not include delivery, and reliance is placed on the finding that there is no proof that this transaction was *benami* : it was a case of a purchase from a previous purchaser and if the Municipality had refused delivery they could have been sued as tortfeasors by the second purchaser. For the second applicant reliance is placed on *Emperor v. Narbada Prasad* (2), which limits the meaning of 'interested' in such a case to 'financially interested.'

It is pointed out by learned Counsel for the non-applicant that although no doubt by s. 64 of the Sale of Goods Act the sale was complete and property passed when the hammer fell still the sale was one with conditions, and until these were fulfilled the contract remained in force. The lower Appellate Court in para. 1 of its judgment mentions these conditions which are found in Ex. P-16. They are :

"That the full purchase money shall be paid immediately and that the manure shall not be allowed to be removed until such time as the full money is not paid. That the manure shall be removed and trenches emptied within one month and 15 days from the date of the auction, failing which

(2) 51 A 864; 121 Ind. Cas. 819; Ind. Rul. (1930) All. 195; 31 Or. L J 356; A I R 1930 All. 38.

the unremoved manure shall become the property of the Municipal Committee."

If a suit arose out of a breach of these conditions then, in our opinion, it would undoubtedly be one under the contract which remained alive until the conditions were fulfilled. At p. 10 of his work on the Law of Contracts, second edition, Venkatesa Iyer points out five ways in which they may be discharged. The first is by performance :

"Where a party performs his obligation according to the tenor of the contract and at the time stipulated, then the *vinculum juris* or the tie binding the parties is dissolved."

In the present case the contract would not be discharged until the conditions were fulfilled. At p. 868 Iyer says dealing with s. 4 of the Sale of Goods Act :

"As a contract of sale includes both a sale and an agreement to sell, it follows that both of them may be conditional."

And again :

"Parties may attach certain consequences to the non-fulfilment of conditions, (e. g.), mutual discharge of obligations."

So in the present case the vendee bound himself to remove the manure within a certain time failing which it was forfeited to the Committee. The law is similarly set forth in Anson's Law of Contract, Chap. XIII, s. 3. See also Chap. IV of the Indian Contract Act, ss. 37 to 40 and s. 55.

It cannot be denied that Hazarimal had a direct and personal interest in seeing that the manure was spread on the field which he held jointly with Narayandas and Hemraj because he stood to gain from the improvement thereby expected in the crops. We answer both parts of the first question in the affirmative.

Learned Counsel would distinguish the cases of Hazarimal and Matagulam, and relies on *Emperor v. Narbada Prasad* (2). Matagulam, it is said, only helped Narayandas out of friendship and was not himself financially interested. The learned Judges in the Allahabad case said :

"An 'interest in a contract' we hold to mean a financial interest, with profit or hope of profit from the contract as the object of the person interested."

A financial interest seems to have been alleged by the prosecution in that case, but if the learned Judges meant that no other kind of interest could come under the section we respectfully disagree. If it was what they meant they gave no

reason for saying so. In *Nutton v. Wilson* (3) Lord Esher, M. R. said that provisions of this kind

"are intended to prevent the members of Local Boards, which may have occasion to enter into contracts, from being exposed to temptation, or even to the semblance of temptation" and again Lindley, L. J., said that "the object..... was to prevent the conflict between interest and duty that might otherwise inevitably arise."

A person can take a deep interest in a thing without being influenced by motives of gain at all. He may be greatly interested in the welfare of a friend and that interest may conflict with his duty. So in the present case if the question of the forfeiture of the manure had come up before the Board Matagulam's interest in Narayandas and the carrying out of the contract on his behalf might well have induced him to favour Narayandas instead of looking at the question with the unprejudiced eye of a dutiful member of the Municipal Committee. Matagulam, according to the evidence, even went so far as to threaten the sweepers with dismissal if they did not remove the manure. He was taking advantage of his position as a member of the Committee to put pressure on the sweepers to work out of hours and on behalf of private persons. In our opinion, the word 'interested' is to be interpreted in its ordinary wide sense and not confined to interest in money. The English case of *Hunnings v. Williamson* (4) did in fact involve financial interest, but the section of the Metropolitan Management Act, 1855, in question (s. 54) contains the words "concerned or interested" and which are words of general and wide significance, and we think that the word 'interested' in the Indian Act must be given a reasonably wide application. In doing so, of course, one must bear in mind that the intention underlying s. 45 (1) of the Municipalities Act is to prevent jobbery and impure administration. Where the interest proved could not possibly lead to corruption then the word could be interpreted in favour of the accused. But there is also the other consideration on which stress is laid in *A. B. v. Emperor* (5) : for instance at p. 59.

"It is clear it was intended that all, and every description of jobbing by the Corporation should

(3) (1889) 22 Q B D 744; 85 L J Q B 443; 37 W R 522; 53 J P 644.

(4) (1883) 11 Q B D 533; 52 L J Q B 416; 49 L T 361; 32 W R 267; 48 J P 135.

(5) 7 N L R 53 (59); 10 Ind. Cas. 577.

be put an end to as far as mere legislation could do it"

and again at p. 61*.

"All such provisions . . . are designed to put a check on every kind of jobbery, and every fraudulent or improper use of office, by Municipal members and servants."

It is clear that both in England and in India such restrictions upon public servants such as councillors in their private dealings are meant to be most stringent, and effect must be given to them.

Our answer to the second question is therefore also in the affirmative.

Order.—The two questions of law which were referred to a Bench for opinion have been answered in the affirmative. The convictions of both the applicants must therefore stand.

As to the sentence I think there is room for consideration. In the circumstances of the case the applicants might in good faith, though erroneously, have believed that their conduct did not contravene the law and as the convictions are likely to disqualify them from continuing as members of the Committee, I reduce the sentences of fines passed against Hazarimal and Matagulam to Rs. 50 and Rs. 25 respectively.

D.

Sentence reduced.

*Page of 7 N L R.—[Ed].

LAHORE HIGH COURT

Execution Second Appeal No. 442 of 1939

October 26, 1939

BHIDE, J.

DAULAT RAM—OBJECTOR—APPELLANT
versus

DR. ANANT RAM—DECREE-HOLDER
AND OTHERS—JUDGMENT-DEBTORS

—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 58, s. 47—Objection by party to suit under O. XXI, r. 58 dismissed summarily as collusive—Subsequent application under s. 47, if barred by res judicata.

Where an objection under O. XXI, r. 58, Civil P. C., made by a party to the suit to an attachment of property in execution of decree is dismissed summarily as being collusive, without any enquiry, the dismissal must be deemed to have been on the ground that objection under O. XXI, r. 58 was not competent. The question of *res judicata* does not arise in such a case and subsequent application by the party under s. 47 is not barred.

Ex. S. A. from an order of the District Judge Amritsar, dated March 9, 1939.

Mr. Shamair Chand, for the Appellant.

Mr. Chandar Gupta, for the Respondents.

Judgment.—This is a second appeal arising out of execution proceedings relating to a decree. A certain house was attached by the decree-holder upon which one Daulat Ram put in objection under O. XXI, r. 58, Civil P. C., claiming the house as his exclusive property. The objection was summarily dismissed on February 19, 1937, without investigation on the ground that it appeared to be collusive. Daulat Ram then instituted a declaratory suit to establish his right but the suit was dismissed on June 23, 1937, on the ground that the suit was not brought under s. 47, Civil P. C., as Daulat Ram was a party to the suit in which the decree had been obtained and, therefore, his objection should have been under s. 47, Civil P. C. Daulat Ram then put in a second objection petition under s. 47, Civil P. C. This was allowed by the executing Court but the learned District Judge held on appeal that the second objection petition was not competent in view of the dismissal of the first petition under O. XXI, r. 58, Civil P. C., as the first petition also must in law be held to have been under s. 47, Civil P. C. He accordingly dismissed the objection petition of Daulat Ram as incompetent. He has preferred a second appeal.

The learned Counsel for the appellant has urged that there was no objection to a second petition being entertained in the circumstances of this case as the first petition purported to have been made under O. XXI, r. 58 and was summarily dismissed without any enquiry. He contended that there could be no question of any *res judicata* in the circumstances and therefore the second objection petition under s. 47, was competent and ought to have been decided on merits. This contention appears to me to be sound. There are no doubt authorities in which it has been held that even if an objection petition is made under O. XXI, r. 58, Civil P. C., the decision may operate as *res judicata*, but the circumstances of those cases are clearly distinguishable inasmuch as the objection was either decided on merits or in circumstances where the rule of constructive *res judicata* would come into operation. In the present instance, the objection purported to be under O. XXI, r. 58, Civil P. C. and was treated as such by the Court. No notice of the objection was issued to the opposite side and the objection was dismissed summarily on the ground that it appeared to be collusive. In these circumstances it seems to me clear that there could be no

question of even constructive *res judicata*. The first objection in the present case must be held to have been dismissed merely because it was incompetent under O. XXI, r. 68, Civil P. C. The second objection under s. 47, Civil P. C., was certainly competent and in the absence of any objection as to limitation or *res judicata* I do not see why it should not have been disposed of on merits. I accordingly accept the appeal and setting aside the order of the learned District Judge, remand the case to him for decision of the objection on merits. Stamp on appeal will be refunded, costs will follow final decision. The parties are directed to appear before the learned District Judge on November 14, 1939.

S.

Case remanded.

BOMBAY HIGH COURT

Second Appeal No. 398 of 1937

April 5, 1939

LOKUR, J.

CHHOTALAL PANACHAND—PLAINTIFF

—APPELLANT

versus

BOROUGH MUNICIPALITY OF NADIAD—

DEFENDANT—RESPONDENT

Bombay District Municipal Act (III of 1901), ss. 3 (13), 50 (2), 90 (5)—Municipality declaring private street as public one—Soil of such street, if belongs to Municipality—Whether can be claimed by person.

From the definition of "public street" in s. 3 (13), Bom. District Municipal Act, it does not follow that the soil of every public street must necessarily be of the ownership of the Municipality. Section 50, sub-s. (2) (f), says that all public streets, and the pavements, stones and other materials thereof and also all trees, erections, materials, implements and things provided for such streets shall be vested in and belong to the Municipality, and shall be held and applied by them as trustees. Unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. In fact s. 90, sub-s. (5), contemplates a private street being declared by the Municipality as a public street, but thereby the soil of such street does not come to be of the ownership of the Municipality. The only effect of such a declaration is that the street is allowed to be used by the public, and the public can claim a right of way over it as contemplated by s. 3, sub-s. (13) (a) of the Act. Therefore the decision of the City Survey Enquiry Officer that certain land was a public street does not declare that the Municipality was the owner of the soil of the street. On failure of a person to file a suit within one year after the decision of the City Survey Enquiry Officer, he is debarred from challenging the Municipality's claim that the land is a public street; but he is not debarred from claiming that even though it is a public street, the soil of the street belongs to him. *Modhu Sudan Kundu v. Promoda Nath Roy* (3), relied on. [p. 168, cols. 1 & 2.]

S. A. from the decision of the Assistant Judge, Nadiad, in Appeal No. 144 of 1936.

Mr. J. C. Shah, for the Appellant.

Mr. M. R. Vidyarthi, for the Respondent.

Judgment.—This second appeal arises out of a suit filed by the plaintiff for a declaration of his title to the land under and in front of Marudia Khadki in Kovada pole and the *chowk* in front of his house and the room in Nadiad, and for a permanent injunction restraining the Nadiad Borough Municipality from obstructing him in the enjoyment of his said site as its owner. The defendant Municipality contended that the plaintiff was not the owner of the site of the Khadki at the time of the City Survey Enquiry in the year 1916, the Khadki having been declared to be a public street, and the plaintiff's suit having been time-barred as it was not filed within one year after the decision of the City Survey Enquiry Officer. The trial Court framed two preliminary issues as to whether the suit was bad for want of necessary parties, and whether the suit was not in time as contended by the defendant Municipality; and it recorded findings in the affirmative on both the issues and dismissed the suit. The lower Appellate Court confirmed the decree, and the plaintiff has come in appeal. As regards the want of necessary parties, it is evident that the plaintiff is not, nor does he claim to be the exclusive owner of the entire Khadki. There are several houses in the Khadki, and even on the admission of the plaintiff, the owners of these houses have an interest in the Khadki. The proper course for the plaintiff was either to file a suit on behalf of all the owners under O. I, r. 8, Civil P. C., if it was permissible for him to do so, or to join them as parties to the suit. However non-joinder of parties is not fatal to the suit, and it is still open to the plaintiff to rectify the defect by joining the other owners of the houses in the Khadki either as plaintiffs or defendants.

As regards the other contention of the defendant Municipality, that the plaintiff should have filed a suit within one year after the decision of the City Survey Enquiry Officer declaring the Khadki to be a public street, it is necessary to consider certain material facts. The plaintiff alleged that he had no notice of the enquiry by the City Survey Enquiry Officer nor of the order passed by him. The City Survey Enquiry was made in 1915-16, and Ex. 16 shows that Chalta Nos. 1224 and 1225, which formed

the Khadki of the site in dispute, were declared to be part of a public street on July 17, 1916. As against Chalta No. 1225, a note was made that it was claimed by the owners of Chalta Nos. 1210-1223 as possessed and owned by them. Against both Chalta Nos. 1224 and 1225 it was noted in col. 5 that it was of the joint ownership of the owners of Chalta Nos. 1210-1223, that is to say, the owners of the houses standing on the Khadki. Chalta No. 1224 is described as Khadki and Chalta No. 1225 as Padtar. In col. 10 a note was made against both the numbers that no evidence was produced, that they were decided to be part of a public street, that members of the same family were not found to be residing in that street, and that the Municipality had got certain *otlas* from that pole removed. It is admitted that no protest was made by the residents in that Khadki against the order of the City Survey Enquiry Officer, nor was any suit filed within one year thereafter. The lower Courts have observed that on that account the present suit is barred under s. 64, Bom. Municipal Boroughs Act, 1925. By this they really mean that it is barred under s. 50-A, Bom. District Municipal Act, 1901, which was in force when the City Survey Enquiry Officer's order was passed. Sub-section (1) of s. 50-A of that Act provides as follows :

"In any Municipal District to which a survey of lands other than lands ordinarily used for the purposes of agriculture only has been or shall be extended under any law for the time being in force, where any property or any right in or over any property is claimed by or on behalf of the Municipality, or by any person as against the Municipality it shall be lawful for the Collector after formal enquiry, of which due notice has been given to pass an order deciding the claim."

It is clear from this that before an order deciding a claim is passed, it is necessary that the Collector or the City Survey Enquiry Officer must give due notice to the parties concerned and then hold a formal enquiry. If after such an enquiry a decision is given, sub-s. (2) of s. 50-A of the Act provides that any suit instituted in any Civil Court after the expiration of one year from the date of such an order shall be dismissed, (although limitation has not been set up as a defence), if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order, provided that the plaintiff has had due notice of such an order.

The plaintiff contends that he does not know if any formal enquiry was held by the City Survey Enquiry Officer, that he did not receive any notice of any such formal

enquiry, and that he did not receive any notice of the order passed by the City Survey Enquiry Officer as required by sub-s. (3) of s. 50-A, Bom. District Municipal Act, 1901. All these contentions were rightly disallowed by the lower Courts. The extract from the Survey Register (Ex. 16) clearly shows that the owners of the houses in the Khadki did appear and put forward their claim at least to the Khadki Chalta No. 1225 as the note in col. 9, shows. The remark made by the City Survey Enquiry Officer in col. 10, that no evidence was produced shows that he expected the said claimants to appear before him and adduce evidence in support of their contention. In the absence of evidence he came to his decision from surrounding circumstances and held that both Chalta Nos. 1224 and 1225 were part of a public street. From these circumstances it may be presumed that a formal enquiry must have been held by the City Survey Enquiry Officer after giving due notices to the parties concerned as required by sub-s. (1) of s. 50-A of the Act. This could have been proved by the direct evidence of the notices and other proceedings held by the City Survey Enquiry Officer, but unfortunately those proceedings have now been destroyed, as seen from the reply given by the Mamlatdar of Nadiad to the plaintiff (Ex. 15). According to Ill. (e) to s. 114, Evi. Act, judicial and official acts may be presumed to have been regularly performed. There was no special reason why the City Survey Enquiry Officer should have omitted to follow the procedure laid down in s. 50-A, Bom. District Municipal Act, 1901. Presumably the order passed by the City Survey Enquiry Officer must have been communicated to the plaintiff and other persons interested. In fact *sanads* must have been issued to the owners of the houses in the Khadki in respect of those houses. No such *sanad* has been produced by or on behalf of the plaintiff. From the *sanad* it could have been seen whether the Khadki which is one of the boundaries was or was not shown as a public street.

When the defendant Municipality came in the way of constructing *otlas* in the Khadki, the residents of the houses in the Khadki made an application to the District Deputy Collector on August 13, 1923, (Ex. 27), requesting that the Khadki should be declared to be of their private ownership. That application was rejected, and an appeal was preferred to the Collector on October 25, 1923, (Ex. 28). The Collector

also rejected that appeal on the ground that the claim was time-barred. At least when this application and the appeal were presented, the plaintiff had come to know the order passed by the City Survey Enquiry Officer, and no suit was filed even within one year after that. Subsequently, on July 9, 1929, the plaintiff built an *otla* and a privy on a portion of the Khadki, and the defendant Municipality ordered their removal. This suit was not filed even within one year after that. It is thus clear that the presumption that the procedure laid down in s. 50-A, Bom. District Municipal Act, 1901, must have been followed by the City Survey Enquiry Officer before deciding that the Khadki in suit was a public street stands un rebutted. It is also to be presumed that the decision was communicated to the plaintiff, and the plaintiff admittedly came to know of it at least in the year 1923; and if the plaintiff wants to have that decision set aside or asks for any relief which is inconsistent with that decision, then his claim is barred under sub-s. (2) of s. 50-A, District Municipal Act.

But the matter does not rest there. The plaintiff is at liberty to ask for any relief in respect of the Khadki if that relief is not inconsistent with the decision of the City Survey Enquiry Officer. The wording of that decision is "decided to be part of a public street," which does not mean that the soil of that street belonged to or was vested in the Municipality. The expression "public street" is defined in s. 3, cl. (13), as follows:

"Public street" shall mean any street—

(a) over which the public have a right of way, or (b) heretofore levelled, paved, metalled, channelled, sewered or repaired, out of Municipal or other public funds, or

(c) which under the provisions of s. 90 is declared by the Municipality to be, or under any other provisions of this Act becomes a public street."

It does not follow from this definition that the soil of every public street must necessarily be of the ownership of the Municipality. Section 50, sub-s. (2) (f), Bom. District Municipal Act, 1901, says that all public streets, and pavements, stones and other materials thereof and also all trees, erections, materials, implements and things provided for such streets shall be vested in and belong to the Municipality, and shall be held and applied by them as trustees. In interpreting s. 32, Beng. Municipal Act, (Beng. V of 1876), which is worded similarly the Calcutta High Court in *Chairman of the Naihati Municipality v. Kishori Lal*

Goswami (1) observed as follows (p. 173):

"If...the word 'road' carried with it all the soil, all the materials, and all the erections on it, this enumeration, in express words, of 'pavements,' 'stones,' &c. would be unnecessary. Clearly then there must be some limitation to the word 'road'. It does not mean everything above and below the road: and we think, looking at the case in *St Mary, Newington v. Jacobs*, (2) that the sub-soil did not belong to the Municipality".

In that case the Municipality claimed compensation for the whole soil on the ground that they had a title to the property in the soil under the said s. 32, while the *zamindar* claimed that money on the ground that the soil belonged to him; and after interpreting the wording of s. 32, Beng. Municipal Act, 1876, the Calcutta High Court held that the soil belonged to the *zamindar*. In the Bom. Act the word 'street' is used instead of the word 'road'. The same view was taken in *Modhu Sudan Kundu v. Promoda Nath Rou* (3), and it was held that s. 10, Beng. Municipal Act (Beng. III of 1864), did not deprive a person of any right of private property that he might have in land used as a public road, nor did it vest the sub-soil of such land in a Municipality. It was also further held that when such land was no longer required as a public road, the owner was entitled to claim its possession.

I agree with that view, and unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. In fact s. 90, sub-s. (5), Bom. District Municipal Act, 1901, contemplates a private street being declared by the Municipality as a public street, but thereby the soil of such street does not come to be of the ownership of the Municipality. The only effect of such a declaration is that the street is allowed to be used by the public, and the public can claim a right of way over it as contemplated by s. 3, sub-s. (13) (a), of the Act. If so, the decision of the City Survey Enquiry Officer that the Khadki was a public street did not declare that the Municipality was the owner of the soil of the street. It may be that at one time it was a private street and was declared by the Municipality as a public street under s. 90, sub-s. (5), Bom. District Municipal Act. Even in that case, the City Survey Enquiry Officer

(1) 13 O 171 (173).

(2) (1871) 7 Q B 47; 41 L J M C 72; 25 L T 800; 20 W R 249.

(3) 20 O 732.

would be justified in holding the Khadki to be a public street, although the soil belonged to the owners of the adjoining houses. If the City Survey Enquiry Officer had decided that the soil belonged to the Municipality and had been declared a public street, then the plaintiff's claim in the present suit would have been inconsistent with that decision. By reason of the plaintiff's failure to file a suit within one year after the decision of the City Survey Enquiry Officer, he is debarred from challenging the Municipality's claim that the Khadki is a public street; but the plaintiff is not debarred from claiming that even though it is a public street, the soil of the street belongs to him.

After the plaintiff's appeal to the Collector was rejected as time-barred in 1924, the plaintiff put up an *otla* and a privy in 1929, and when they were ordered to be removed, all the residents in the Khadki made an application to the Municipality requesting that the Khadki be declared to be of the private ownership and not a public street. At a general meeting of the Municipality held on February 28, 1931, (Ex. 22), it was resolved that the public street should be "made" a private street. A reply was given accordingly to the applicants on March 1, 1931, (Ex. 21). That resolution was forwarded to the Collector, but the Collector refused to sanction the conversion of the public street into a private street. When this decision was communicated to the plaintiff and other residents, the present suit was filed.

Section 90, sub-s. (1), Bom. District Municipal Act, 1901, which corresponds to s. 114, sub-s. (1), Bom. Municipal Boroughs Act, 1925, which now governs the Nadiad Municipality, empowers the Municipality "to widen, open, enlarge or otherwise improve, and to turn, divert, discontinue or stop up any public street." In exercise of this power the defendant Municipality passed a resolution discontinuing the use of the Khadki in dispute as "a public street." Such discontinuance did not require the sanction of the Commissioner under s. 40, sub-s. (2), Bom. District Municipal Act, 1901, or s. 48, sub-s. (2), Bom. Municipal Boroughs Act, 1925, since such discontinuance did not amount to a lease or sale of any Municipal land, unless it is held that the soil of the Khadki belongs to the Municipality. The question whether the soil of the Khadki belongs to the owners of the adjacent houses or to the Municipality has not yet been determined. If it be-

longs to the Municipality, then the plaintiff has no claim over it, and the suit is bound to be dismissed. If on the other hand it belongs to the plaintiff and other residents of the locality, then the Municipality can discontinue its use as a public street without the sanction of the Commissioner, since thereby it does not part with any land belonging to it. Admittedly, the Municipality passed a resolution at its general meeting discontinuing the use of the Khadki as "a public street," and the resolution was duly communicated to the owners of the houses in that locality. That resolution took effect immediately, unless it is held that it required the sanction of the Commissioner. Whether such sanction is required or not depends on the ownership of the Municipality over the soil of the Khadki. It is, therefore, necessary to raise an issue as to whether the land belongs to the plaintiff or to the Municipality, and this suit cannot be finally disposed of unless a finding is recorded on that issue.

This aspect of the case has not been considered by the lower Courts. They seem to have thought that the decision of the City Survey Enquiry Officer amounted to an order that the soil of the street belonged to the Municipality and that therefore the plaintiff's claim in this suit is inconsistent with that decision. But, as I have pointed out above, even if the decision of the City Survey Enquiry Officer cannot be challenged by the plaintiff, still he can contend that by reason of the resolution of the Municipality converting the public street into a private street, the land of the street reverts to him as he was its owner before it was declared to be a public street, as held in *Modhu Sudan Kundu v. Promoda Nath Roy* (3). Both the lower Courts dismissed the suit on their findings on preliminary issues and therefore the suit must be remanded under O. XLI, r. 23, Civil P. C.

For these reasons I allow the appeal and set aside the decree passed by the lower Courts. I frame the following issues: (1) Does the plaintiff prove that the site of the Khadki in suit belongs to him? (2) If so, can the defendant Municipality discontinue the use of the Khadki as a public street without the sanction of the Commissioner? (3) If so, does the ownership of the site of the Khadki, which was till then a public street, revert to the plaintiff? (4) And, if so to what relief is the plaintiff entitled? I remand the case to the trial

Court for further hearing and disposal under O. XLI, r. 23, Civil P. O. Both the parties are at liberty to adduce further evidence. The costs in this Court and in the lower Appellate Court will be costs in the suit.

s.

*Case remanded.***ALLAHABAD HIGH COURT**

First Appeal No. 231 of 1937

November 1, 1939

BENNET AND VERMA, JJ.

RANBIR KARAM SINGH—

DEFENDANT—APPELLANT

versus

JOGINDRA CHANDRA BHATTACHARJI

—PLAINTIFF AND OTHERS—DEFENDANTS—

RESPONDENTS

Hindu Law — Adoption — Bringing up child and describing him as adopted, whether valid adoption—Succession Act (XXXIX of 1925) — Applicability—Hindu convert to Christianity — Succession to, how governed — Punjab Laws Act (IV of 1872), s. 5—Adoption by Hindu convert to Christianity — Custom must be alleged and proved — Caste Disabilities Removal Act (XXI of 1850) — Scope—Does not deal with succession to estate of convert — Evidence Act (I of 1872), s. 115—There must be creation of belief and a person must act on it.

The bringing up of a child, even with the intention of giving one's property to him and describing him as having been adopted, do not constitute adoption in the sense as understood in Hindu Law. [p. 172, col. 1.]

Succession to the estate of an Indian Christian dying intestate cannot be governed by the rules applying to the Hindus to which community he belonged before his conversion to Christianity. In such a case the succession is governed by the Succession Act. 64 Ind. Cas. 559 (1), relied on. [p. 174, col. 1.]

So far as the Province of Punjab is concerned, under s. 5, Punjab Laws Act, 1872, the primary rule for decision in matters of succession is custom, which may be found to govern the parties, but it is for those who allege that there is such a custom to establish it. Thus, it is at least necessary for a Hindu convert to Christianity to allege and to prove that there is any custom of adoption among the Christian community in the Punjab, or in any section of that community, before any question as to whether any such adoption confers on the alleged adopted boy the same rights as an adoption in Hindu Law confers on him, can be considered. 1 Ind. Cas. 597 (4) and 116 Ind. Cas. 308 (5), explained. [p. 175, col. 1.]

The Caste Disabilities Removal Act is intended to deal with the rights to property of the person who is converted and not with succession to the estate of the convert. [p. 175, col. 2.]

The creation of a belief alone is not what s. 115, Evi. Act, requires. It is further necessary that the person who is made to believe something must act upon that belief. [p. 176, col. 2.]

F. A. from the decision of the First Civil Judge, Meerut, dated February 4, 1937.

Mr. O. M. Thomas, for the Appellant.

Mr. G. S. Pathak, for the Respondents.

Verma, J.—This is an appeal by defendant No. 1. The plaintiff's suit was that

"it be declared that defendant No. 1 is neither the adopted son of the deceased, Mrs. Surendri Helen Karam Singh or her husband, nor is the legal heir to her estate in the hands of the Administrator-General and Official Trustee, United Provinces, Allahabad, which is divisible according to law only amongst the plaintiff and defendants Nos. 2 to 4 who are her legal heirs."

The Court below has decreed the suit. The plaintiff and the persons who were originally defendants Nos. 2 to 4 are brothers. Mrs. Surendri Helen Karam Singh deceased was their sister. Dr. J. C. Bhattacharji, who was originally defendant No. 2, seems to have died after the institution of the suit and a number of persons have been brought on the record as his legal representatives.

The plaintiff and his brothers are Christians. So were their sister, Mrs. Surendri Karam Singh deceased, and her husband, Mr. Karam Singh. These facts are admitted. It is also common ground that Karam Singh died intestate on September 2, 1931, and all his property was inherited by his widow, the sister of the plaintiff. It is again common ground that this lady, Mrs. Surendri Helen Karam Singh, also died intestate on April 11, 1932. At the time of her death she was possessed of movable and immovable property and the dispute in this case relates to this property. The case of the plaintiff is that the deceased Mrs. Karam Singh being a Christian, he and his brothers are the legal heirs in accordance with the provisions of the Indian Succession Act. Defendant No. 1, who is a minor under the guardianship of one Dr. Miss O. M. John, contested the suit. The principal pleas raised on behalf of defendant No. 1 were that the property did not belong to the lady, Mrs. Surendri Helen Karam Singh, that all the property was owned by her husband, the late Mr. Sardar Karam Singh, that defendant No. 1 was the legally adopted son of the late Mr. and Mrs. Karam Singh, and as such was entitled to the estate left by them; that Mr. Karam Singh and his wife were competent to adopt the contesting defendant as their son and heir under the Punjab Customary Laws; and that the plaintiff was estopped from denying the adoption. In para. 24 of the written statement it was further pleaded that

"the deceased Sardar Karam Singh was a Sikh by caste before his conversion to Christianity and in the matter of succession was governed by rules of Hindu Law and Punjab Customary Law. The plaintiff and his brothers are no heirs to the late Mr. Karam Singh."

The Court below has held that the property in question belonged to Mrs. Surendri Helen Karam Singh; that defendant No. 1 was not the adopted son of Mr. or Mrs. Karam Singh; that he was not their heir and was not entitled to inherit the property in question: that no custom of adoption governing Indian Christians had been proved, and that there was no estoppel against the plaintiff.

The case of the plaintiff was that defendant No. 1 was a foundling whom the late Mr. Karam Singh had taken over from the Police at Lahore with the intention of protecting him and bringing him up. In proof of this assertion, the plaintiff has filed Ex. 4, which is a certified copy of a Police report dated June 27, 1929. Mr. Muhammad Sadiq, one of the witnesses produced by defendant No. 1, admits that this report bears his signature. He was the Kotwal at Lahore at that time. It is stated in this report that the maintenance and care of "the newly born child" (the word in the original is "tiff" and the verb used in the original denotes that the child was male child) had been at first made over to one Hafiz Lohar, but afterwards, on account of the unsatisfactory manner in which Hafiz looked after the child, it had been entrusted to Mr. Karam Singh, Station Superintendent of the office of the Inspector-General of Police, Lahore. It is also stated in this report that Mr. Karam Singh expressed a desire that the child be made over to him. This report was put up before a Magistrate who sanctioned the making over of the child to Mr. Karam Singh. The case put forward on behalf of the appellant, on the other hand is, that he was born on June 19, 1929, and nine days after his birth he was "given in adoption" to Mr. Karam Singh and his wife by the appellant's mother and her sister. We have not been referred to any evidence to show who the appellant's mother was or who her sister was. As to the manner in which the adoption was performed, the case put forward on behalf of the appellant is that no ceremony of any sort is required by the Punjab Customary Law governing the Sikh community to which Mr. Karam Singh belonged before his conversion to Christianity, that that Customary Law must be applied to Mr. Karam Singh, and that therefore it was not necessary for Mr. Karam Singh to perform any ceremony whatsoever. It is argued that the facts that Mr. Karam Singh took over the appellant, brought him up and used to describe him as his

"adopted son," are sufficient to confer on the appellant the legal status of sonship and to entitle him to succeed to the property left by Mrs. Surendri Helen Karam Singh.

Of the witnesses produced on behalf of the appellant, the only person who claims to be an eye-witness of what may be described as the factum of adoption is one Feeroz Din who says that he was Mr. Karam Singh's official orderly. His story is that the adoption took place in the evening in the month of June or July about eight years before January 6, 1937, when he was giving evidence, and that the witness

"was massaging the legs of Mr. Karam Singh at the time when a Sikh couple came to him and said that they had brought a boy for the said Mr. Karam Singh. The couple said they would not be able to bring up the child and asked Mr. Karam Singh to adopt the boy."

He states that Mr. and Mrs. Karam Singh agreed to the proposal of the Sikh couple who went away leaving the child behind with Mr. and Mrs. Karam Singh. After having carefully perused the statement of this witness, we have not the slightest hesitation in agreeing with the opinion of the Court below that the evidence given by this witness in a "tissue of lies." It will also be noticed that the allegation in the written statement is that the appellant was given in adoption by his mother and her sister, whereas the witness's story is that a Sikh couple came to Mr. Karam Singh with the boy and left him behind. Baba Mani Ram is one of the witnesses examined by defendant No. 1 on commission and he states that, as far as he could recollect, Mr. Karam Singh had said in the presence of all the other clerks of the office that he had got the boy "through the agency of the Police". In view of this statement of a witness of the appellant himself, and in view of the inherent improbability of the story related by Feeroz Din, we are not prepared to place any reliance on his evidence. As already stated, there is no other eye-witness of the alleged adoption. It is argued however that the appellant's case of adoption is proved by the fact that Mr. and Mrs. Karam Singh had this boy baptized on February 2, 1930, and reliance is placed on a copy of the baptismal certificate (Ex. A) printed at p. 39 of the paper book. The Rev. Dinanath, who was the Vicar of the Holy Trinity Church where the baptism took place, has been examined on commission by the appellant

He states that he performed the baptism and that Ex. A is a true copy of the entries in his register which he had before him when he was making his statement.

The argument on behalf of the appellant is that in the column "parents' names" the entry is as follows: "Adopted by Stephen Karam Singh, Surendri Karam Singh," and it is urged that this entry must have been made on a statement by Mr. and Mrs. Karam Singh that they had adopted the boy. Although we are not satisfied that the requirements of the law as to the proof of Ex. A have been strictly complied with, we shall deal with this document on its merits. We may also accept the argument that Mr. and Mrs. Karam Singh in all likelihood told Rev. Dinanath that the child to be baptised had been "adopted" by them. It must however be remembered that adoption in the technical legal sense is one thing, and the bringing up of a child, even with the intention of ultimately giving one's property to that child, and loosely describing him as having been adopted, is quite another. Although Dr. Miss. John, the certificated guardian of the appellant, has made in the Court below the startling statement that "the custom of adoption prevails very freely amongst the Christians" and that "by adoption I mean perpetuating of the line and that the adopted boy becomes the owner of the adoptive parents" (the word "property" seems to have been left out by oversight) it has not been argued before us that adoption is a recognized institution among Christians in the sense in which it is understood and recognized among the Hindus and in Hindu Law.

It is possible that Mr. and Mrs. Karam Singh, who, it is common ground, had no children of their own and had taken over this boy from the Police with the intention of bringing him up, had grown very fond of him and used to describe him as their adopted son, but that would not make the boy Mr. Karam Singh's adopted son in the sense in which that expression is used in Hindu Law. It is further urged that the fact that Mr. and Mrs. Karam Singh had this boy baptised goes to support the case of the appellant. In this connection reliance has been placed on Ex. C, p. 33, which is alleged to have been the invitation card which Mr. and Mrs. Karam Singh are alleged to have issued at the time of the baptism. The witness Feeroz Din has stated that he was given this invitation card "to join the

ceremony" and that it remained with him and he made it over to the guardian of the appellant when she visited Lahore. As we have already stated, we do not consider Feeroz Din to be a truthful witness at all. It may further be pointed out that appellant's witness Baba Mani Ram states that he was present at the time of the ceremony of baptism. But no question was put to him as to whether he received any such invitation card. The suit was instituted in January 1935; the appellant's written statement was filed in May 1935, and issues were framed in December 1935. This invitation card was not produced in Court until December 6, 1936. Muhammad Sadiq, another witness produced on behalf of the appellant states that he does not remember if any invitation card to join the ceremony of baptism was issued at the time, although he says that he was present at the ceremony. We do not in these circumstances consider that Ex. C has been proved to be a genuine document. But even if we take it to be a genuine invitation card which was really issued by Mr. and Mrs. Karam Singh at the time of the appellant's baptism, that cannot help the defendant. The appellant relies on the words "adopted son of S. Karam Singh..."

The observations which we have made with regard to the entry in the baptismal certificate apply to the use of these words in this invitation card also. Further, the adoption is alleged to have taken place in June 1929, and the baptism took place in February 1930. The position thus is that there is no contemporaneous documentary evidence in proof of the alleged adoption. The oral evidence to prove it consists of the testimony of a solitary witness Feeroz Din which is wholly unsatisfactory. In this connection a statement of the appellant's witness, Mr. J. T. M. Bennet, is significant. A question was put to him in cross-examination:

"What did you understand by his saying that he had adopted the boy? Was it in the ordinary sense amongst Europeans that he was going to bring up the boy as his son; and eventually to make him his heir, or was it in any other special sense?"

The answer to this question is in these words:

"I understood that his adoption was in the ordinary sense understood amongst Europeans that he was going to bring up the boy as his son and make him his heir."

We are therefore not prepared to hold that the appellant has proved the factum of adoption. It has been argued on behalf of the appellant that Mr. Karam Singh, al-

though he renounced Sikhism and embraced Christianity, continued to retain what is described as "the right of adoption." As stated above, it was alleged in para. 24 of the written statement that in the matter of succession, Sardar Karam Singh was governed by rules of Hindu Law and the Punjab Customary Law, it is argued that among the class of Sikhs to which Sardar Karam Singh belonged before his conversion to Christianity and in the locality where his family had originally resided, there was a custom of adoption and that Mr. Karam Singh continued to be governed by that custom. Now, the Succession Act (XXXIX of 1925) states in its Preamble that it was expedient to consolidate the law applicable to intestate and testamentary succession in British India. Section 2 (d) defines "Indian Christian" as meaning "a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion."

It is not denied that Sardar Karam Singh as well as his wife were of unmixed Asiatic descent, were natives of India and professed the Christian religion. Defendant's own witness, the Rev. Dinanath, states that he always thought that both of them were good Christians and that, as far as his knowledge went, none of them ever professed either Hindu or Sikh belief. He has further stated that Mr. Karam Singh, to the best of his knowledge, was a member of the Indian Christian community at Lahore and that he and his wife belonged, as far as he knew, to the Church of England and attended the Holy Trinity Church, Lahore. Baba Mani Ram has stated that the funeral ceremonies of Mr. Karam Singh were performed according to Christian rites at Lahore by an Indian Christian *padri*. Thus, there can be no doubt whatsoever that Mr. and Mrs. Karam Singh were Christians not only in name and form, but they followed the tenets of the Christian religion sincerely and faithfully. It is difficult to believe therefore that Mr. Karam Singh could possibly ever have had any intention of retaining any customs, traditions or practices of the religion which he had deliberately renounced. Section 5 (1) of the Indian Succession Act provides:

"Succession to immovable property in British India of a person deceased shall be regulated by the Law of British India, wherever such person may have had his domicile at the time of his death," and sub-s. (2) of that section provides that succession to the movable property of a person deceased is regulated by the law of the country in which such person had his

domicile at the time of his death. There is no question that Mr. Karam Singh as well as his wife had their domicile in British India. Succession to their property, immovable as well as movable, is therefore governed by the Law of British India. Part IV of the Act deals with consanguinity, and by s. 23, which is the first section in that part, it is provided that nothing in that part shall apply to any will made or intestacy occurring before January 1, 1866, or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jain or Parsi. It follows therefore that the provisions of that part apply to Indian Christians. Section 24 runs thus: "Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor," and s. 25 (1) provides that

"lineal consanguinity is that which subsists between two persons, one of whom is descended in a direct line from the other, as between a man and his father, grandfather and great-grandfather, and so upwards in the direct ascending line; or between a man and his son, grandson, great-grandson and so downwards in the direct descending line."

Section 26 deals with collateral consanguinity. It will thus be noticed that there is absolutely no mention of adoption as creating any kind of relationship whatsoever. Part 5 deals with the intestate succession and by sub-s. (1) of s. 29 succession to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jain is excepted. Sub-s. (2) of s. 29 provides:

"Save as provided in sub-s. (1) or by any other law for the time being in force, the provisions of this part shall constitute the Law of British India in all cases of intestacy."

The rules as to succession in the case of an intestacy then follow in Chap. II. It is not denied that, but for the adoption set up on behalf of the appellant, the plaintiff and his brothers are the heirs of the deceased lady under the provisions of the Succession Act. It is argued, however, that as Sardar Karam Singh was a resident of the Punjab, he must be taken to be governed by the Punjab Customary Law even on his conversion to Christianity. It is alleged, on the basis of a statement made by Baba Mani Ram, that Mr. Karam Singh was a Khattri by caste before his conversion to Christianity. It is then argued on the authority of a book called "Customary Law in the Gujranwala District, Vol. XXVI" by Dalip Singh, Settlement Officer, that the custom of adoption did prevail among the Khattris in that district. Now, in the first place we are not satisfied that there is really any clear and convincing evidence that

Mr. Karam Singh was a resident of the district of Gujranwala or was a Khattri by caste. But even accepting these allegations for the sake of argument as true, the question still remains as to whether it can be held that even after Mr. Karam Singh was converted to Christianity he continued to be governed by the customs prevailing among the Khattris of the district of Gujranwala. It seems to us that the argument that succession to the estate of an Indian Christian can be governed by the rules applying to the community to which he belonged before his conversion to Christianity is not sound. Their Lordships of the Privy Council have had occasion to deal with this matter in *Kamawati v. Digbijai Singh* (1). The relevant portions of their Lordships' judgment are at pp. 533 and 534 of the Report. Their Lordships observe that an argument was submitted to them to the effect that even accepting the view that the deceased was a Christian, still he had by his acts made such an indication as the law would respect, to the effect that his succession was not to be governed by the Succession Act. Their Lordships then observe:

"Their Lordships can give no countenance to such a principle. It is unavailing to quote the cases of *Abraham v. Abraham* (2) or *Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi Nilamani Patta Maha Devi Garu* (3). These cases preceded the Succession Act and cannot modify or interpret it."

Proceeding further, their Lordships say:

"The question accordingly is, was the late owner of this estate, or was he not, a Hindu? If he was, the Mitakshara Law would apply. If he was a Christian, the Succession Act, rules would apply."

Then their Lordships state that the argument before them was that, notwithstanding the fact that the deceased was proved beyond question to have been a Christian at the time of his death, the Hindu Law of succession should apply to his estate. The pronouncement of their Lordships with regard to this argument is in these words:

"A situation of nothing but confusion could be thus produced. The plain law of the Succession Act would be eviscerated, and in each case inquiry might have to be entered upon as to whether a deceased subject of the Crown wished or by his acts compelled that the law of the land should not apply to his case. A particular subject can settle that in India, as in other parts of the

(1) 43 A 525 (533, 534); 64 Ind. Cas. 559; A I R 1922 P O 14; 48 I A 381; 15 L W 1; 10 M L T 47; 42 M L J 87; 26 O W N 490; 24 Bom. L R 626; 4 U P L R (P O) 27; (1922) M W N 336 (P O).

(2) 9 M I A 195; 1 W R 1; 1 Suther 501; 2 Sar. 10 (P O).

(3) 13 M I A 497; 14 W R 33; 2 Suther 365; 6 Beng L R 202; 2 Sar. 601 (P O).

Empire, by exercising whatever be his religion his power of testacy, and definitely declaring how he desires his affairs to be regulated so far as his own individual property is concerned."

It will be noticed that the argument pressed upon us is of the same type as was submitted to their Lordships, and in our opinion such an argument cannot, in view of the observations of their Lordships of the Privy Council quoted above, be accepted. It is argued however that so far as a resident of the Punjab is concerned, the question of succession to his estate must be decided in accordance with the provisions of the Punjab Laws Act, IV of 1872. Now, s. 5 of that Act provides that:

"In questions regarding succession... adoption the rule of decision shall be (a) any custom applicable to the parties concerned.....(b) the Muhammadan Law, in cases of Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment or is opposed to the provisions of this Act or has been modified by the provisions of any such custom as is above referred to."

It is obvious that cl. (b) has no application to the case before us, but it is argued on the basis of cl. (a) that the succession to the estate of Mrs. Karam Singh must be held to be governed by the customs prevailing among the Sikhs and the Khattris of the Gujranwala District. This argument however completely loses sight of the important words "applicable to the parties concerned." Learned Counsel appearing for the appellant has invited our attention to two cases decided by the Punjab Chief Court, viz., *Mukerji v. Alfred*, 1 Ind. Cas. 697 (4) and *Sohan Lal v. A. Z. Mukhuin*, 116 Ind. Cas. 305 (5). These very cases however are in our opinion against the contention of the learned Counsel. It was held in the first case mentioned above that in the absence of any custom, as provided by s. 5 (a), Punjab Laws Act, the rule of law applicable to the case of Hindu converts to Christianity is as provided for in the Succession Act. It was further held that:

"The test for applying the rule of equity and good conscience to regulate succession in the case of a convert is to ascertain the course of conduct and usage adhered to since conversion."

It would thus appear that this case is no authority for the proposition that the rule of law applicable in the present case should be the custom or practice which prevails in the community to which Mr. Karam Singh belonged before con-

(4) 36 P R 1909; 1 Ind. Cas. 697.

(5) 116 Ind. Cas. 308; A I R 1929 Lah. 230; Ind. Rul. (1929) Lah. 484.

version. In the second case mentioned above it was observed that so far as the Province of Punjab was concerned, under s. 5, Punjab Laws Act, 1872, the primary rule for decision in matters of succession was custom, which may be found to govern the parties, but it is for those who allege that there is such a custom to establish it. Thus, even according to the authorities cited by the learned Counsel for the appellant it is at least necessary for the appellant to allege and to prove that there is any custom of adoption among the Christian community in the Punjab, or in any section of that community, before any question as to whether any such adoption confers on the alleged adopted boy the same rights as an adoption in Hindu Law confers on him, can be considered. It is sufficient to state that no such custom has been set up, much less proved. It may be mentioned here that in *Sohan Lal v. A. Z. Mukuin*, 116 Ind. Cas. 308 (5) mentioned above, which is a decision by a learned Single Judge, a somewhat restricted meaning has been given to the observations of their Lordships of the Privy Council in *Kamawati v. Digbijai Singh* (1). In view of the fact however that in the case before us no custom alleged to be applicable to Christians has either been set up or proved, we do not consider it necessary to express any opinion as to the soundness or otherwise of the view expressed on that point in *Sohan Lal v. A. Z. Mukuin*, 116 Ind. Cas. 308 (5). Reference has also been made to the Caste Disabilities Removal Act XXI of 1850, and reliance has been placed on the word "right" in s. 1. It has been urged that Mr. Karam Singh before he was converted to Christianity had the "right" to adopt a son and that in view of the provisions of this Act he ought not to be held to have forfeited that right. In our opinion, this argument cannot be accepted. A Hindu has the "right" to use the language of the learned Counsel for the appellant to marry, and to have at the same time as many wives as he likes. A Muslim has the "right" to have at the same time four wedded wives. Can it be maintained for a single moment that a Hindu or a Muslim, after renouncing Hinduism or the Muslim faith and embracing Christianity, will under the Caste Disabilities Removal Act continue to possess the "right" of having more than one wife? Various other considerations can be mentioned to show the incorrectness of the argument advanced on behalf of the appel-

lant, but we consider it unnecessary to dwell on it any further. The Caste Disabilities Removal Act is :

"An Act for extending the principle of s. 9, Ragn. 7, 1832, of the Bengal Code throughout the territory subject to the Govt. of the East India Company."

The Preamble provides :

"Whereas it is enacted by s. 9, Regn. 7, 1832, of the Bengal Code, that "whatever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasion, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled," and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Govt. of the East India Company; it is enacted as follows:"

It is clear therefore that the Act is intended to deal with the rights to property of the person who is converted and not with succession to the estate of the convert. The question that arises in the case before us is as to whether defendant No. 1 is entitled to succeed to the estate of the deceased, in preference to the persons entitled under the Succession Act, on the ground that he was taken in adoption by a person who, at the time when he is alleged to have taken him in adoption, was admittedly a Christian. There is absolutely no evidence to show that after his conversion to Christianity Mr. Karam Singh ever expressed any desire, or did anything which can be said to indicate an intention, to retain any custom that might have prevailed in the community to which he had belonged before his conversion. It is said that his mother, who was a Sikh by religion, used to come to see her son and used to stay with him and that Mr. Karam Singh used to permit her to stay in his house. But this can be no evidence of the expression of any intention on the part of Mr. Karam Singh. Reliance is further placed on the statement of Feeroz Din that Mr. Karam Singh performed the funeral ceremonies of his mother according to Sikh religion. In cross-examination this performance of the funeral ceremonies is whittled down to Mr. Karam Singh supporting the *arhi* on which the dead body of his mother was taken. The witness further states in cross-examination that Karam Singh stayed there only for the night and returned to Lahore the next day. In addition to this, as we have already stated, we are not prepared to place any reliance on the testimony of Feeroz Din. The last point urged on behalf of the appellant

is that the suit is barred by estoppel. According to the judgment of the Court below, the argument of estoppel was based on a statement of the present plaintiff in the proceedings for the guardianship of the appellant after the death of Mrs. Surendri Helen Karam Singh. In the Court below reliance was placed on the following statements which the plaintiff made in the Court of the District Judge of Meerut on January 13, 1933, (*vide* Ex. B, p. 43):

"The adoptive mother of the child was my sister The child is owner of all the property left by my sister. I have no claim."

We fail to understand how these statements can be said to create the bar of estoppel. One may say that the plaintiff, having made those statements on a previous occasion, should not be believed when he makes statements to the contrary in the present case. But that is totally different from saying that the plaintiff is estopped. We agree however with the Court below that the plaintiff has fully explained the statements quoted above on which reliance was placed in support of this argument of estoppel in the Court below. He states in his deposition in the present case that he made the statement (Ex. B) in the guardianship case as he was told by Yakub Ali Khan, Kotwal, Meerut, that there was a will in favour of defendant No. 1 and under that impression he stated, that defendant No. 1 was the owner of all the property which had been left by his sister. He further stated that he had been told by Mr. Mukerji, who was the Vakil of Dr. Miss John in the guardianship proceedings, that defendant No. 1 had been adopted by Karam Singh and that he mentioned that fact in his statement and said that his sister was the adoptive mother of defendant No. 1. It is argued that it is not probable that the lawyer of Dr. Miss John would have had this conversation with the plaintiff. But we see nothing inherently improbable in the story that Mr. Mukerji, although he was appearing for a rival applicant for guardianship, namely, Dr. Miss John, had mentioned to the present plaintiff that Karam Singh had adopted the boy. For one thing, Mr. Mukerji might have felt that an information like that might deter the present plaintiff from actively prosecuting his own application for the guardianship of the boy; and for another, there is nothing to show that Mr. Mukerji had given this information to the present plaintiff after the latter had made his application for guardianship. It may be mentioned that an unsigned and

unattested writing purporting to be the last will and testament which Mrs. Surendri Helen Karam Singh is supposed to have intended to execute, has been produced on behalf of the defendant in this case. It is thus not unlikely that this story as to there being a will in existence in favour of the boy was circulated after the death of Mrs. Karam Singh. We agree therefore with the Court below that the explanation given by the plaintiff is sufficient. The arguments on the point of estoppel advanced before us have gone somewhat further. It has been argued that the plaintiff as well as his brothers by their conduct in the lifetime of Mr. Karam Singh showed that they looked upon the appellant as Mr. Karam Singh's adopted son, and reliance has been placed on s. 115, Evi. Act. Granting for the sake of argument that the plaintiff and his brothers did show in the lifetime of Mr. Karam Singh that they looked upon this boy as the son of Mr. Karam Singh, we are at a loss to understand how s. 115 can be brought into play in this case and how it can be said that the provisions of that section in any manner operate to bar the present suit. It is argued that by their conduct the plaintiff and his brothers created a certain belief in the mind of Mr. Karam Singh. But the creation of a belief alone is not what the section requires. It is further necessary that the person who is made to believe something must act upon that belief. We are not told in what manner Karam Singh acted upon the belief which the plaintiff and his brothers are alleged to have created in his mind. Then again, the present suit is not against Karam Singh. To argue that the appellant is a representative of Karam Singh is to beg the whole question. For the reasons given above we hold that the appeal is devoid of any merit and dismiss it with costs.

D.

Appeal dismissed.

MADRAS HIGH COURT

Full Bench

Appeal No. 135 of 1937

November 3, 1939

LEACH, O. J., KRISHNASWAMI AYYANGAR
AND SOMAYYA, JJ.

PALADUGU VEERA RAMACHANDRA
RAO—APPELLANT

versus

PALADUGU PARASURAMAYYA

AND ANOTHER—RESPONDENTS

*Civil Procedure Code (Act V of 1908), s. 48—
Starting point—Decree amended—Art. 182, Limitation*

Act, if affects s. 48—Limitation, whether begins to run from date of amendment or of original decree—Interpretation of Statutes—Language clear—Must be given effect to irrespective of anomaly.

Article 182, Lim. Act is expressly limited to applications for execution not provided for by Art. 183 or by s. 48, Civil P. C. Inasmuch as Art. 182 clearly leaves the provisions of s. 48 untouched there can be no execution of a decree governed by s. 48 when 12 years have passed from the date of the decree, amendment, or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under s. 152, Civil P. C., but, because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred. 138 Ind. Cas. 93 (2), followed, 46 Ind. Cas. 107 (1), *Ganesh Das v. Vishnu Das* (3) and 185 Ind. Cas. 373 (2) (4), relied on.

Per *Krishnaswami Ayyangar, J.*—When the language of the statute is clear the Court cannot refuse to give effect to it on a consideration that it would create an anomaly. It is in the hands of the Legislature to remedy such anomaly.

A. against appellate order of the District Court, Guntur, dated February 9, 1936.

Messrs. V. Parthasarathy and P. Satyanarayana Rao, for the Appellant.

Mr. A. Lakshmayya, for the Respondents.

Leach, C. J.—This appeal raises a question of limitation. On March 9, 1922, respondent No. 1 obtained in the Court of the Subordinate Judge of Bezwada a money decree against the appellant, the appellant's uncle and a cousin, who were the members of an undivided family. The amount for which judgment was obtained was Rs. 3,735 but a mistake was made in drawing up the decree and the figure inserted was Rs. 2,200. It was not until July 16, 1928 that the mistake was corrected under the provisions of s. 152, Civil P. C. On December 6, 1933 the respondent caused the decree to be transferred to the Court of the Subordinate Judge of Guntur for execution and on March 5, 1934, he applied for attachment of certain immovable property. The appellant objected to the attachment on the ground that the property was his personal property and the decree had only made him liable to the extent of his interest in the family property. This objection was well-founded and the attachment was raised. On November 12, 1935 the respondent filed another application for execution. Here he asked for the attachment of two decrees, one obtained by the appellant alone and the other in conjunction with his cousin. It was contended that the application was barred by the law of limitation and the contention was upheld by the Sub-

ordinate Judge. An appeal followed to the District Judge of Guntur who held that the decree was barred so far as it related to the sum of Rs. 2,200 but it was enforceable to the extent of Rs. 1,535, the difference between the Rs. 2,200 and Rs. 3,755, the figure which was inserted in the decree as the result of the amendment.

It is obvious that the District Judge's decision was wrong in allowing execution of part of the decree. The respondent must be entitled to the full amount, if entitled to anything. When the provisions of s. 48, Civil P. C. and Art. 182, Lim. Act, are considered it, however becomes manifest that the Subordinate Judge was right in holding that the decree was time-barred. Section 48 (1), Civil P. C., reads as follows:

"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed, or, (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree".

Therefore a decree which has been passed for more than 12 years cannot be executed, but where the decree or an order passed subsequent to the decree directs payment of money or the delivery of property to be made at a certain date or at recurring periods the date of the default in such a case shall be the starting point for the period of 12 years. Order XX, r. 7 provides that the decree shall bear the date of the judgment. Sub-s. (2) of s. 48 says:

"Nothing in this section shall be deemed (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application; or (b) to limit or otherwise affect the operation of Art. 180 of Sch. II, Lim. Act, 1877".

The corresponding Article in the present Lim. Act is Art. 182. Now, turning to cl. (4) of that Article we find that the period of limitation where a decree has been amended is three years from the date of the amendment, but the Article is expressly limited to applications for execution not provided for by Art. 183 or by s. 48, Civil P. C. Article 183 refers to applications to enforce judgments of High Courts and it has no bearing here. Inasmuch as Art. 182 clearly leaves the provisions of s. 48 untouched there can be no execution of a

decree governed by s. 48 when 12 years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under s. 152 of the Code. But because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred.

The question under consideration has been the subject of decisions by the Bombay, Allahabad, Lahore and Patna High Courts and they have all agreed that an amendment of a decree to bring it in accordance with the judgment does not have the effect of starting a fresh period of limitation. See *Narasinga Rao v. Bando Krishna Kulkarni* (1), *Fakir Chand v. Kundan Singh* (2), *Ganesh Das v. Vishnu Das* (3), and *Dulhin v. Harihar Gir* (4). In *Fakir Chand v. Kundan Singh* (2), the Allahabad High Court observed:

"Now no change was made in s. 48, Civil P. C., providing for the extension of the period of 12 years in that section from the date of the amendment of a decree. We consider that the Legislature advisedly omitted that provision for extension from s. 48, and that the omission was not accidental. In our opinion the effect of the omission is that an amendment of a decree does not give a new date for starting a period of limitation, if the application for execution is beyond the period of 12 years allowed by s. 48, that is, that the period of 12 years under s. 48 is final and cannot be extended by any amendment of the decree, whether that amendment is made before the expiry of the period of 12 years, or whether that amendment is made after the expiry of the period of 12 years. The reason why no amendment was made in s. 48 is that probably the greater period of 12 years is allowed by that section, and it is probably the intention of the Legislature that that period of 12 years should be final, and that within that period a decree-holder should amend his decree, and obtain all consequent remedies. If a decree-holder neglects to amend his decree within a sufficient period before the expiry of 12 years to allow him to obtain his remedy by execution, then he has only himself to blame."

I agree entirely with what is said here. In an unreported case of this Court (O. M. A. No. 264 of 1931) Madhavan Nair and Cornish, JJ. without giving any reasons, held that the period of limitation should be calculated from the date of the amendment of the decree. As their decision runs con-

trary to the plain wording of s. 48, Civil P. C., and Art. 182, Lim. Act, it cannot be allowed to stand. The learned Advocate for the respondent has argued that s. 48, Civil P. C., is not in all cases final and has drawn attention to the provisions of s. 15, Lim. Act, but all that need be said is that s. 48 is final unless there is some statutory provision which governs it in a particular case, and that is not the position here. Section 48 applies in the present case and as more than twelve years had elapsed before the last application for execution was made the decree had become time-barred. The appeal will be allowed and the judgment of the Subordinate Judge restored. The appellant is entitled to his costs in this Court and in the District Court. A memorandum of cross-objections filed by the respondent does not call for consideration and will be dismissed without costs.

Krishnaswami Ayyangar, J.—I am of the same opinion. Indeed, there is no escape from it when the language of s. 48, Civil P. C., is read in the light of the provisions of Art. 182, Lim. Act. The words used in col. 1 of that Article make it clear that the Legislature did not intend to interfere in any way with the limit of time fixed by s. 48. The Civil P. C., and the Lim. Act were enacted at the same time and a comparison of the provisions of the two statutes makes it abundantly clear that there is an intimate relationship between the two. In the Lim. Act of 1908 a new provision was inserted to fix the point of time from which the period of limitation under Art. 182 has to be calculated where the decree is amended; cl. (4) was added to the Article, so as to make it clear in such a case that it is the date of the amendment from which limitation will run. While the case of an amendment is thus met and provided for by Art. 182, Lim. Act, it is significant that the language of s. 48, Civil P. C., has been left unaltered. It is therefore a fair inference that the period of twelve years should be counted from the date of the decree irrespective of any amendment that it might have undergone since. The date of the amendment does not therefore furnish a fresh starting point under s. 48, Civil P. C., and must accordingly be ignored in making the calculation.

It was suggested on behalf of the respondent that the fact that there is no period of time limited for an application for an amendment under s. 152 introduces an

(1) 42 B 309; 46 Ind. Cas. 107; A I R 1918 Bom. 217; 20 Bom. L R 481.

(2) 54 A 622; 138 Ind. Cas. 93; A I R 1932 All. 351; (1932) A L J 471; Ind. Rul. (1932) All. 363.

(3) A I R 1935 Lah. 292.

(4) 18 Pat. 395; 185 Ind. Cas. 373 (2); A I R 1939 Pat. 607; 20 P L T 832; 6 B R 172 (2); 12 R P 364.

anomaly. It was said that a Court may grant and may be obliged to grant an amendment even after the period of twelve years fixed by s. 48, Civil P. C., and where an amendment is so granted the order would be rendered futile and barren unless s. 48 is understood as permitting the twelve years' period to be calculated from the date of the amendment. This may be an anomaly but the remedy is in the hands of the Legislature. When the language of the statute is clear we cannot refuse to give effect to it on a consideration of this kind.

Somayya, J.—I agree with my Lord the Chief Justice.

N.S.

Appeal allowed.

OUDH CHIEF COURT

First Civil Appeal No. 2 of 1937

February 27, 1940

ZIA-UL-HASAN AND YORKE, JJ.

Mst. PIRTHI PAL KUNWAR AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

Mst. SURAJ KUNWAR

AND ANOTHER—DEFENDANTS—

RESPONDENTS.

Hindu Law—Jointness—Presumption—Partition—Evidence of—Conduct of parties—Presumption as regards cousins—Joint execution of security bond by brothers—Presumption—Mutation in name of widows—Effect—Custom—Wajib-ul-arz—Entries in—Effect.

Execution of a security bond jointly by brothers does not necessarily show the jointness of the family as even strangers can join in executing a document. [p. 182, col. 1.]

There is no presumption that mutation in the name of a Hindu widow is by way of consolation. [p. 183, col. 2.]

Where there is no definite evidence of separation taking place at a particular time the separation of a family can be proved by the conduct of the family and the attendant circumstances. [p. 183, col. 1.]

The partition of joint estate consists in defining the shares of the co-parceners in the joint family and it is not necessary that there should be an actual division of the property by metes and bounds and the definition of shares may be proved by an entry in the Record of Rights showing the shares of each member of the family, and, further such an entry will be evidence of the severance of the joint status. 172 Ind. Cas. 977 (1) and 175 Ind. Cas. 332 (2), relied on. [p. 183, col. 2.]

The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker. [p. 184, col. 1.]

Wajib-ul-arz sometimes record not custom but the wishes of those who dictated them or their conception of the law on the subject.

Held, that the *wajib-ul-arz* of Isapur could not be taken as establishing the alleged custom of exclusion of sisters and sister's issue. [p. 184, col. 2.]

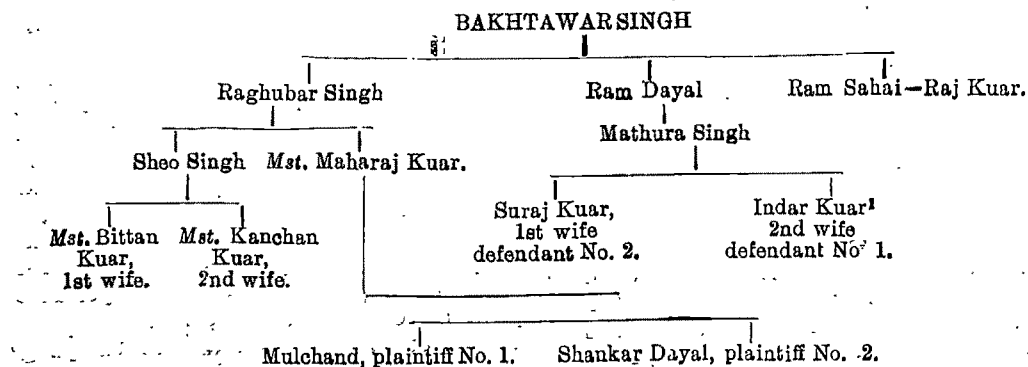
F. C. A. against an order of the Civil Judge, Sitapur, dated September 30, 1936.

Messrs. *Hyder Husain* and *H. H. Zaidi* for the Appellants.

Messrs. *S. C. Das*, *R. B. Lal* and *M. M. Lal* for Respondents Nos. 1 and 2.

Judgment.—This is an appeal against a decree of the learned Civil Judge of Sitapur dismissing the plaintiffs-appellants' suit for possession of certain immovable properties mentioned in lists A and B attached to the plaint.

The following pedigree has been proved and is not now disputed by the defendants, though in the trial Court they denied that the plaintiffs were sister's sons of Sheo Singh or in fact that Sheo Singh had any sister.



It will thus be seen that while defendants Nos. 1 and 2 are widows of Mathura Singh, the plaintiffs are sons of the sister of Sheo Singh, first cousin of Mathura Singh. The plaintiffs' case is that the

property in suit belonged to Sheo Singh who died on December 17, 1920, without leaving any issue but leaving two widows, Bittan Kuar and Kanchan Kuar, that Bittan Kuar and Kanchan Kuar entered

into joint possession of Sheo Singh's property after his death, that Bittan Kuar died on February 28, 1924, and Kanchan Kuar thereupon came into possession of the entire property, that Kanchan Kuar also died on April 25, 1930, and on her death Mathura Singh took wrongful possession of the property in suit, that on Mathura Singh's death which occurred on December 11, 1934 his two widows, the present defendants, came into possession of the property, that the plaintiffs are sons of Sheo Singh's sister, *Mst. Maharaj Kuar*, who died long ago and that as such they are entitled to Sheo Singh's property and that Mathura Singh and his widows obtained possession of the property wrongfully against them. On these allegations they sued Mathura Singh's widows for possession of the property. They originally claimed only a declaratory decree in respect of the property mentioned in list B of the plaint as they said they were already in possession of it but subsequently they amended their plaint and paid court-fee for possession of this property also.

Both the defendants contested the suit. They denied that Maharaj Kuar, the plaintiff's mother, was the sister of Sheo Singh or that Bittan Kuar and Kanchan Kuar were ever in possession of the property in dispute and alleged that the names of *Mst. Raj Kuar*, widow of Ram Sahai and of Kanchan Kuar and Bittan Kuar were entered fictitiously in the revenue papers for the sake of consolation only. The main defence of the defendants was that there never had been any partition among the descendants of Bakhtawar Singh so that when Sheo Singh died in 1920 Mathura Singh succeeded to the family property by right of survivorship. They further contended that according to the custom prevailing in the family of Bakhtawar Singh, daughters with their issue and sisters and their sons were excluded from inheritance by collaterals and it is only when there are no collaterals or daughters or daughters' issue that sisters and their sons become entitled to the property. Their further plea was that Act II of 1929, under which alone the plaintiffs could be entitled to the property, even supposing that they are the sister's sons of Sheo Singh, has no application to the case. The defendants also put up a plea of limitation.

On the defence raised by the defendants

the trial Court framed the following eight issues :

1. Whether Sheo Singh was separate from Mathura Singh? If so, its effect on the ownership of the property in suit?
2. Whether Maharaj Kuar was sister of Sheo Singh?
3. Are the plaintiffs in possession of the property in list B? If not, its effect?
4. Are daughters and their sons and sisters and their sons postponed as against the agnates, and in case there is no agnate then the daughter and her issue and after them the sister and her issue succeed by a family custom, as alleged by the defendant?
5. Does the Act II of 1929 not apply as Sheo Singh died before the Act came into force?
6. Would the Act not enure for the benefit of the sisters and their issues as they were not heirs under the Benares School of Mitakshara Law?
7. Does the Act also not apply because the family is governed by the special custom relating to sister as contained in issue (4)?
8. Is the suit barred by limitation?

To what relief and mesne profits, if any, are the plaintiffs entitled?

All the issues except Nos. 1, 4 and 7 were decided by the learned Judge in favour of the plaintiffs, but the suit was dismissed on the findings that Sheo Singh and Mathura Singh were members of a joint Hindu family and that there was a custom in the family whereby sisters and their issue were excluded by agnates so that the plaintiffs cannot avail themselves of Act II of 1929.

The two questions therefore that arise in this appeal are (1) whether Sheo Singh and Mathura Singh were members of a joint Hindu family or whether Sheo Singh died while separate from Mathura Singh and (2) whether there is any custom in the family of Sheo Singh excluding sisters and their issue if collaterals are in existence.

In support of their case on the first point, namely, that Sheo Singh was separate from Mathura Singh, the plaintiffs-appellants rely on the following documents :

(After detailing the documents the judgment proceeded)

Exs. A-37 to A-40 which are accounts filed by the defendants themselves and which the plaintiffs say are separate accounts of Sheo Singh and prove the separation of Sheo Singh from Mathura

Singh. We shall deal with these accounts later on in the judgment.

The plaintiffs further rely on the evidence of the following witnesses :

P. W. No. 2 Mangal, a tenant of Aonri Shahpur who states that Mathura Singh and Sheo Singh sued to take grain rent separately, that Sheo Singh had a grove in the village but Mathura Singh had not and that after Sheo Singh's death, the rent of his *sir* plots was realised by his widows and not by Mathura Singh.

P. W. No. 4 Mohabbat Bahadur, Patwari of Darapur, who says that he used to visit Sheo Singh and Mathura Singh, that the door of the house of Sheo Singh was to the west and that of Mathura Singh to the north and that the two were separate from each other. He further says that the business and servants of Sheo Singh and Mathura Singh were also separate.

P. W. No. 5 Baldeo Prasad, a *kayasth zamindar* paying Rs. 2,000 as land revenue, who says that the fathers of Sheo Singh and Mathura Singh were separate from each other and that he used to send invitations on occasions of ceremonies at his house to Sheo Singh and Mathura Singh separately.

P. W. No. 6 Bishambhar Dayal, *kayasth*, who deposes to Sheo Singh and Mathura Singh being separate in mess and to their having separate servants and *karindas*. This witness is a son of Badri Prasad in whose favour Mathura Singh executed the general power-of-attorney Ex. 26. He states that his father used to manage Mathura Singh's *sir* and wrote his accounts and further that Sheo Singh and Mathura Singh lived in separate houses.

P. W. No. 7 Pirthipal Singh, a *zamindar* related to the family, who says that in the lifetime of Sheo Singh he used to visit Tambour and that Sheo Singh and Mathura Singh were separate from each other in business as well as in food. He also deposes to mutual accounting being made in his presence once between Mathura Singh and Kanchan Kuar.

P. W. No. 8 Paragi, who also deposes to separation between Sheo Singh and Mathura Singh.

P. W. No. 9 Baijnath, another tenant of Aonri Shahpur who says he used to go to the houses of Sheo Singh and Mathura Singh both of whom were *zamindars* of his village and that their houses mess, servants business, *sir* etc. were all separate. He further says that he borrowed Rs. 50 from Sheo Singh some twenty-two years ago

and in this he is corroborated by Ex. A-38 filed by the defendants in which on date June 3, 1916, there is an entry of a loan of Rs. 50 to Baijnath Chaudhri.

P. W. No. 10 Beni Madho, who is a Khattri by caste and who had a brick kiln in 1914 from which he says Mathura Singh and Sheo Singh purchased bricks separately. He says he received the price of bricks from the two separately and brought suits for the balance against them separately. He referred to his own accounts and stated that he withdrew his suit against Sheo Singh on receiving payment of Rs. 85 from him. In this he is corroborated by Exs. A-39 which shows that on August 3, 1918, a sum of Rs. 85 was paid to Lala Beni Madho after a settlement being made with him. He further deposes that his account books showed that he was paid Rs. 50 by Mathura Singh on November 21, 1918. No question in cross-examination was put to the witness about his accounts with which he refreshed his memory. The plaintiffs have filed certain documents in this Court and have applied for their admission under O. XLI, r. 27, Civil P. C. These documents were rejected by the trial Court and are said to include decrees in suits brought by this witness against Sheo Singh and Mathura Singh. It is said that these decrees fully bear out the evidence of this witness but as for reasons given in our order recorded separately, we are not going to admit these documents, we cannot refer to them.

The last witness on whom the plaintiffs rely is Suraj Kuar, defendant No. 1, herself who was examined on commission. At p. 27 of the record she says :

"Sheo Singh and Mathura Singh were separate (*alag alag*). Their houses were separate. Their mess was joint and also separate. Formerly they were joint in mess and subsequently they had separate mess. *Sir*, servants and management of the estate (*karbar*) of Sheo Singh and Mathura Singh were separate. Mathura Singh's *mukhtar* was Badri Prasad. I have forgotten the name of the *mukhtar* of Sheo Singh."

At p. 30 she says :

"Sheo Singh and Mathura Singh must be adjusting their accounts between themselves,"

and at p. 32 :

"Badri Prasad was separately engaged by my husband... Badri Prasad was in my husband's service and another man was in the service of Sheo Singh."

This witness in her cross-examination had said that Ram Dayal was *karta* of the family but in re-examination she stated that he was *karta* of the family of Mathura Singh.

This finishes the evidence on the point of

separation relied on by the plaintiffs. The documents on which the defendants rely are the following.

Ex. A-2, *wajib-ul-arz* of village Ismailganj prepared at the First Regular Settlement about 1873. In para. 3 it says :

"Raghubar Singh is proprietor and manager in respect of his share and of the shares of Ram Sahai and Ram Dayal, co-sharers. The rest of the co-shares are joint with them in mess. No rendition of accounts is made."

From this it is sought to show that the family of Raghubar Singh and his brothers Ram Dayal and Ram Sahai was joint; but in the first place, the wording of the clause is not very clear and in the second place, even if the family was joint in or about 1873, when this *wajib-ul-arz* was framed, there is no improbability in separation taking place afterwards. All that the plaintiffs say is that separation took place sometime between the First Regular Settlement and the death of Ram Sahai (*vide* plaintiffs' Pleadings statement of December 17, 1935) and there is nothing in this *wajib-ul-arz* which rebuts this statement. Further, the Settlement Circular No. 20 of 1863 which lays down the method of preparation of *wajib-ul-arzes* shows that it was not the duty of the Settlement Officer to record whether families of landholders are joint or separate.

Ex. A-42, which is a security bond jointly executed by Raghubar Singh and his brothers in 1874. This does not necessarily show the jointness of the family as even strangers can join in executing a document. Moreover, it was executed in 1874 and does not rebut the case of the plaintiff. (After further reviewing the documentary and other evidence relied upon by the defendants the judgment continued).

We are of opinion that the evidence on the side of the plaintiffs, both oral and documentary, is decidedly superior to and more reliable and convincing than that on the side of the defendants. The witnesses produced by the plaintiffs are more disinterested and independent and their evidence is corroborated not only by documentary evidence but by the evidence of some of the defendants' own witnesses.

We now come to Exs. A-37, A-38, A-39 and A-40, which are accounts for the years 1914-15, 1915 to 1917, 1918 to 1920 and 1920 to 1923 respectively. What the respondents most rely on in these accounts are certain entries on the expenditure side showing payments of money to or through Mathura Singh or Badri Prasad (*e. g.* entries

of November 3, November 12, November 20, December 14, December 20, December 26, 1914, and April 26, November 7, 1915, February 27, 1918, November 1, 1919, February 1, and September 30, 1920). We do not think that the fact that some payments were made to Mathura Singh or Badri Prasad, or through them, can lead to any conclusion about the jointness of the family. On the other hand it is significant that while Sheo Singh is always referred to in these accounts as "Thakur Sahib" and his wives as senior and junior "Thakurain Sahibas", Mathura Singh is everywhere mentioned by name and no mention is to be found of his wives. This fact alone goes a long way to support the plaintiffs' case that these accounts are the separate accounts of Sheo Singh; but there are entries in these accounts which prove almost conclusively that Sheo Singh and Mathura Singh were separate from each other. In Ex. A-40 we find an entry of a parole debt of Rs. 600 "borrowed from Thakur Mathura Singh" on February 18, 1923, and there are entries of the repayment of this debt on February 27, and March 24, 1923, in instalments of Rs. 500 and Rs. 100. These transactions no doubt took place after the death of Sheo Singh but if Sheo Singh had died joint with Mathura Singh and Mathura Singh had actually succeeded to him as survivor and was supporting the widows, there could have been no occasion for the widows to borrow a large sum of Rs. 600 from him.

We have already referred to the evidence of P. W. No. 9 Baijnath, who says that he borrowed a sum of Rs. 50 from Sheo Singh twenty or twenty-two years ago and we find an entry relating to this debt dated June 3, 1916, in Ex. A-38. Nothing has been shown in this witness's cross-examination to make us suspect his impartiality and his evidence coupled with Ex. A-38 gives strength to the plaintiffs' case that these accounts are the separate accounts of Sheo Singh. All these accounts are in Urdu in the hand-writing of one and the same person, probably Qurban Ali, and as it is proved that Qurban Ali was in the service of Sheo Singh, this also shows that these accounts represent Sheo Singh's separate accounts.

From the fact that in Ex. A-40 there are certain entries of expenditure amounting to Rs. 80 relating to expenses of music and dancing on the occasion of one of Mathura Singh's marriages it was argued

that these entries showed jointness of the family. To our minds, however, so far from showing the jointness of the family they show just the reverse, for if the account Ex. A-40 were the account of the joint family, we should have found in it the entire expenses of Mathura Singh's marriage rather than a partly sum of Rs. 80 spent on dancing and music. Bittan Kuar and Kanchan Kuar were after all the widows of Mathura Singh's cousin and there is nothing strange in their spending something over the marriage ceremonies of Mathura Singh.

The plaintiffs-appellants have filed some accounts in Hindi and applied for their admission under O. XXI, r. 47, Civil P. C. on the ground that those accounts, which are the separate accounts of Mathura Singh, were given to them after the decision of the suit by the trial Court by one of the sons of Badri Prasad. They went to compare certain entries in Exs. A-37 to A-40 with those accounts filed in this Court in order to further show that the cousins were separate and that Exs. A-37 to A-40 are the accounts of Sheo Singh only, but for reasons given in our order on their application No. 621 of 1937 we do not consider it necessary to admit these accounts.

The learned Counsel for the respondents tried to show from the entries in these account books and the lists attached to the plaint that the land revenue paid by Sheo Singh related to the entire family property and not to his own share. There is however nothing to show the exact amount of land revenue payable in respect of the family property between 1914 and 1923, the period to which the accounts relate, and as Sheo Singh was *lambardar* in almost all the villages and used to pay the land revenue on behalf of his co-sharers also, no conclusion can be drawn from the figures contained in the account books.

The accounts, Exs. A-37 to A-40 so far from proving anything in support of the respondents' case, bear out the case of the appellants.

It is well-established and not disputed that where there is no definite evidence of separation taking place at a particular time, the separation of a family can be proved by the conduct of the family and the attendant circumstances and we are of opinion that in this case there are strong circumstances proving the separation of the family.

To sum up, we have first of all instances of succession to property inconsistent with the jointness of the family. When Ram Sahai died about the year 1886, his property was not only mutated in the name of his widow Raj Kuar to the exclusion of his brothers but Raj Kuar was appointed *lambardar* of certain villages. When Sheo Singh died mutation was made in favour of his widows and not of Mathura Singh and the order of mutation having been passed by the Tahsildar shows that Mathura Singh did not even contest the widows' right to succeed to their husband. We have also seen that Kanchan Kuar was *lambardar* in at least three villages. Some of the defendants' witnesses tried to prove that Bittan Kuar and Kanchan Kuar were not in actual possession of the property but their evidence was disbelieved by the learned Judge of the Court below, and we think very rightly. It is well-established that there is no presumption that mutation in the name of a Hindu widow is by way of consolation. Consequently whoever raises the plea of mutation being for consolation must prove it but in the present case there is no evidence worth the name in support of the defendants' allegation on this point. The fact that Ram Sahai and Sheo Singh's widows were *lambardars* in some of the villages knocks the bottom out of the plea of consolation.

Then, we have evidence not only that Sheo Singh and Mathura Singh's shares were specified in the *khewats*, but also that they held *sir*, *khudkasht* and groves separately. In *Anurago Kuar v. Darshan Raut*, (1938 O. W., 201) (1) their Lordships of the Privy Council held that the partition of joint estate consists in defining the shares of the co-parceners in the joint family and it is not necessary that there should be an actual division of the property by metes and bounds and that the definition of shares may be proved by an entry in the Record of Rights showing the shares of each member of the family, and, further that such an entry will be evidence of the severance of the joint status. To the same effect is the decision in the case of *Harkishan Singh v. Partap*

(1) 1938 O W N 201; 172 Ind. Cas. 977; 1938 O L R 87; 1938 A L R 121; 10 R P O 191; 19 P L T 131; (1938) A L J 174; A I R 1938 P C 65; 47 L W 225; 4 B R 302; 40 P L R 179; (1938) M W N 527; 40 Bom. L R 758; 32 S L R 392 (P C).

Singh, (1938 O. W. N., 727) (2) in which their Lordships of the Judicial Committee say:—

"... According to the Mitakshara Law... partition consists in defining shares of the coparceners in the joint property, and a physical division of the property is not necessary. Once the shares are defined, there is a severance of the joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined and thenceforth the parties hold it as tenants-in-common".

Then, there is evidence that Mathura Singh carried on money-lending business and acquired property in the lifetime of Sheo Singh but there is no evidence that Sheo Singh had anything to do with those transactions. If the defendants' case were true and Sheo Singh were the manager of the joint family, one would expect mortgage deeds and sale-deeds to be in his name rather than in the name of Mathura Singh.

The evidence also proves that the cousins lived in separate houses and had even separate sitting rooms and separate cattle sheds. They also had separate servants and sued and were sued separately. Last but not least are the account books Exs. A-37 to A-40 showing that Sheo Singh kept his own separate accounts from Mathura Singh.

The learned Judge of the Court below has laid stress on the presumption of Hindu Law relating to the jointness of a Hindu family but Sheo Singh and Mathura Singh being cousins and not brothers, the presumption in their case is not very strong. Mulla in his *Principles of Hindu Law*, Para. 233 (1) says:

"Generally speaking, 'the normal state of every Hindu family is joint. Presumably every such family is joint in food, worship and estate. In the absence of proof of division, such is the legal presumption.' In other words, 'given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint.' The strength of the presumption necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker."

We are perfectly satisfied that the case of the plaintiffs is true and that Sheo Singh died separate from Mathura Singh.

On the question of the alleged custom of exclusion of sisters and their issue by collaterals the learned Counsel for the respondents relies mainly on the *wajib-ul-*

arz of Isapur, Ex. A-41. Paragraph 4 of this *wajib-ul-arz* runs thus—

"The custom obtaining in the family of the *zamin-dars* of this village is that on the death of any co-sharer, if there be any male issue and widow, the male issue get the heritage in equal shares and the widow, food and raimant... If there be no male issue, the real brothers shall be the heirs, generation after generation and shall support the widow. If even real brothers be not in existence, then the widow shall remain the heir for life. If there be two or more widows they shall be the owners in equal shares. In the event of the widow becoming immoral, she shall be deprived of the share. If there be no widow even, then the nearest among the collateral relations of the widow's husband shall get the share and if even he be not forthcoming, then the daughter and her issue and sister and sister's issue shall be the heirs."

The above paragraph can hardly be taken as a record of an invariable custom when we find that on Ram Sahai's death his property devolved on his widow Raj Kunwar and not on his brother, Ram Dayal. As held by their Lordships of the Privy Council *wajib-ul-arzes* sometimes record not custom but the wishes of those who dictated them or their conception of the law on the subject and in the present case there is no satisfactory evidence to show that the clause of the *wajib-ul-arz* quoted above, records a custom. It is significant that though the defendants tried to prove the alleged custom by oral evidence also none of the witnesses could cite a single instance in which a sister or sister's son was excluded by collaterals. In *Thakur Anant Singh v. Thakur Durga Singh*, (L. R. 37 I. A. 191) (3), their Lordships of the Privy Council in a case in which no evidence was given of any instance in which a particular custom had been observed, held that the Appellate Court rightly disregarded the *wajib-ul-arzes* containing entries which probably connoted the views of individuals as to the practice which they would wish to see prevailing rather than the ascertained facts of a well-established custom. Further, it is difficult to see how there could have been a custom of exclusion of sisters when sisters were no heirs at all in these provinces prior to the passing of Act II of 1929. We are, therefore, of opinion that the *wajib-ul-arz* of Isapur cannot be taken as establishing the alleged custom of exclusion of sisters and sisters' issue.

The defendants-respondents have filed the *wajib-ul-arz* of Ismailganj, Ex. A-2,

(2) 1938 O W N 727; 175 Ind. Cas. 332; 1938 O L R 301; 1938 A L R 519; A I R 1938 P C 189; 11 R P C 14; 4 B R 688; 42 O W N 1021; 48 L W 66; (1938) M W N 766; (1938) A L J 763; 19 P L T 591; (1938) 2 M L J 234; 40 Bom. L R 1068; 32 S L R 798 (P C).

(3) 37 I A 191; 6 Ind. Cas. 787; 14 O W N 770; 12 O L J 36; 7 A L J 70; 13 O O 163; 32 A 363; 12 Bom. L R 104; 8 M L T 79; (1910) M W N 327; 20 M L J 604 (P O).

but it contains no such provision relating to the succession of sisters as is contained in the *wajib-ul-arz* of Isapur. We therefore, hold that the custom set up by the defendants-respondents has not been established. This point is also decided in favour of the appellants.

The appeal is, therefore, allowed and the plaintiffs' suit decreed with costs in both the Courts.

D.

Appeal allowed.

ALLAHABAD HIGH COURT

First Appeal No. 234 of 1935

August 30, 1939

BENNET AND VERMA, JJ.

Mst. KUNJLAS KUNWAR AND OTHERS—

PLAINTIFFS AND OTHERS—DEFENDANTS—

APPELLANTS

versus

KRISHNA DEO SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS

Forfeiture Act (IX of 1859), s. 20—Section, if repealed by Act VIII of 1868—Mortgagor turning rebel—Property confiscated—Redemption suit by person claiming to be owner must be brought within one year of date of confiscation—Sale certificate—Evidentiary value of.

Section 20, Forfeiture Act, was intended to be a permanent bar against subsequent suits in Civil Court. It has remained in force up to the present day and is not repealed by Act VIII of 1868. The section requires that persons who have any claim that they are owners of property which has been confiscated as the property of another should bring such a claim within one year from the attachment or seizure of the property which they claim. Consequently where the property of a mortgagor who has turned a rebel is confiscated a suit for redemption by person claiming to be its owner is barred if brought more than one year from the date of confiscation. *Mahomed Bahadur Khan v. The Collector of Bareilly* (2) and *Ramphul Tiwari v. Badri Nath* (3), relied on. [p. 195, col. 1.]

The sale certificate is the document of title and cannot be lightly ignored by reference back to other documents and it cannot be argued that the property could not have been sold and so must be taken not to have been sold. 63 Ind. Cas. 703 (1), relied on. [p. 197, col. 2.]

F. A. from the decision of the Sub-Judge, Allahabad, dated February 9, 1935.

Messrs. S. K. Dar, Banke Behari and Hyder Mehdi, for the Appellants

Messrs. P. L. Banerji, Mushtaq Ahmad, Mahboob Alam and Radhe Mohan Lal, for the Respondents.

Bennet, J.—This is a first appeal by *Mst. Kunjlas Kunwar* and 15 other defendants against a decree for redemption granted in favour of *Krishna Deo Singh* and other plaintiffs by the learned Civil Judge of

Allahabad. The plaint set out that there was a usufructuary mortgage dated February 25, 1848, executed by *Badal Singh*, guardian and *sirbarakar* of *Bharat Singh* minor, the mortgagor, in favour of *Mahadeo Prasad* and *Karanpuri Goshain*, mortgagees. The amount of the mortgage money was Rs. 13,001. There was to be no interest but profit would go in lieu of interest and redemption might be made in *Jeh* of any year. The mortgaged property was set out in Sch. A of the plaint and had become altered by a partition to the property in Sch. B. Para. 3 of the plaint alleged that *Bharat Singh* only owned one-quarter of the property mortgaged and the remaining three-fourths was owned by *Mst. Gulab Kuer* and *Uttam Kuer* and with their consent the name of *Bharat Singh* was recorded for the entire property and that the mortgage had been made with the consent of these ladies. Para. 4 admitted that on September 7, 1861 the original mortgagees had sold their mortgagee rights to *Thakur Sheopal Singh*, ancestor of defendants Nos. 1 to 16, the present appellants. Para. 5 stated:

"During the Mutiny in 1857, *Bharat Singh* turned a rebel. Accordingly his one-fourth share in the mortgaged property was sold at a public auction by the Govt. and the same was purchased by *Sheopal Singh* aforesaid. Thus *Sheopal Singh* remained a mortgagee to the extent of three-fourths only. Now defendants Nos. 1 to 16, the heirs and representatives of *Sheopal Singh* aforesaid, are, as mortgagees, in possession and occupation of three-fourths of the mortgaged property and only a sum of Rs. 9,750-12-0 remains as proportionate mortgage money."

The defence of the appellants is given on pp. 14 to 17. The original mortgage was admitted. It was claimed that the property in fact belonged to *Bharat Singh* and that *Mst. Uttam Kuer* and *Mst. Gulab Kuer* had no right or title therein. Para. 19 claimed that the entire property was confiscated to Govt. Para. 22 claimed that of the Kotwa property out of 44 villages *Sheopal Singh* received one-fourth share as reward for his loyalty and as to the 16 mortgaged villages one-quarter share was confiscated and purchased by *Sheopal Singh* on December 21, 1868. Para. 23 admits that the Govt. had exempted in favour of *Mst. Uttam Kuer* and *Mst. Gulab Kuer* three-fourths share of *Taluqa Kotwa* and there was this partition and out of 16 mortgaged villages, they got a five annas share in 9 villages and a share in *Raipur*. Para. 24 states as follows:

"The rights which *Uttam Kuer* and *Gulab Kuer* acquired by exemption were, along with other property, sold at a public auction in execution of a decree of *Lala Mahadeo Prasad* and *Mahant Karan-*

puri to which Uttam Kuer and Gulab Kuer were also parties and all the rights they had in the mortgaged property became extinguished. The said auction sale took place on April 20, 1877, and the property was purchased by Sheopal Singh. Thus, all the mortgagors' rights in the mortgaged property became extinct since the date of the purchase and Sheopal Singh and his heirs and representatives entered into adverse and proprietary possession and occupation of the aforesaid villages. The suit is barred by 12 years' limitation. Para. 26 stated. The claim is barred by s. 20, Act IX of 1859."

Various issues were framed and the learned Judge in the trial Court has granted a decree for redemption of the property in Sch. B on payment of Rs. 9,240 which is three-fourths of the original mortgage consideration. The appellants have appealed against all portions of the decree.

We shall first of all take up the case of Kotwa Taluqa which stands on a different ground from the other two taluqas. Chak Binda and Motiha as the claim of defendants was that although the Govt. had not confiscated a certain share of the ladies, that share had afterwards been put up to auction sale on another mortgage decree in Suit No. 58 of 1861 and had been purchased at auction sale by Sheopal Singh and it was claimed therefore that with that purchase in 1877 the ladies had no longer any right or title in Taluqa Kotwa by which their descendants could obtain a decree for redemption in 10 villages which now represent the property in Kotwa.

The claim of the ladies to a share in the original property mortgaged will be considered later in connection with the two other taluqas, but in connection with Kotwa the defence is not based on a challenge of their claim but on the fact that Sheopal Singh is alleged to have purchased their rights at the auction sale in execution of a decree No. 58 of 1861. This portion of the case rests on the decree and sale in that case. The mortgage on which this decree in Suit No. 58 of 1861 was based is not available as like many other documents prior to the Mutiny of 1857 it has been lost. The first document on p. 147 is an admission of the claim, filed by the Pleader for the defendants *Mst* Gulab Kuer and *Mst*. Uttam Kuer dated April 6, 1861. This sets out that a regular suit was brought against the ladies by *Lala* Mahadeo Prasad and *Mahant* Karanpuri for Rs. 10,719-1-3 on account of the amount of a decree for mortgage money with reference to the decision of the *Sadar-us-Sadur* of December 15, 1855 against a 1 anna 9 pie *zamindari* share in 44 villages in the Taluqa of Kotwa and with reference to the agreement execut-

ed by the defendants dated June 20, 1854. The document then admits that as alleged in the plaint, the claim aforesaid was rightly recoverable

"from the persons of the defendants aforesaid and 1 anna 6 pie *zamindari* share in 44 villages of taluqa aforesaid in possession of the defendants, mortgaged and hypothecated under the bond on the basis of which the decree was passed as specified in the agreement aforesaid."

On pp 149 and 150 there is the decree in Suit No. 58 of 1861 passed on this admission of claim. This decree states:

"Suit for recovery of Rs. 10,719-1-3, the amount of decree obtained on the mortgage in our favour, the decision of the *Sadar-us-Sadur* dated December 15, 1855, on the basis of the registered mortgage deed for Rs. 4,999-8-0 principal, dated January 14, 1854, executed by Bharat Singh debtor under the conditional mortgage of a 1 anna 9 pies *zamindari* share in 44 villages of Taluqa Kotwa, Pargana Juhi, by means of sale, by auction of a 1 anna 3 pie share free from confiscation by Govt. mortgaged and hypothecated under the bond on the basis of which the decree aforesaid was passed, the terms of the agreement executed by the defendants aforesaid, dated and registered on June 20, 1854. . . . The defendants filed an admission of claim through their Pleader. It was, therefore, ordered that a decree be passed in favour of the plaintiffs against the defendants and the aforesaid property, which is in their possession, for the amount claimed together with costs and interest in the terms of the compromise."

This document makes the matter somewhat clearer and it appears that Bharat Singh had originally executed a mortgage by conditional sale dated January 14, 1854, in favour of Mahadeo Prasad and Mahant Karanpuri and on that a decree had been obtained against him on December 16, 1855. Subsequently there was the Mutiny in 1857 and Bharat Singh was convicted as a rebel and his property was forfeited. Apparently under these circumstances the mortgagees thought it necessary to proceed against the ladies and they based their claim against the ladies on a document which was produced in that record and has been obtained by us from that record. In the Court below a certified copy of this document was filed and is printed on pp. 91 to 93. This document is headed a deed of agreement but it is executed by one person only, Debi Prasad, general attorney of *Mst*. Gulab Kuer and Uttam Kuer. The document on p. 92 from the top of the page sets out the usufructuary mortgage for Rs. 13,001 on 16 villages in Taluqa Kotwa, etc., which is the subject of the present suit dated February 25, 1848. The document states that for a further payment to creditors another sum was borrowed and a document mort-

gaging the remaining 44 villages of *Taluqa Kotwa* and certain other property described as *Binda* and *Hakim Patti* was executed on behalf of *Bharat Singh* on January 14, 1854:

"Having regard to the fact that the property is held jointly by co-sharers, the mortgagees aforesaid hesitate in causing mutation of names to be effected."

The beginning of the document has set out that the two ladies have a share in this property. The document proceeds:

"We therefore of our own accord and free will do covenant and give in writing that the entire amount of mortgage payable under the two documents aforesaid is a charge on the entire *zamindari* (paper torn) mortgaged under the mortgage deeds and on the persons of *Bharat Singh* and the executors After payment of the amount of mortgage etc, due to the mortgagees, we shall with mutual consent or in any way possible (paper torn) have our names recorded against our respective shares in the 1 anna 9 pie share purchased at auction in this way that the name of *Bharat Singh* shall be recorded against 3 pies, and against the 1 anna share, me, *Gulab Kuer* against (paper torn) and the name of *Uttam Kuer* against the 6 pie share. The terms of the mortgage transaction (paper torn) are and shall be admitted and accepted. I have therefore executed this deed of agreement on behalf of *Mst. Gulab Kuer* and *Uttam Kuer* by virtue of the power-of-attorney in my favour, registered on April 7, 1854, so that it may serve as evidence."

Although the decree was passed on April 10, 1861, proceedings in execution were spread over a considerable period. Meanwhile on August 30, 1866, the Board of Revenue had passed a final order on p. 179 as follows:

"In supersession of orders No. 385, dated August 15, 1866, Board direct that a 6 pie share of *Badul* and *Bharat* in the sixteen villages is to be held confiscated and the names of the two female relatives are to be recorded as owners of the 1 anna 6 pie share in the *Taluqa*."

It is clear from this order therefore that the ladies were recorded before the partition as owners of 1 anna 6 pie share in the whole of *Taluqa Kotwa*. On pp. 219 to 222 there is a *rubkar* in execution of the decree in Suit No. 58 of 1861. The final order is that the application for execution was allowed for a sum of Rs. 6,628-12-0. On pp. 186 to 189 there is a document dated March 6, 1877, which is the notice of sale of *Mauza Ramaipur* and other villages in *Taluqa Kotwa* and the sale was fixed for April 20, 1877. The notice states that:

"this sale shall relate only to the rights and interests of *Dilas Kuer* and other judgment-debtors to the property specified as given below."

In col. 1 there are the names of different *mauzas* and in col. 2 there is the amount of share and in the third *jama* (revenue). This is headed: "Name and Govt. *jama* of the *mahal* or part of the *mahal* to be

sold by auction..." There is no doubt that it is in this column for the amount of share that the notice states what share is to be sold. The contention for the plaintiffs is that the share to be sold was only 7 annas. If that had been so, the figures '7 annas' would have appeared in col. 2 and not in the figures '12 annas.' The plaintiffs rely on a note in the last column which is headed; "Detail of share or crop of each judgment-debtor mentioned by the decree-holder in his application." Apparently this column is intended for specification of how the different judgment-debtors hold the total share which is entered as the share to be sold in col. 2 and it is not to this last column that a purchaser looks to find the property which is to be sold. Opposite the first village *Ramaipur* there is a note as follows:

"This *Mauza Ramaipur* is in possession of *Sheopal Singh* by virtue of mortgage. The former mortgaged share 5 annas and the share mortgaged with conditional sale 7 annas. Whatever rights and interests of defendants are in this should be sold by auction."

The next village *Mauza Katwarapur* has a note as follows:

"In *Mauza Katwarapur* a 5 annas each is in possession of *Sheopal Singh* by virtue of mortgage and the rest in possession of defendants. The rights and interests of the defendants should be sold by auction."

The subsequent villages in this list have a similar note down as far as *Mauza Shahbaz*, that is the last of the 12 annas share villages and the other villages have a note that the rights and interests of the defendants should be sold by auction. The argument for the plaintiffs is that so far as *Ramaipur* is concerned, the mention is made in this last column that the mortgage with conditional sale was 7 annas and therefore the argument is that this note should be read as applying to all the other villages and that only 7 annas was to be sold according to this notice. We cannot accept that view. The note clearly related to *Ramaipur*. The note does not say that 7 annas is to be sold. It is true that the note does mention the mortgage with conditional sale as 7 annas but that is all. A fair construction of this document certainly is that what was notified for sale was 12 annas of all the villages *Ramaipur* to *Shahbaz* and these are the nine villages on p. 8 in which redemption is claimed of a 5 anna share and the remaining village *Raipur* is 1 anna 6 pies the whole of which was to be sold according to this notice of sale.

On p. 223 there is an order of the Court of the sale officer dated April 19, 1877 to the effect that the report of the *Sadar Kanungo* showed that there was a difference between the notice and the *pattidari* statement as regards amount of share and *jama* and a copy of the report was sent to the Subordinate Judge for instructions. On p. 225 the Pleader for the decree-holder asked that the entire rights and interest of the judgment-debtors may be sold by auction with reference to the correct share and *jama* of the defendants. This reply of the Pleader was forwarded by the Court. On p. 224 the sale officer notes that this reply was received after conclusion of the sale by auction of the property. The fact that this was received after the conclusion of the sale is also mentioned on p. 227, line 11. Learned Counsel pointed out that the report of the *Sadar Kanungo* in question is given as a record of the *pattidari* statement on pp. 243 and 245. These nine villages are shown beginning with Lurhwa on p. 243 and continuing to p. 245. There is however no real difference in regard to the shares of the judgment-debtors which are shown on pp. 241 and 242 as annas 12, and in the *pattidari* statement on pp. 243 to 245 in the margin also as annas 12 for these nine villages. The matter therefore is of no importance. It is admitted for the plaintiffs-respondents that no objection was taken by the ladies to the sale notice or at the time of sale. On pp. 226 to 228 there is a *rubkar* of the sale officer of the date of sale, April 20, 1877 and in that he sets out that the property sold was 12 annas share in these nine villages and 1 anna 6 pies in Raipur and he states that the sale was concluded for Rs. 1,905 in the name of Sheopal Singh. There was an objection dated May 19, 1877, made by the judgment-debtors which is in a typed book, pp. 8 and 9. In this they objected to the amount of Rs. 1,900 realized at the sale and claimed that it should be Rs. 30,000 and they objected to the want of beat of drum in all but four villages and to the fact that some objection of theirs was not decided before attachment was made. They do not state in this objection any objection to the amount of property sold which was entered as 12 annas in the *rubkar* of the sale officer and in the notice of sale. On p. 229, line 38, the *rubkar* of the Civil Court states :

"This day when the defendants made a relinquishment the objection of the defendants was

rejected and an order was passed for confirmation of the sale. It is therefore ordered that the sale in this case, dated April 20, 1877, be confirmed."

The date of this order is July 21, 1877. In accordance with this order a sale certificate dated November 12, 1877 was drawn up in favour of Sheopal Singh which is printed on pp. 237 to 239. That document sets out the nine villages 12 annas shares and Raipur 1 anna 6 pies share as the amount of share sold and states in the remarks column "in this the rights and interests of the defendants were sold." Learned Counsel for plaintiffs-respondents argued that some weight should be attached to these words but we consider that these words are of an ordinary nature and their entry is a mere matter of routine. It is not to be denied for the plaintiffs that the ladies had the right and title to the entire 12 annas and therefore the expression cannot be taken to mean that a less amount than 12 annas was sold. The *rubkar* beginning at p. 240 was sent for mutation in favour of Sheopal Singh as is shown by the order on p. 246, line 4. In this matter the defendants-appellants rely on a ruling of their Lordships of the Privy Council in *Ramabhadra Naidu v. Kadiriyaasami Naicker* (1), where on p. 489 their Lordships state :

"Certificates of sale are documents of title which are not to be lightly regarded or loosely construed. There is full opportunity for challenge of all proceedings in the execution of mortgage decrees at the time, and except in clear cases a purchaser ought not to be harassed in his possession by disputes arising years after his purchase."

Learned Counsel for the plaintiffs-respondents relies on the following documents for his case that only 7 annas out of the 12 annas was sold by this auction sale. Exhibit 58 on pp. 231 to 233 is a simple mortgage deed by Sheopal Singh and his son, Ajodhya Prasad Singh, dated November 10, 1877. This sets out :

"For the satisfaction of the said creditor we have, in order to secure payment of the amount due under this bond, pledged, hypothecated and mortgaged in *Taluga Kotwa, Pargana Jhusi* the shares of Uttam Kuer and Gulab Kuer which I, Sheopal Singh, purchased at an auction sale held on April 20, 1877 and execute this simple mortgage to secure the loan hereunder borrowed."

In the table on p. 232 there are the nine villages in which there was a 12 annas share sold shown as being now mortgaged by the purchaser to the extent of 7 annas. The argument is made that because he was now mortgaging 7 annas therefore it must be assumed that he had only purchased 7

(1) 44 M 483 (189); 63 Ind. Cas. 708; A I R 1922 P O 252; 48 I A 155; (1921) M W N 374; 14 L W 125; 3 U P L R (P O) 83; 30 M L T 31; 24 Bom. L R 692 (P O).

annas. This argument is not logical because if a man purchased 12 annas, he is not compelled to mortgage the whole of that amount specially as the mortgage in question was for a small amount of Rs. 1,145. There is nothing in the document which states that the whole of the share which had been purchased at the auction sale was being mortgaged. Reference is only made to the auction sale to show what was the title of the mortgagors. Similar remarks apply to the simple mortgage deed also executed by Sheopal Singh and his son on November 10, 1877, to the same mortgagees printed on p. 234 to 236.

Another line of argument was taken by learned Counsel for the plaintiffs-respondents to the effect that it would have been incorrect to put up for sale 12 annas of these nine villages because that 12 annas was not all responsible for the mortgage and that only the amount responsible for the mortgage should have been put up or would have been put up for sale. The facts that are basis of this argument are as follows: On p. 92 there is set out the usufructuary mortgage of 16 villages in *Taluqa Kotwa* and then the words are used "thereupon a document mortgaging the remaining 44 villages of *Taluqa Kotwa*," etc., was executed on January 14, 1854. This no doubt recites that the 44 villages in the mortgage of 1854 were none of them the same as the 16 villages in the usufructuary mortgage. The matter was certainly not made clear in the decree in Suit No. 58 of 1861 which merely says that there was to be a sale by auction of the share of 1 anna 3 pies "in 44 villages of *Taluqa Kotwa*." It was not stated which were the 44 villages. Now learned Counsel refers in detail to the partition proceedings in 1873-75. On p. 204 there is a partition agreement between the parties to that partition of whom No. 31 is Uttam Kuer, wife of Mohan Singh. Number 32 is Dilas Kuer wife, and 33 Krishna Deo Singh, son of Amar Bahadur Singh. This Uttam Kuer was not to be confused with Uttam Kuer No. 14. The share of these ladies, Krishna Deo Singh, and Sheopal Singh is shown in the list as a 2 annas share on p. 206. Sixty villages of *Taluqa Kotwa* were divided into Class I 37 villages which were called *uparwar* villages, that is villages on high ground and Class II villages *kachhar* or low ground villages, that is villages liable to alluvial action. In Class I there were six more villages added by agreement on p. 208. All the nine villages with which we are

concerned were thus added in Class I which was brought up to the total of 43 villages and it was provided in regard to these 43 villages that there would be division by entire villages among the eight groups of shareholders, shown on p. 206. The other villages were to be divided up by *pattis* in each village which is called *bong bat*. On p. 212 lot No. 5 was given to Mohim Singh, husband and *karpardaz* of Mst. Uttam Kuer *zamindar* for the proprietors of *Patti Badal Singh* and it is this lot No. 5 with which we are concerned. A document which has not been printed but of which a translation has been made Ex. 42, shows that these nine villages comprised lot No. 5 and it is admitted that in these nine villages as shown on pp. 243 to 245 Sheopal Singh was entered for 4 annas and the ladies and Krishna Deo Singh for 12 annas. On p. 216 the ladies made an application as follows:

"It is submitted that Sheopal Singh is the *zamindar* of 16 villages in the *ilaga* of the applicants. Now 15 villages held as mortgagee and 28 villages of the applicants' *ilaga* have been taken (?) together (?) and partition has been effected with reference to *gaumbat* and lots have been formed. Out of 43 villages a lot of 9 villages has fallen to the share of the applicants with reference to the lots. Out of 16 villages possession over one village, *viz.*, Balrampur, has been continued as before and two villages out of those held as mortgagees have been continued as before, *i. e.*, possession has been maintained over the villages of Lurhwa and Ohak Karim *alias* Khanipur. Accordingly with the exception of the villages of Ramaipur and Katwarpur and after taking out all the villages of Balampur, Lurhwa and Ohak Karim *alias* Khanipur, with reference to the lots, the arbitrators may separate the other villages from the applicants' *gaumbat* to which applicants shall have no objection."

It is claimed on behalf of the plaintiffs-respondents that the 43 villages which went to form the 16 annas of the nine villages came actually from 15 villages which were subject of the usufructuary mortgage of 1848 and 28 villages which were not but which were subject to the 1854 mortgage. The argument therefore is that as only 2d of the 43 villages were subject to the 1854 mortgage, the whole of the 12 annas in the nine villages should not have been sold in execution of the decree on the 1854 mortgage. The mortgagees of the 1854 mortgage, Mahadeo Prasad and Sheopuri Goshain, are shown on p. 149 as residents of the city of Allahabad, and they were not in possession of the shares mortgaged, nor were they parties to the partition suit. The suit was in 1873 to 1875 and the rights of these mortgagees had previously merged in 1861 in the decree which

they obtained in Suit No. 58 of 1861. Learned Counsel for the plaintiffs-respondents has failed to show us that there is anything on the record showing that the partition suit settled that the mortgage of 1854 should be limited to any particular portion of the 12 annas share in these nine villages. That suit did not deal with this question at all, nor could it deal with it in the absence of the mortgagees. Learned Counsel argues that in the "agreement" or declaration of June 20, 1854, by the attorney of the ladies the 44 villages of the 1854 mortgage are said to be separate from the 16 villages of the usufructuary mortgage, and the partition settled that 5 annas of the 12 annas in the nine villages was under the usufructuary mortgage, therefore the balance of the 12 annas, that is 7 annas, should be held to be under the 1854 mortgage because the principle of keeping them separate should still prevail. It will be noted that the only mention of 7 annas mortgage was for a single village Ramaipur in the column of detail of shares in the notice of sale on p. 186, and for that and the other villages the share for sale in col. 2, was shown as 12 annas.

Of the nine villages shown with 5 annas shares usufructuarily mortgaged in Kotwa after partition in list B of the plaint, p. 8, only two appear in the list of villages in the original usufructuary mortgage list A on p. 6. These two are Ohak Karim, also known as Khanipur, No. 21, p. 8 and No. 26, p. 6, and Lorhua, No. 22, p. 8, No. 27, p. 6. The other seven villages on p. 8, No. 17 Ramaipur, No. 18 Katwarpur, No. 19 Sarai Chachack, No. 20 Deokali, No. 23 Todarpur, No. 24 Zarait Shahbaz and No. 25 Zarait Suthan do not appear on p. 6 for Kotwa, and therefore they were not subject to the original usufructuary mortgage but, if we accept p. 92, line 9 as correct, were subject to the mortgage of 1854. Mahadeo Prasad, etc. the decree-holders in Suit No. 58 of 1861 would find that in Kotwa *Taluqa* the judgment-debtors, who had originally 1 anna 6 pies out of 2 annas, that is three-fourths of the family share in these seven villages, had after partition been entered for 12 annas out of 16 annas, also three-fourths of the family share (the remaining 4 annas being held by Sheopal Singh, a relative who had obtained it by purchase at confiscation sale). The natural conclusion of the decree-holders would be that as the three-fourths share had been subject to their 1854 mortgage, so the three-fourths share after partition should be

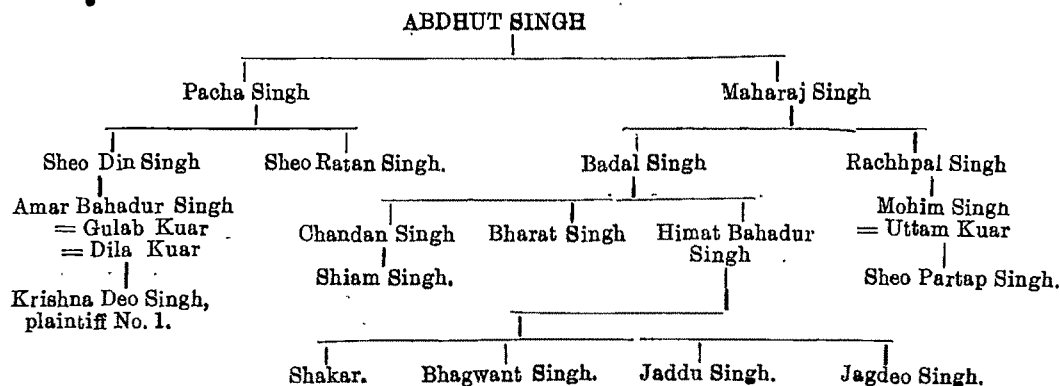
subject to the mortgage decree. The judgment-debtors did not make any objection before or after the sale to this sale of the whole 12 annas.

Whether there was some error in the shares sold in 1877 is a matter which cannot be questioned now after all these years. The mere fact that Sheopal Singh, the purchaser, was a usufructuary mortgagee does not in our opinion entitle the plaintiffs to re-open the question, in this suit of 1933. The matter is long ago time-barred. We hold that the plaintiffs have failed to prove that they have any right of redemption in the villages of *Taluqa Kotwa*, and accordingly we allow the appeal in regard to *Taluqa Kotwa*.

We now turn to the case in regard to the other two *talukas* which are shown in the plaint as *Taluqa Chak Binda*, 12 villages, 2 annas share, and *Taluqa Motiha*, 4 villages, 1 anna share. In each case the claim is for redemption of 3/4ths of these amounts i. e. 1 anna 6 pies for *Taluqa Chak Binda* and 9 pies for *Taluqa Motiha*. The first objection taken on behalf of the defence was that the ladies had failed to establish that they ever had any right or title to this property. The right and title of the ladies is based on this document of which a copy is printed on pp. 91 to 93 and of which we have obtained the original. If we assume that this was a genuine document executed as it purports to have been executed on June 20, 1854 and registered on that date there are still some difficult questions on which the plaintiffs have failed to satisfy us. The first point is that this document is not any sort of agreement although it is headed "agreement." The document is executed by Debi Prasad who describes himself as general attorney of *Mst. Gulab Kuer* and *Uttam Kuer* and on their behalf he puts forward an allegation that the ladies owned 1 anna share in the case of *Gulab Kuer* and 6 pies share in the case of *Uttam Kuer* and that *Bharat Singh* only owned 3 pies share. The pedigree of this family is given in the judgment of the lower Appellate Court on p. 29 as follows:

(See page 191 for pedigree table.)

Now it is clear from this pedigree that these two ladies *Gulab Kuer* and *Uttam Kuer* could never have had any right or title in 1848 or in 1854 or at any period to the property of the family. The husbands of both these ladies were alive at the time in 1848 and *Amar Bahadur Singh*,



husband of Gulab Kunwar, has a son Krishna Deo Singh, plaintiff No. 1, who is still alive and the husband of Uttam Kuar had a son Sheo Pratap Singh. Although the mortgage deed of 1848 was in the name of Bharat Singh, minor, alone under his father Badal Singh as guardian, the document sets out on p. 91 the method in which the document on p. 91 derived a title for these two ladies under these difficult circumstances is as follows:

"The *zamindari* property of Amar Bahadur Singh, Sheo Ratan Singh and Rachhpal Singh in the *talukas* aforesaid was, in consultation with the executants and *Mst.* Basant Kuar, mother and guardian of Bharat Singh minor, all of whom were the co-sharers in possession of the property purchased in the name of the minor aforesaid at an auction sale held in execution of a decree. The sale proceeds were deposited after borrowing the same from *Lala* Manohar Lal Mahajan, resident of Rani Mandi, in the City of Allahabad with mutual consent. It was agreed upon that all should jointly pay the prior debt payable by the ancestors and the sale proceeds recently borrowed due to the creditor by mortgaging *zamindari* property in the *ilagas* aforesaid and that after the debt has been paid and the *ilaga* is released each co-sharer should have her name recorded in the public registers with reference to her old share and enter into possession."

To support these allegations no documents are produced. The allegations appear to be that there was a borrowing from *Lala* Manohar Lal in the name of the ladies and the minor. It is not alleged in this document that the ladies had any property with which the auction purchase could be made. It was merely alleged that the money was borrowed in their names and there is nothing whatever to confirm the allegation. Moreover on p. 92, line 10 it is admitted that there was a further deed of mortgage on January 14, 1854 and this again was in the name of Bharat Singh alone. Now this document (the agreement) was produced for the first time in suit No. 58 of 1861 and by that time the Mutiny had taken place in 1857 and the

property of Bharat Singh and other members of the family had been confiscated. The ladies had therefore put forward a claim that they were the owners of the property. It is under these doubtful circumstances that this ingenious claim is made unsupported by any document to show that the ladies had borrowed any money from *Lala* Manohar Lal. We are unable to accept that the statement of Debi Prasad, the general attorney of the ladies, does give them any right or title to the property in question. This finding would be sufficient alone for the dismissal of the plaintiff's suit for redemption of the property mortgaged in *Talukas* Chak Binda and Motiha in the name of Bharat Singh in 1848.

Assuming that the plaintiffs had overcome this difficulty the next point taken by the defence is that the property even if it had belonged to the ladies was treated by the authorities as the property of Bharat and was all confiscated and sold in the proceedings after the Mutiny. On p. 97 there is an order of the Court of committal to Sessions, dated May 28, 1858, of Bharat Singh and other members of the family, his father Badal Singh and Amar Bahadur Singh, husband of *Mst.* Gulab Kuar and Rachhpal Singh. The Sessions case is noted as decided on December 13, 1861. On pp. 142 to 145 there is a *rubkar* of Mr. Nazir Ali Khan, Deputy Collector, exercising the powers of a Magistrate dated April 29, 1860, and he sets out that the 7 accused persons including Bharat Singh, Badal Singh, Amar Bahadur Singh and Rachhpal Singh had been submitted to the Court of the Special Commissioner for passing an order confiscating their property as they were ringleaders. A table of the different accused and their shares follows and it is stated that in regard to accused No. 3 Bharat Singh he appeared on January 14, 1859 after the expiry of the period allowed

in the Queen's Proclamation. The *zamindari* property was attached under general orders dated February 20, 1858 and April 29, 1858 passed in this case. "This should be entered in the statement showing the property confiscated." The order follows on p. 145 to the effect that

"the *rubkar* should be put up before the Magistrate for two purposes: (1) the *zamindari* property of No. 3 Bharat Singh... be entered in the statement showing confiscated property."

On p. 193 there is a statement dated July 15, 1870 of the confiscated property of the rebels and it shows *Taluqa* Motiha four *mahals*. It states that Badal Singh had 3 pies which was confiscated by order of Mr. Mayne, Special Commissioner, dated February 20, 1858 and of this amount Mahadeo and Mahant Karanpuri were mortgagees and that the *zamindari* rights should be sold. The next entry is similar, for Bharat Singh 6 pies. And for Amar Bahadur 3 pies which was shown as confiscated and granted to a loyalist Asapal Singh, but this 3 pies was not mortgaged. There was therefore 9 pies in *Taluqa* Motiha which was confiscated with the direction "it should be sold."

On p. 271 there is an extract from the list of villages confiscated which refers to Bharat Singh and Badal Singh as the owner of 3 annas share in Binda and Chak Moqim which was confiscated under various orders of February 20, and April 29, 1858 and June 6, 1860. There was also another 1 anna shown for Bharat Singh mortgagor which was in possession of Mahadeo and Mahant Karanpuri, mortgagees in Chak Binda and Chak Moqim, Urna and others 12 villages, and further a 1 anna in the same villages in *Taluqa* Chak Binda also with Bharat Singh and Badal Singh, mortgagors, and Mahadeo and Mahant Karanpuri as mortgagees. These entries undoubtedly relate to the villages which were usufructually mortgaged in *Taluqa* Chak Binda and the entry of confiscation shows that the rights shown for the mortgagors were confiscated in the whole of the 2 annas claimed on p. 5 of the plaint. We therefore find that both in *Taluqa* Chak Binda and in *Taluqa* Motiha there was the confiscation of the property of the mortgagors. Now it is true that various objections were made to the attachment by the ladies. On pp. 98 and 99 there are two applications by one Gur Datt Chaube who was put down as the employee of Gulab Kuer in the first case and in the second he apparently applies on behalf of

the lady whose husband was Mohim Singh, i. e., Mst. Uttam Kuer. The petitions were both made on July 3, 1858, and the petitions asked that 1 anna of Mst. Gulab Kuer in *Taluqa* Kutua and *Taluqa* Chak Binda should be released and also Motiha. The other petition does not mention a share. On pp. 102 and 103 there is the order of the Court dated July 8, 1858. The order is very brief:

"Let *parwanas* be issued to the Tahsildars of Sikandara and Kiwai for release of the property of the defendants."

Learned Counsel for plaintiffs-respondents contends that this order was passed on these applications. He also claims that it was passed on the merits of the claims of these ladies after an inquiry. The order was passed five days after the applications were made. We consider that this was an interim order of release from attachment without any inquiry passed merely on the allegations that were contained in the applications. There were *parwanas* issued by the Court to various Tahsildars on pp. 100, 101, 103, 104 and 105. The Tahsildars made various replies. On p. 109 the Tahsildar of Kiwai and Mah reported that there was no property of the ladies attached in that Tahsil. This Tahsil contains *Taluqa* Chak Binda and Motiha as is shown on p. 5 of the plaint.

The history of these *talukas* must be distinguished from the history of *Taluqa* Kotwa in which the Tahsildar's Report on p. 107 of July 12, 1858, was that although Bharat Singh and Badal Singh were recorded in the *pattidari* register of *zamindars* and Uttam Kuer was not recorded in that register, still in the register of revenue the name of Uttam Kuer was recorded as manager of 1 anna, and a similar report was made in regard to Gulab Kuer as manager of 2 annas on p. 110 in *Taluqa* Kotwa, and the matter is mentioned in another report on p. 112 of January 19, 1859, which states that the 2 annas was released to Gulab Kuer and the 1 anna was released to Uttam Kuer in accordance with the order of the Court of August 2, 1858. It is to be noted that there was no such release in the *Taluqa* of Chak Binda and the Motiha. On p. 147 there is an order of the Court dated August 8, 1860, in the file of *Mauza* Motiha to the effect that the properties of Bharat Singh, Badal Singh and Amar Bahadur Singh had been confiscated by the Govt. under order of the Magistrate dated June 2, 1860, and of the Collector dated June 6, 1860. The order of the Magistrate

is that printed on p. 142. This order doubtless was passed in regard to all the villages in Ohak Binda Taluqa and Motiha Taluqa. On p. 271 there is an order for mutation in the name of the Crown for all the villages of Ohak Binda Taluqa to the extent of 1 anna, the entry being :

"Queen Empress, mortgagor Mahadeo, son of Kandhai Lal, and Mahanth Karanpuri, disciple of Niranjanpuri, mortgagees in possession."

On p. 280 there is a similar order in the register of mutation for Motiha Mauza opposite two entries of 3 pies for Bharat Singh and one entry of 3 pies for Badal Singh. There was also in Motiha a mutation on pp. 278 and 279 of 3 pies which had been in the name of Gulzari Singh, son of Bhagwan Singh, and this was mutated in the name of the Queen Empress on the ground of confiscation. It is true that there is not the entry of the usufructuary mortgage for this 3 pies share. On pp. 282 and 283 there is also another entry for Binda and Ohak Moqim on dispossession of Bharat Singh from a 3 annas share of confiscation but this was not shown as mortgaged property. From 1860 to 1863 the confiscated property in these two taluqas remained under direct management of the Crown in the contrast to Taluqa Kotwa in which a share of 3 annas had been released to the management of the ladies. On pp. 200 and 201 there is an entry of a Govt. order of October 24, 1863, which grants permission for the sale of this confiscated property in Ohak Binda and mortgage is mentioned. On p. 180 there is the list of sale for these two taluqas the property to be sold on September 20, 1864, the amount to be sold being 2 annas in Ohak Binda and 9 pies in Motiha both under the usufructuary mortgage. On p. 160 there is an enquiry by the Court from the Tahsildar of Kiwai as to the amount of share and revenue in the property confiscated by Govt. and whether the name of the rebel or of the Govt. was recorded against the confiscated share and other points. The reply of the Tahsildar dated March 12, 1864, is on p. 161 in regard to Ohak Binda. He states that the name of the Govt. was recorded against a 2 annas share bearing a revenue of Rs. 586 and that Sheopal Singh mortgagee was in possession. On p. 162 there is a petition by the two ladies dated July 20, 1864, in regard to all three taluqas in which they state that only the name of Bharat Singh was recorded but that the ladies got their names recorded for 44 villages in Taluqa Kotwa and got that

taluqa property released on August 22, 1858, but that they did not get possession of Ohak Binda or Motiha Taluqas. They asked that they should be given relief by release of the shares they claimed in all three taluqas and that only the remaining share of Bharat Singh should be sold by auction. On p. 163 the report of the Tahsildar dated July 27, 1864, in regard to Ohak Binda states :

"The applicant wants the release of the confiscated share of Bharat Singh rebel, which has been advertized for sale and has been granted for loyalty, alleging it to be her share. The share of Bharat Singh was forfeited under order of Mr. Mayne, Special Commissioner, dated February 20, 1858, and this confiscation was sanctioned by Govt. The prayer of the applicant for release of the share aforesaid is, therefore, groundless. Report is submitted. Necessary orders may be passed."

On p. 164 there is the second application made by the ladies by way of a petition dated September 10, 1864, to the Board of Revenue. The application is in regard to all three taluqas. On p. 268 there is the order of the Board of Revenue on September 17, 1864, referring the matter to the Collector. The reply of the Collector dated September 19, 1864, is on p. 159 and is as follows :

"In reply to your docket No. 434 dated 17th instant, regarding a petition by Mst. Gulab Kuer and Uttam Kuer I have the honour to report that their names are not shown in the *malgozaree* registers as *zamindars* of talukas Motiha and Ohak Binda.

2. The recorded proprietors are Badal Singh and Bharat Singh whose proprietary rights were confiscated in 1857. Since confiscation, Govt. has been the recorded proprietor.

3. The petitioners are the wives of two notorious absconders, cousins to each other, and nephews of Badal who is father of Bharat Singh.

4. The petitioners declare that they purchased the *zamindari* they now claim seven or eight years before the rebellion, from Ummar Bahadur and Ruchpal Singh, or in other words they purchased the property of the husband of one and the father-in-law of the other, but that it was recorded fictitiously as the property of Bharat Singh.

5. Independently of the improbability of these statements, it must be noted that the petitioners have never advanced their claims in this Court, during the seven years that have elapsed since the confiscation of this *zamindari*.

6. It is evidently a last attempt to save their husband's former property from the final sale which will transfer it into new hands.

7. A family tree is attached to which reference is requested."

On p. 160 at the top of the page there are the words : "Board's order. Application rejected. 30. 9." The appellant claimed that this is the order of the Board on the letter of the Collector on p. 159. Mr. Banerji for the respondents-plaintiffs

claims that this is not the order. His ground for saying so is that the certified copy filed of the order is on a separate piece of paper from the certified copy of the letter. If this was not the order, as the copies have been filed in the Court below, it was open to Mr. Banerji to have sent for the original document and have shown that some other order was passed and that the appellants were wrong in producing that order in the Court below as the order on the letter. No other order has been shown by Mr. Banerji, nor is it shown by him that the original does not contain the order. It is also to be noted that on the letter of the Collector it would not have been possible to pass any order to the contrary effect and that the most that the Board might have done would have been to make further enquiries.

On p. 168 there is the third petition of the ladies dated September 19, 1864, which was addressed to the Court asking that the sale fixed for the next day might be postponed and their rights safeguarded. Apparently this was in regard to all three *talukas* as they signed in regard to those *talukas*. On p. 167 the order of the Court on this petition was :

"That this application be placed on the record and as a precautionary measure the auction-purchasers be informed of the contents of the application."

On p. 165 there is a petition of Sheopal Singh dated September 19, 1864. The order on this is on p. 167 and is, "At the time of auction-sale the purchasers be informed of the contents of the application." On p. 169 there is a *robkar* of the Collector dated September 20, 1864 setting out the sale of the 2 annas share in *Mauza Chak Binda* bearing a revenue of Rs. 586 which was in possession of Sheopal Singh as mortgagee and the rejection of the petition of the ladies, and the letter from the Board of Revenue containing their petition to the Board, and that a reply was sent on September 19, 1864 (which is the letter on p. 159 of the Collector) and reference is also made to the third petition of the ladies and it was stated that the purchasers were informed of the particulars in the aforesaid applications. It was further stated that the sale went on for a long time and Sheopal Singh purchased the rights in *Taluqa Chak Binda* for Rs. 2,108. On p. 181 there is an extract from the list of confiscated property for sale by auction which shows this sale to Sheo-

pal Singh of *Taluqa Chak Binda* and also the sale to Sheopal Singh on the same date of *Taluqa Motiha* for Rs. 550. On p. 171 there is an order of the Court informing the Tahsildar of Kiwai of these two sales. On the same date there is a report of the Tahsildar dated December 5, 1864 stating that there was mutation by the removal of the name of Govt. and the entry of the name of Sheopal Singh, auction-purchaser. Sheopal Singh has been in possession of the shares of 2 annas in *Chak Binda Taluqa* and nine pies of the share in *Motiha Taluqa* for the period from the auction sale in 1864 up to the date of suit on November 1, 1933 which is a period of 69 years. The remaining three pies in *Chak Binda* appears to have been confiscated and granted to someone as is shown by the letter of the Collector on p. 159. Or it may be that the deed of the usufructuary mortgage was not originally for more than 9 pies share in *Taluqa Motiha*. It is to be noted that we have not got that mortgage-deed before us or any copy of it. Be that as it may, it is clear that there never was any entry of these ladies for possession of any share of the property in *Motiha* which was the subject of the usufructuary mortgage and therefore the descendants of these ladies the plaintiffs cannot claim through them a right of redemption. The distinction between the history of these two *talukas* and the history of *Kotwa* is shown by the correspondence between pp. 173 and 179.

On p. 173 the Commissioner on June 11, 1866 made a reference to the Board in regard to *Taluqa Kotwa* alone and on p. 173, line 37 he stated that Mr. Sladen, the Collector, considered that confiscation was barred by the admission of these women as managers and by the share they had in the mortgage. The Commissioner himself took a contrary view. The first order of the Board on p. 174 was passed on the erroneous assumption that the ladies had been entered for shares and on a subsequent reference the Board passed a final order on p. 179 dated August 30, 1866 to the following effect :

"The Board direct that a 6 pie share of *Badal* and *Bharat* in the sixteen villages is to be held confiscated and the names of the two female relatives are to be recorded as owners of the 1 anna 6 pie share in the *taluka*."

No such order was ever obtained by the ladies in regard to *Taluqa Chak Binda* and *Motiha*. What happened in those *talukas* was that their names were never entered as managers or in any other

capacity, that the Tahsildar never released any of the property in their favour, that the sale took place of the shares as recorded in the names of the rebels and that Sheopal Singh purchased those shares and obtained mutation in his favour. No objection was ever taken and his possession has all along been without challenge. We are of opinion that under these circumstances the descendants of the ladies cannot now re-open this matter in regard to Chak Binda and Motiha and that the plaintiffs have failed to show that there was any right, title or interest of the ladies in these two *talukas*. On this ground also the case for the plaintiffs must fail. A further ground brought forward by the appellants is the provisions of Act IX of 1859, s. 20. This Act was to provide for the adjudication of claims to property seized as forfeited and it provided for Courts of special commission to be set up. We have seen that the matter of confiscation was brought before such a Special Commissioner in Allahabad and that his decision was that the shares in *Taluqas* Chak Binda and Motiha were to be confiscated. No application or objection was ever made by these ladies to that Court. Section 20 of that Act provides as follows :

"Nothing in this Act shall be held to affect the rights of parties not charged with any offence for which upon conviction the property of the offender is forfeited, in respect of any property attached or seized as forfeited or liable to be forfeited to Govt. provided that no suit brought by any party in respect of such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates."

This section in our opinion clearly requires that persons who have any claim that they are owners of property which has been confiscated as the property of another should bring such a claim within one year from the attachment or seizure of the property which they claim. Various objections have been taken to the application of this Act which have found favour with the Court below. One of these objections is that s. 20 would not apply because by Act VIII of 1868 certain provisions of the Act were repealed, namely ss. 1 to 15 and s. 19. The repeal was made because by the year 1868 the special Courts had finished their work and were no longer necessary and ss. 1 to 15 related to those special Courts. The application of s. 18 had expired, but as regards s. 20 its application was permanent because it was intended to be a permanent bar against subsequent suits in Civil Courts.

Hence s. 20 has remained in force up to the present day.

Another objection taken to the Act is that there really was no attachment or seizure of the property in question and therefore the period of one year did not begin to run. Now we have seen that as regards these two *Taluqas* of Chak Binda and Motiha there was an attachment by the Criminal Court and this was carried out by the Tahsildar and the application of the ladies against this did not result in the Tahsildar of Kiwai releasing the property in these two *talukas* from attachment. Accordingly, in our opinion, the property was attached and the period of one year did begin to run. The relevant portions of the paper book are p. 142, line 25 :

"Hence a *parwana* be issued to the Sub-Inspector of Police for taking all necessary action in connection with the arrest and attachment of the property of the seven accused mentioned."

This property as shown on p. 143 included the property in Chak Binda *Taluqa* and Motiha. On pp. 109 and 111 there are the reports of the Tahsildar of Kiwai and there is the letter of the Collector on p. 159 saying that they had no property recorded for them. We think therefore that from the date of the attachment which was in accordance with the order of March 9, 1858 mentioned on p. 142, line 21 and which had been objected to in the petitions of Gur Datt Chaube (pp. 28 and 99) dated July 3, 1858, time began to run against these ladies under s. 20, Act IX of 1859. As they did not bring any claim within one year from that attachment in 1859 their right to contest the attachment became barred.

This view of the effect of Act IX of 1859 has been taken by their Lordships of the Privy Council in *Muhammad Bahadur Khan v. The Collector of Bareilly* (2) a case decided in 1874. The suit was brought in 1865 before amendment of the Act of 1868. It was held that where B's estate is confiscated the sons of his brother A who should have had a share could not sue after the expiry of one year from the date of the attachment. Another case in which the matter was considered after the amendment of the Act is *Ramphul Tiwari v. Badri Nath* (3) where a Bench of this Court held that a case stronger than the present, brought by the reversioners of a widow less than 12 years after the death of the widow was similarly barred. We are therefore of

(2) 1 I A 167; 13 Beng. L R 292; 21 W R 318; 3 Sar. 363 (P O).

(3) 13 A 108.

opinion that the present suit would also be barred by the provisions of Act IX of 1859. For all the reasons we have given we consider that the suit of the plaintiffs must fail in its entirety. We allow this appeal with costs and we dismiss the suit of the plaintiffs with costs both in this Court and in the Court below.

Verma, J. — I agree that the appeal should be allowed and wish to add only a few words. It is common ground that at the time of the execution of the mortgage deed in question the names of *Mst. Gulab Kuer* and *Mst. Uttam Kuer* were not entered in the revenue records in respect of the property in question, or for the matter of that, in respect of any property whatsoever. The names of various male members of the family were entered against different portions of the property belonging to the family. It must also be borne in mind that the mortgage deed, of which redemption is sought by the plaintiffs as the representatives of *Mst. Gulab Kuer* and *Mst. Uttam Kuer*, was executed by *Bharat Singh* alone, or rather on his behalf by his father and guardian *Badal Singh*.

The case put forward on behalf of the plaintiffs-respondents is that although the entire property belonging to the family stood in the names of the male members alone and the names of the ladies *Gulab Kuer* and *Uttam Kuer* were not entered, and although the property mortgaged under the deed in question stood in the name of *Bharat Singh* or *Badal Singh*, and although the mortgage in question was made by *Bharat Singh* or *Badal Singh*, yet the ladies had a proprietary interest in the property and must therefore be treated as mortgagors along with *Bharat Singh* and *Badal Singh*. The defendants-appellants deny this. The further contention of the defendants-appellants as to *Taluqa Chak Binda* and *Taluqa Motiha* is that even if it be taken for granted that the ladies had any proprietary interest in the property, the Govt. confiscated the entire property as belonging to *Bharat Singh* and *Badal Singh*, who had been found to have been rebels during the Mutiny, and it was sold as the property of the rebels and was purchased by *Sheopal Singh*, the predecessor-in-title of the appellants, and no suit having been brought by the ladies within one year as required by Act IX of 1859, whatever rights they might have possessed came to an end. The plaintiffs-respondents, on the other hand, contend that the Govt. released the shares of the ladies, which were found to amount to three-fourths

of the property in question, and consequently the confiscation and sale must be taken to be operative in respect of only one-fourth of the property which was the share found to belong to *Bharat Singh* and *Badal Singh*.

It seems to me that the case put forward on behalf of the plaintiffs-respondents is an unusual and improbable one and a heavy burden rests on them. Not only were the husbands of these ladies, viz. *Amar Bahadur Singh* and *Mohim Singh*, alive, but they were actually entered in the Govt. records as the proprietors, and the names of the ladies were not, as stated above, entered against any property. It has nowhere been stated by the plaintiffs when and how these Hindu ladies came to acquire a share in the property, and no evidence has been adduced on the point. In the plaint there are merely the bald statements that the original mortgagor was the owner of only one-fourth of the entire property mortgaged, that the remaining three-fourths was owned by *Mst. Gulab Kuer* and *Uttam Kuer*, that with the consent of the ladies the name of the original mortgagor stood recorded in the papers against the entire property mortgaged, and that "the persons named above" (evidently meaning *Badal Singh* and *Bharat Singh*) had mortgaged with possession the entire property under the mortgage deed dated February 25, 1848 with the knowledge and consent of the *Msts.* No evidence has been given in support of the allegations made in this paragraph that the names of *Badal Singh* and *Bharat Singh* had been recorded in the papers against the entire property mortgaged with the consent of *Mst. Gulab Kuer* and *Mst. Uttam Kuer*, nor has any evidence been given of the fact that the mortgage deed in question was executed with the knowledge and consent of the *Msts.*

At the trial reliance was placed on *Ex. 30* and on certain documents of the time of the Mutiny and of the period immediately following it to show that the allegation made in para. 3 of the plaint to the effect that "the original mortgagor was the owner of only one-fourth of the entire property mortgaged" and "the remaining three-fourths was owned by *Mst. Gulab Kuer* and *Uttam Kuer*" was true. As has been pointed out by my learned brother, *Ex. 30* is a unilateral agreement, and there is nothing to show that it was executed by *Debi Prasad*, who purported to act as the general attorney of these ladies, with the knowledge of the mortgagees of 1848, *Madadeo Prasad* and *Karanpuri*. There is no evidence whatso-

ever to show that the statements made in this deed as to the original title to the property and as to a purchase at auction sale having been made in the name of Bharat Singh in consultation with Bharat Singh's mother and with the consent of *Mst. Gulab Kuer* and *Mst. Uttam Kuer*, are true. It does appear that the mortgagees, Mahadeo Prasad and Karanpuri, subsequently in Suit No. 58 of 1861 obtained a decree against these ladies on the basis of this deed of agreement in respect of another deed of mortgage, executed on January 14, 1854, which has been variously described as a simple mortgage or as a mortgage by conditional sale. The present suit is not in respect of that mortgage, but there is nothing on this record to show that the mortgagees of 1848 or Sheopal Singh ever accepted *Mst. Gulab Kuer* and *Mst. Uttam Kuer* as having had any interest as mortgagors in the property which had been mortgaged in 1848.

So far as the other documents are concerned, they are ambiguous and indecisive. It is possible to argue on the basis of some of them and they lend some support to the contention of the plaintiff, but the documents relied on by the defendants-appellants, *e.g.*, Exs. E, G, K, L, M and N and again Exs. T, WW with the order of the Board thereon, and OCO, with all of which my learned brother has dealt in detail, fully support the contention of the defendants-appellants. Even if these ladies had any interest in the two *Taluqas* of Ohak Binda and Motiha it was their duty to bring a suit within one year, and that not having been done, any such right that they are alleged to have had, came to an end.

The case as to *Taluqa Kotwa* stands on a slightly different footing. The defendants-appellants admit that after the Munity the Govt., rightly or wrongly, were persuaded to release a three-fourths share in these 16 villages, with which we are concerned in this suit, in favour of *Mst. Gulab Kuer* and *Mst. Uttam Kuer* and that they came to be recorded as the proprietors of that share. The parties are also agreed that in or about the year 1873 there was a Revenue Court partition in the course of which certain proceedings took place and certain villages were allotted to the different parties in certain shares. It is common ground that a number of entire villages and shares in certain villages were allotted to this family in which these ladies had a three-fourths share. The contention of the appellants is that subsequently, in 1877,

the decree-holders of the Suit No. 58 of 1861 put up to sale the entire property belonging to these ladies in the villages of *Taluqa Kotwa* with which we are concerned and had them sold and that Sheopal Singh purchased the whole of the share belonging to these ladies.

Here, again, it may be that there are certain documents which lend some support to the contention of the plaintiffs, but these documents also are ambiguous. On the other hand, the sale certificate Ex. LL and the *rubkar*, Ex. PP are decisive in favour of the defendants-appellants. In view of the ruling of their Lordships of the Privy Council in *Ramabhadra Naidu v. Kadiriyasami Naicker* (1), the sale certificate is the document of title and cannot be lightly ignored by reference back to other documents and it cannot be argued that the property could not have been sold and so must be taken not to have been sold. The sale certificate leaves no room for doubt that the entire 12 annas, *i. e.*, three-fourths share of the ladies was purchased by Sheopal Singh.

The plaintiffs-respondents have laid great stress on Exs. 58 and 59 and have urged that the language of these two documents is such that it must be held that Sheopal Singh stated in these documents that he had purchased only 7 annas out of the 12 annas belonging to the ladies and not the remaining 5 annas which had been held during the partition proceedings to represent what had been usufructually mortgaged in 1848. We are not prepared to accept the contention that the language of these two documents is such that it must necessarily be held that Sheopal Singh was mortgaging all that he had purchased at the auction sale held in execution of the decree. The documents are open to the construction that he was mortgaging a portion, namely 7 annas, of the property which he had purchased at the auction sale. The contention of the defendants-appellants therefore must be accepted and it must be held that the plaintiffs-respondents failed to establish that they had any subsisting title to the property which they sought to redeem.

D.

Appeal allowed.

PATNA HIGH COURT

Letters Patent Appeal No. 5 of 1939

September 7, 1939

HARRIES, C. J. AND FAZL ALI, J.

KUBAD MIA—APPELLANT

versus

GUHI MIA AND OTHERS—RESPONDENTS

Registration Act (XVI of 1908), ss. 49, 17 (2) (v)—Integral part of transaction creating charge—Registration of document, necessity of—Tendering of such unregistered document to prove agreement to execute further document such as sale-deed—Proviso to s. 49 as added by Act XXI of 1929, whether retrospective in effect—Document held created right in immovable property—Pleadings—Amendment—Letters Patent Appeal—Suit for specific performance, if can be turned into one for compensation.

Where a charge is created by a term which is an integral part of the transaction, then the document must be registered and cannot be tendered in evidence even to prove an agreement to execute a further document such as a sale-deed. Where, however, the promises are distinct and separable, then a document, though it creates a charge, can be put in evidence to establish a promise to execute a further document such as a sale-deed. 98 Ind. Cas. 108 (5) and 119 Ind. Cas. 633 (6), relied on. 56 Ind. Cas. 642 (4), distinguished. Observations in 155 Ind. Cas. 47 (3), held *obiter*. [p. 201, col. 2.]

The proviso to s. 49 Registration Act, which was added by Act XXI of 1929 does not have retrospective effect and therefore cannot affect an agreement which was executed four years before the amending Act XXI of 1929 came into force and which if unregistered could not be adduced in evidence according to law in existence before 1929. 148 Ind. Cas. 229 (1), explained. 147 Ind. Cas. 1057 (2), applied.

Held, that the agreement in question undoubtedly gave the plaintiff a right in the immovable property; it gave him not only possession but security for the money which he had already paid. Hence the document created a right in immovable property. [p. 200, col. 1.]

A Court should not grant an amendment in a suit for specific performance unless such is asked at an early stage. A suit for specific performance therefore should not be allowed to be converted into one for compensation or damages at the stage of Letters Patent Appeal. 111 Ind. Cas. 413 (7), relied on. [p. 202, col. 2.]

L. P. A. from the decision of Mr. Justice Agarwala, dated November 30, 1938.

Mr. S. C. Mazumdar, for the Appellant.

Messrs. G. C. Mukherji and N. N. Ray, for the Respondents.

Harries, C. J.—This is a Letters Patent appeal from a decision of Agarwala, J. dismissing a second appeal. The suit out of which the proceedings arose was brought by the plaintiff claiming specific performance of certain agreement entered into between him and the father of defendants Nos. 1 and 2. The learned Munsif who heard the suit decreed the plaintiff's claim; but on appeal the learned Additional Deputy Commissioner, Subordinate Judge of Dhanbad, reversed the decision of the Court

below and dismissed the claim. He held that the agreement sought to be specifically enforced could not be tendered in evidence and therefore the plaintiff could not prove his claim. The plaintiff appealed to this Court; but Agarwala, J. held that the decision of the lower Appellate Court was right and dismissed the appeal. It is against that decision that the present Letters Patent Appeal has been preferred. The agreement in question was entered into between the plaintiff and the father of defendants Nos. 1 and 2 in the year 1926 and is in these terms:

"I, Nilkantha Ghati of Metala Pargana Nagar Keari, execute this deed of security (*thika abadha*) to this effect: For giving you *kabala* of my homestead land which appertains to my share in my *maurashi mukarrari mauza* which is plot No. 813, described in Sch. III, the total amount is settled at Rs. 300 in the presence of five gentlemen and out of that agreed sum I receive Rs. 200 and give the property as security to you. As long as you do not pay the remaining Rs. 100 which is fixed for sale-deed (*kabala*) so long you will not be able to erect any house on the land but you will remain in possession in bringing it under cultivation, to that I or my heirs will not take objection. On the day you pay the remaining Rs. 100 for sale-deed (*kabala*) I shall be bound to execute registered sale-deed (*kabala*) after fixing the proportionate rent of the said land. To this effect after receiving Rs. 200 I execute this deed of security after giving the said land as security."

The plaintiff paid the sum of Rs. 200 and obtained possession of the land. However, he has not paid the remaining sum of Rs. 100, though he is ready and willing to do so. Defendants Nos. 1 and 2 later settled the land with other defendants who ejected the plaintiff therefrom, and accordingly the latter brought this suit seeking specifically to enforce the contract and to compel defendants Nos. 1 and 2 to execute a sale-deed in his favour on receipt of the balance of the purchase money, namely Rs. 100. As I have stated, the learned single Judge of this Court held that the agreement sought to be specifically enforced could not be put in evidence by reason of the fact that it had not been registered, and therefore the plaintiff could not prove his case. The only question in the appeal therefore is whether this document is one requiring registration, because if it does not require registration then it could be adduced in evidence to establish the plaintiff's case. Section 17 (1), Registration Act, sets out the documents which require registration, and sub-cl. (c) requires all non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of an

such right, title or interest in immovable property to be registered. Sub-section 2, cl. (v) of this section however provides that "any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest, of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest" need not be registered. The result of non-registration of a document requiring registration is provided for in s. 49 of the Act, which says that no document required by s. 17 of the Act or by any provision of the T. P. Act, 1882, to be registered shall be received as evidence of any transaction affecting such property. There is however a proviso to this section, which is in these terms :

"Provided that an unregistered document affecting immovable property and required by this Act or T. P. Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. II, Specific Relief Act, 1877, or as evidence of part performance of the contract for the purposes of s. 53-A, T. P. Act, 1882, or as evidence of any collateral transaction and not required to be effected by registered instrument".

There can be no question that if this latter proviso applied to this case, the agreement, though unregistered, could be adduced in evidence. It has however been contended on behalf of the respondents that this proviso cannot affect the case by reason of the fact that it only came into force in the year 1930. The proviso was added to s. 49, Registration Act, by s. 10, T. P. (Amendment) Supplementary Act, 1929; and s. 15 of that Act, expressly provides that nothing in the Act shall be deemed to affect (b) the validity, invalidity, effect or consequences of anything already done or suffered before the Act came into force; and s. 1 (2) provides that the Act should come into force on April 1, 1930. The respondents argue that one of the effects or consequences of non-registration of the agreement in question was that it could not be adduced in evidence, and as such was undoubtedly the case until this amending Act was passed. If the amending Act applied to transactions which took place before the passing of the Act, then the consequences of non-registration would no longer apply. However, as the Act is not to affect the validity, invalidity, effect or consequences of anything already done, it is argued that any document executed before the Act, which could not be ad-

duced in evidence by reason of non-registration, is not affected by the amending Act. On behalf of the appellant however, it is contended that the High Court at Allahabad has taken a different view. It is urged that this proviso relates only to procedure and there is no reason why the proviso should not be considered to be retrospective. In *Sohan Lal v. Atal Nath* (1), a Bench of the Allahabad High Court held that a document executed before the amending Act XXI of 1929, could be adduced in evidence after the passing of that Act though it had not been registered as required by the Registration Act at the time when it was executed. The learned Judges stated that the matter was one relating to procedure, and therefore the amending Act could be regarded as retrospective. It was not brought to the notice of the learned Judges however that s. 15 of the amending Act XXI of 1929 makes this provision applicable only to transactions entered into after the passing of the Act and in the absence of any reference to s. 15 of the amending Act XXI of 1929 this case cannot be considered as an authority in support of the appellant's contention. Rowland, J. in *Dharichhan Singh v. Mahabir Singh* (2), held that the amendment of the T. P. Act by the amending Act XXI of 1929 cannot assist a plaintiff whose suit was commenced before that Act came into force, as such proceedings were expressly saved by s. 15 of the amending Act. In my view, the reasons given by Rowland, J., in that case apply equally to this case. Section 15 of the amending Act XXI of 1929 expressly says that any remedy or proceeding or anything done in the course of any proceeding pending in any Court when the Act came into force, was not to be affected by the Act. The same section also says that the validity, invalidity, effect or consequences of anything already done or suffered before the Act came into force was not to be affected by the Act. As I have stated, one of the consequences of failure to register this document was that it could not be adduced in evidence. That was a consequence which the Act expressly states should not be affected. In my view therefore the proviso to s. 49 did not have retrospective effect and therefore cannot affect this agreement which was executed four years before the

(1) 56 A 142; 148 Ind. Cas. 229; A I R 1933 All. 846; (1933) A L J 1584; 6 R A 656.

(2) 14 P L T 628; 147 Ind. Cas. 1057; A I R 1933 Pat. 544; 6 R A 391.

amending Act XXI of 1922 came into force. That being so, it must be held that the agreement in question could only be admitted in evidence if it fell within s. 17 (2) (v), Registration Act.

This latter provision renders registration unnecessary if the document does not create any right, title or interest of the value of Rs. 100 or upwards to or in immovable property, but merely creates a right to obtain another document which would, when executed, create such a right. It has been contended by the appellant that the agreement in question does not create any right in immovable property, but merely creates a right to obtain a sale-deed, that is another document which would, when executed, create a right in immovable property. It is therefore necessary to consider the document in order to see whether it does create an interest in immovable property or merely creates a right to obtain a sale-deed. In my view this agreement clearly created a right in immovable property. The document is itself stated to be a deed of security, and it is provided that on payment of Rs. 200 out of the purchase price of Rs. 300 the land is to be delivered to the plaintiff as security and that the latter should hold it as security for the sum of Rs. 200 until he paid the balance of Rs. 100. There is a further provision that whilst the land is held by the plaintiff as security he cannot build on it though he can bring it under cultivation. It is true that there follows a provision that on the day the plaintiff pays the remaining sum of Rs. 100 the father of defendants Nos. 1 and 2 would execute a sale-deed; but this latter provision is only one of many terms in the agreement.

There can be no question that possession of the property passed to the plaintiff under the agreement, and he was given a right to hold it and to cultivate it as security for the sum of Rs. 200 which he had already paid. Such an agreement undoubtedly gave the plaintiff a right in this immovable property: it gave him not only possession but security for the money which he had already paid. Agarwala, J. was of opinion that the document created a right in immovable property, and with that view I agree. It has however been strongly urged by Mr. Mazumdar on behalf of the appellant that the promise to execute a sale-deed on receipt of the balance of the purchase price is the only promise sued upon in this case, and that being so the document could be adduced in evidence of this isolated

promise. Reliance was placed upon a case of this Court, *Abdul Latif v. Debi Mahton* (3), in which it was held that where in an unregistered document there are two distinct provisions, one creating a charge or mortgage and requiring registration and the other being an agreement for sale not requiring registration there is nothing to prevent the plaintiff in a suit for specific performance wherein the charge or mortgage is not sought to be enforced from relying on that part of the document which purports to be a mere agreement to sell. This Court purported to follow the case in *Vyavan Chetti v. Subramanaiah Chetti* (4). It is to be observed however that this Court in construing the document then under consideration held that it was a document which gave the plaintiff merely a right to call for a sale-deed and that it was not an agreement which created any interest in immovable property. That being so any observations of the Court as to whether terms in a document can be severed were purely *obiter*. It is to be noted however that Wort, J., who delivered the leading judgment observed at p. 628* that the decision of their Lordships of the Privy Council in *Dayal Singh v. Indar Singh* (5), was an authority for the contention that where a document created a specific charge as well as a right to demand a sale-deed such a document required registration under s. 49, Registration Act. In my view the case in *Abdul Latif v. Debi Mahton* (3), to which I have referred is not an authority in favour of the appellant's contention in this case, because the point which is now before the Court was not before the Court in the earlier case.

The appellant has strongly relied upon the case in *Vyavan Chetti v. Subramanian Chetti* (4), which is a decision of their Lordships of the Privy Council; but in my view that case is clearly distinguishable from the present one. In the Madras case the facts were as follows: The appellants were the first mortgagees of certain immovable property, and the respondents held a second

(3) 13 Pat. 620; 155 Ind. Cas. 47; A I R 1934 Pat. 495; 15 P L T 443; 7 R P 532.

(4) 43 M 660; 56 Ind. Cas. 642; A I R 1920 P O 33; 47 I A 188; (1920) M W N 368; 18 A L J 726; 39 M L J 37; 12 L W 143; 24 O W N 1053; 22 Bom. L R 1357 (P O).

(5) 53 I A 214; 98 Ind. Cas. 508; A I R 1926 P O 94; 24 A L J 807; (1926) M W N 602; 3 O W N 634; 24 L W 396; 44 O L J 97; 7 P L T 661; 28 Bom. L R 1372; 51 M L J 778; 31 O W N 121; 28 P L R 10 (P O).

* Page of 13 Pat.—[Ed.]

mortgage of the same property. They agreed that both parties should, as regards rights, stand in the same position without claiming prior or subsequent rights and divide and appropriate in equal halves as per terms mentioned whatever amount might be realized on the date of realization. The appellants realized part of the estate and the respondents sued them in order to obtain their share of the proceeds to which they claimed to be entitled by virtue of the agreement. The agreement was unregistered and an objection was raised by the appellants that the agreement required registration and not being registered could not be used in evidence. Their Lordships held that on the construction of the agreement that if the whole effect of the agreement was to provide merely that the realized money was to be divided in equal shares there was nothing to require it to be registered, and if, on the other hand, there were two distinct provisions, the one relating to rights of property and the other with regard to the division of the money realized, then as the proceedings in the suit related merely to the question of the realized money, the agreement need not be registered for the purpose of being given in evidence in this suit, though it might require registration in a suit relating to the regulation of the rights against the estate itself.

It has been contended that in the present case the agreement to execute a sale-deed is a distinct and separate agreement and that the agreement of 1926 can be put in to prove this portion though it might not be admissible in evidence as proving a right or interest in immovable property by reason of want of registration. It is to be observed that in *Vyavan Chetti v. Subramanian Chetti* (4), there were two distinct and separate agreements one relating to rights in immovable property and the other relating to rights in the proceeds realized. The only question which arose in the case was whether or not the respondents were entitled to a half share of the proceeds collected by the appellants. It was possible to separate and sever the two terms and to regard them as independent of each other. In the present case, it is quite impossible to sever the terms. In my view the provision that the defendant would execute a sale-deed on payment of the balance of Rs. 100 is an integral part of the whole agreement and it cannot be severed and treated as something distinct and apart from the other terms which undoubtedly create an interest in immovable property. In my view, the

present case cannot be distinguished from the later decision of the Privy Council in *Dayal Singh v. Indar Singh* (5). In this latter case there was an agreement for the sale of immovable property which acknowledged the receipt of Rs. 1,000 part of the purchase price paid by the buyer as earnest money. The seller refused to complete and the buyer sued for specific performance. The agreement was not registered. Their Lordships held that under s. 55, sub-s. 6 (b), T. P. Act, 1882, the buyer was entitled to a charge upon the property in respect of the earnest money, and that consequently the agreement created an interest in it, with the result that it was required to be registered under s. 17 (1) (b), Registration Act 1908, and was not exempt by s. 17, sub-s. (2) (v). Therefore the suit could not be maintained having regard to s. 49, Registration Act. It is true that no such charge upon property in respect of earnest money is now created by reason of an amendment of the law after the decision of that case; but the case is still clearly an authority for the proposition that if an agreement creates a charge by implication of law then it is an agreement affecting immovable property and cannot be regarded as an agreement merely creating a right to demand a sale-deed. It appears to me that the present case is a stronger one than the case which was before their Lordships of the Privy Council. In the latter case the charge was created by implication of law, whereas in the present case the charge is expressly created by the terms of the agreement. As I have already stated, *Wor, J.*, in *Abdul Latif v. Debi Mahton* (3), expressly held that *Dayal Singh v. Indar Singh* (5), was still an authority for the contention that a specific charge created by an agreement would render it liable to registration though the agreement also contained a provision relating to the execution of a further document such as a sale-deed. These two decisions of their Lordships of the Privy Council appear at first sight to be conflicting, but they are clearly distinguishable. Where a charge is created by a term which is an integral part of the transaction, then the document must be registered and cannot be tendered in evidence even to prove an agreement to execute a further document such as a sale-deed. Where, however, the promises are distinct and separable, then a document, though it creates a charge, can be put in evidence to establish a promise to execute a further document such as

a sale-deed. Such is the view expressed by Sir George Lowndes who delivered the judgment of the Board, in *James Skinner v. R. H. Skinner* (6). He observed:

"In the present case the document under consideration, in addition to creating an interest in the immovable property concerned, provides as one of the terms, and therefore as an integral part of the transfer, that the vendor should, if the vendee so requires, execute a registered sale-deed, and it is contended for respondent No. 1 that, notwithstanding the non-registration, he can sue upon this agreement putting the document in evidence as proof of it. Their Lordships are clearly of opinion that this is within the prohibition of the section".

In my view the present case cannot be distinguished from the cases in *Dayal Singh v. Indar Singh* (5) and *James Skinner v. R. H. Skinner* (6) to which I have referred. That being so, the agreement as it was unregistered, could not be tendered in evidence even to establish the promise by the defendants to execute a sale-deed on payment of a future sum of Rs. 100. Agarwala, J., was therefore right in holding that this document was not admissible in evidence and that the plaintiff had therefore not established his case. Lastly, it was argued that even if this document is not admissible in evidence to establish the defendant's promise, yet it is admissible in evidence to establish that the plaintiff has paid a sum of Rs. 200 upon a consideration which has failed. We were therefore asked to treat this case as a suit for the return of Rs. 200. In my view, a suit if it lay at all, would be a suit not for the return of Rs. 200 but for damages for breach of contract, and the plaintiff would not be able to prove his contract without putting in the document, and in my view the document could not be adduced in evidence for want of registration for the reasons which I have already given. The plaintiff was given possession of the property and remained in possession for nearly ten years, and such possession is expressly stated in the document to be by way of security for the sum of Rs. 200 which he had paid. It in no way follows that upon dispossession the plaintiff has lost Rs. 200. He may have derived considerable profit from the property during his possession, and, on the other hand, the possession might not have been worth reasonable interest on the money. His claim would have to be a claim for damages or compensation and not for the return of

money upon a consideration which had failed. Consideration had not wholly failed because he had been in possession for a long period of time.

In any event, the Court could not at this late stage convert the suit into one for compensation or damages. It is true that the plaintiff, after asking for specific performance and possession, asked for such other and further relief, but in no Court did he ask for damages in the alternative, and it appears to me that to ask for such in a Letters Patent Appeal is asking for alternative relief at too late a stage. Further, there is authority of their Lordships of the Privy Council, which makes it clear that a Court should not grant an amendment in a suit for specific performance unless such is asked at an early stage. In *Ardeshir Mama v. Flora Sasoon* (7) a plaintiff claimed, pursuant to s. 19, Specific Relief Act, specific performance of a contract, and compensation in addition or in substitution, and subsequently gave notice abandoning his claim for specific performance. It was held that he could not recover damages for breach of contract without amending the plaint, since relief under s. 19, Specific Relief Act could be decreed only where the plaintiff was ready and willing to perform the contract and that it was therefore still subsisting. It was further held that the Court even at the trial, had power to allow the necessary amendment, but that power should be exercised most carefully and jealously, and with due regard to the position of both the plaintiff and the defendant. An amendment should not be allowed when the suit has been pending as one for specific performance for a long period, during which the defendant had been prevented by s. 27 (b), from dealing with the property. As I have stated an amendment is asked at this very last stage, and in my view this Court cannot grant it having regard to the views expressed by their Lordships of the Privy Council in the case to which I have referred. That being so, the Court cannot give the appellant any relief by way of compensation. For the reasons which I have given, I am satisfied that the decision of Agarwala, J. was right and I would therefore dismiss this appeal with costs.

Fazi Ali, J.—I agree.

D.

Appeal dismissed.

(6) 56 I A 363; 119 Ind. Cas. 633; A I R 1929 P O 269; 51 A 771; 6 O W N 835; 30 L W 451; (1929) A L J 1060 Ind. Rul. (1929) P O 337; 17 M L J 765; 50 O L J 487; (1929) M W N 937; 32 Bom. L R 1; 11 P L T I (P O).

(7) 52 B 597; 111 Ind. Cas. 413, A I R 1928 P O 208; 55 I A 300; 32 O W N 953; 30 Bom. L R 1242; 28 L W 257; I L T 40 Bom. 125; 55 M L J 523; (1928) M W N 893; 48 O L J 451; 26 A L J 1220 (P O).

NAGPUR HIGH COURT

Criminal Appeal No. 300 of 1939

November 17, 1939

NIYOGI AND GRUBE, JJ.

HORILAL—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 339 (2), 337, 164—S. 339 (2) to be read in conjunction with s. 337—S. 337 does not contemplate recording of statement by accused as preliminary to tender of pardon—Statement of confessional nature recorded before tender of pardon, not strictly according to provisions of s. 164—Admissibility of, against accused in his trial after forfeiture of pardon—Procedure to be followed in recording statement of accused after tender of pardon.

Sub-s. 2 of s. 339, Criminal P. C., has to be read in conjunction with s. 337. Section 337 itself does not contemplate and authorise the recording of any statement by the accused as a preliminary to the tender of pardon. [p. 204, col. 2; p. 205, col. 1.]

Any statement made by an accused person before he receives pardon under s. 337 must, if it is of a confessional nature, be recorded strictly in accordance with the procedure prescribed for the record of confession by ss. 164 and 361, or the statement of the accused after he has been pardoned may be recorded in his character of a witness under s. 164, Criminal P. C., or his statement may be one which is recorded formally as that of a witness examined in the course of an enquiry or trial. The word "statement" contemplated in sub-s. 2 of s. 339, appears primarily to refer to a statement made by him as a witness as contemplated in sub-s. 2 of s. 337 in the course of an enquiry or trial. It may also include a statement recorded under s. 164 after the tender of pardon but it can in no case include a confessional statement made by an accused person before the tender of pardon unless it was recorded in accordance with the strict procedure provided for recording confessions. [p. 206, col. 1.]

Hence a statement made by the accused, of a confessional nature, before he had been tendered pardon and after he was put on solemn affirmation, is inadmissible against him in his trial after he has forfeited the pardon if it is not recorded as a confession in the manner prescribed by ss. 164 and 361. It is also otherwise inadmissible for the reason that the accused was induced to make that statement implicating himself and others on the promise of a pardon. [ibid.]

[Case-law discussed and relied on]

In recording a statement after an acceptance of pardon, the Magistrate has the power of administration of oath or solemn affirmation under s. 164, Criminal P. C. The proper procedure then to be followed by a Magistrate is to record the statement of the approver immediately after, and not before, tendering pardon. A statement so recorded is clearly admissible in evidence under s. 339 (2). 142 Ind. Cas. 776 (10), relied on. [p. 206, col. 2; p. 207, col. 1.]

Or A, from the order of the Court of the Additional Sessions Judge, Chhindwara, Camp Seoni, dated September 21, 1939.

Mr. S. R. Mangrulkar, for the Appellant.

Mr. W. R. Puranick, Advocate-General, for the Crown.

Niyogi, J.—The appellant Horilal and

two others by name Bhagchand and Hiralal were originally challaned under s. 302, I. P. C., for murdering one Dhanaram and his wife *Mst. Kala*. In the course of the proceedings Horilal was granted pardon under s. 337, Criminal P. C., but when he was examined in the Court of the Sessions, Judge, Chhindwara, (in the Sessions Trial of Bhagchand and Hiralal which was numbered 25 of 1938) he turned hostile to the prosecution and was consequently declared to have broken the conditions of his pardon. On the certificate of the Public Prosecutor that Horilal had forfeited the pardon, criminal proceedings were started against him for the offence of murder in the Court of the Head Quarters Magistrate, First Class, Seoni, who committed him to the Court of Session, Chhindwara, to stand his trial. The learned Sessions Judge found that Horilal failed to comply with the conditions of the pardon entailing its forfeiture. As a result of the trial Horilal was found guilty of murder and sentenced to death subject to confirmation by this Court.

The outline of the case may be briefly stated. On October 29, 1938, Dhanaram the deceased accompanied by his wife *Mst. Kala* the deceased and her younger sister *Mst. Ghasiti* left their village Sukri in a bullock cart for village Simariya where Dhanaram's uncle-in-law Onkar resided. *Mst. Kala* was wearing ornaments on a somewhat generous scale. The party halted for a time at *Mauza Kohka* to witness the festival of Madai where it is alleged they were observed by Horilal, Bhagchand and Hiralal. They left Kohka about the time of sunset and while they were half way between Kohka and Gadkhapa in the Kohka forest the couple were done to death. The girl, *Mst. Ghasiti*, however, escaped unscathed and she disclosed the details of the murder to one Beharilal of Gadkhapa who happened to be on his way to Kohka. On a message sent by him to *Mauza Ghodawadi* Narayan Prasad, Sub Inspector of Police, hastened to the spot and held the inquest and seized certain articles. The investigation was then taken over by Ehaful Rahman Khan, Sub-Inspector of Police, Seoni, who arrived there on receipt of information about the incident from Zadu, the elder brother of the deceased Dhanaram, through Rupchand Kotwar. In the course of the investigation Horilal's *kurta*, Art. P-1, was seized from his person. Horilal, it is alleged, discovered an axe, Art. D-1, from the field of one Gulli and he also led the Police to Bharamal's field where *Mst. Kala's*

ornaments were stated to be buried, but they were not discovered. He, as alleged, took the Police to the scene of the occurrence and pointed out various places where Bhagchand and Hiralal lay in wait for their victims before the commission of the crime. Horilal was arrested on November 6, 1938 and produced before Mr. R. P. Kote, Magistrate, First Class, on November 8, 1938, for the record of his confession. Horilal was sent back to jail as the Magistrate stated he could record his confession on November 11, 1938. On that day the Magistrate received a memo. from the Sub-Inspector asking him not to record his confession. He was therefore sent back to the jail custody with an order that he should be produced on November 18, 1938. On November 12, 1938, the Magistrate received a memo. from the Sub-Inspector of Police, Seoni, that Horilal had agreed to disclose the facts connected with the murder and that he should be examined with a view to his being granted a pardon and examined at the trial as an approver. On the same day the Magistrate recorded his statement and submitted it to the Additional District Magistrate for orders. On November 17, 1938, the Additional District Magistrate, Seoni, tendered him pardon and he was later examined as a witness in the Court of Session. Both the statements made by him and recorded by the Magistrate on November 12, 1938 and by the Sessions Judge on January 6, 1939, are exhibited in the case and marked as Ex. P-25 and Ex. P-30. There is no doubt that the latter flatly contradicts the former statement. It is clear that if the first statement was true he totally failed to comply with the conditions of his pardon.

The evidence on the record is meagre and it is not by itself capable of sustaining the conviction unless his statement recorded by the Magistrate on November 12, 1938, Ex. P-25, in anticipation of the grant of pardon, can be admitted into evidence against him.

Apart from his statement, Ex. P-25, the circumstances proved against the appellant are that he was seen in the company of Bhagchand and Hiralal on that critical evening, that none of the three was present to hear the recital of Ramayana at the house of Mullu (P. W. No. 13), that he pointed out the axe, Art. O, that he led the Police to a place where certain ornaments were supposed to have been concealed although they were not discovered and that his *kurta*, Art. P-1 was found blood-stained. A critical

examination of each of these circumstances exposes its weakness. *Mst. Budho* (P. W. No. 24) saw Horilal and Bhagchand sitting together under the eaves of the house of Hiralal at *Mausa Kohka*. It was towards evening and they were smoking *chilam*. The witness, however, says they were in the habit of sitting together like that as she had seen them together quite often in the past. It may be that the three individuals did not attend the Ramayana recital but that is not by itself sufficient to show that they had gone out for committing murder. The axe, Art. O, pointed out by Horilal does not make any contribution to the evidence as the Imperial Serologist was not able to detect any blood on the scrapings from the axe blade sent to him. His *kurta*, Art. P-1, was also devoid of any evidentiary value as the blood-stains on it had become disintegrated and their origin could not be determined. His conduct in leading the Police to the place where the ornaments were supposed to be buried loses all its significance in the absence of the discovery of the ornaments.

Mst. Ghasiti was not examined as a witness against Horilal, presumably for the reason that she had not stated in the previous case that she had seen Horilal.

The conviction rests essentially on the confessional statement which he had made before Mr. Kote on November 12, 1938, Ex. P-25. It is remarkable that even in that statement Horilal assigned to himself a very minor part. If, however, that statement is admissible against him that invests the circumstances proved against Horilal with some corroborative value. The question, therefore, is whether the statement is admissible against him.

The statement was recorded on November 12, 1938, before he had been tendered pardon which was done on the 17th. It would be held admissible if it is the statement contemplated by sub-s. 2 of s. 339, Criminal P. C. Sub-section 2 of s. 339, has to be read in conjunction with s. 337. That section lays down that in case of certain specified offence certain specified officers may at any stage of the investigation or enquiry into or trial of the offence with a view to obtaining the evidence of any person supposed to have been concerned in or privy to the offence tender a pardon on his making full and true disclosure of the whole circumstances within his knowledge relative to the offence, sub-s. 2 of that section says:

"Every person accepting a tender under this section shall be examined as a witness in the Court

of the Magistrate taking cognizance of the offence and in the subsequent trial, if any."

Inasmuch as the procedure regarding grant of pardon is laid down in s. 337, the terms of that section alone will be the test to determine whether or not the statement recorded by Mr. Kolte was in accordance with law. The wording of that section reproduced above leaves no room for doubt that the tender of pardon is to precede the making of full and true disclosure and not to follow it; that is, the true and full disclosure is expected to be made by the approver when he is examined as a witness in the enquiry or trial. Section 337 itself does not contemplate and authorise the recording of any statement by the accused as a preliminary to the tender of pardon.

Section 337, not lending any support to this course, one may well look to another section to which recourse is usually to be had in the course of the investigation, namely, s. 164, Criminal P. O. That section authorises certain specified classes of Magistrates to record any statement or confession made to them in the course of an investigation or at any time afterwards before the commencement of the enquiry or trial. In so far as the statement amounts to a confession it is clearly inadmissible as it was not recorded as a confession in the manner prescribed by ss. 164 and 364, Criminal P. O., in view of the recent ruling of their Lordships of the Privy Council in *Nazir Ahmad v. King-Emperor* (1); it is also otherwise inadmissible for the reason that as admitted by the prosecution, see *Ehafazul Rahman Khan* (P. W. No. 5), *Laxminarayan* (P. W. No. 32) and *R. P. Kolte* (P. W. No. 33), the accused Horilal was induced to make that statement implicating himself and others on the promise of a pardon.

Now the question is whether it was admissible as a statement recorded by the Magistrate under s. 164. It is pertinent to observe that Horilal was put on solemn affirmation before he made the statement as if he was a free person. There has been some divergence of judicial opinion as to the range of the meaning of the word "statement." In *Queen-Empress v. Bhairab Chunder Chuckerbutty* (2) and *Queen-Empress v. Malka* (3), it was held that the statement

(1) 17 L 629; 163 Ind. Cas. 881; 38 Bom. L R 987; 1936 O W N 505; (1936) M W N 745; 1936 O L R 437 (2); A I R 1936 P O 253 (2); 1936 A L R 747; 9 R P C 57; (1936) A L J 895; 37 Cr. L J 897; 40 O W N 1221; 17 P L T 594; (1936) Or. Cas. 752 (2); 71 M L J 476; 39 P L R 43; 44 L W 583; 19 N L J 214; 64 O L J 445 (P O).

(2) 2 O W N 702.

(3) 2 B 643.

did not include the confession of a person accused of an offence. In *Legal Remembrancer v. Lalit Mohan Singh Roy* (4) and *Ghulam Mohammad Khan v. King Emperor* (5), it was held that in that section there can be no distinction between a statement made by an accused and a confession made by him, and that his statement must be recorded as provided by this section. The Patna case does not appear to go as far as the Calcutta case does in that it holds that the section contemplates a statement made by an accused person before a Magistrate which is not a confession but is wholly of an exculpatory nature. If it is a statement of that nature, viz., that made by an accused person as a witness and not in his character of an accused person, that statement cannot be treated as substantive evidence but can be used only for cross-examining him in the witness-box: see *Harnam Kisha v. Emperor* (6) and *In re Kuruppanna Pillai* (7). It is clear that whether it is recorded as a statement or as a confession under s. 164, Criminal P. O., it is inadmissible against the accused who made it.

Although s. 337 does not contemplate recording of any statement by a Magistrate in the course of the investigation it is quite conceivable that after an accused is granted pardon he ceases to be an accused person and he can be examined as a witness: see *Harumal Parmanand v. Emperor* (8) and *Faqir Singh v. Crown* (9). When he ceases to be an accused person he may well be examined under s. 164, Criminal P. O. after administering him oath, as was done in the cases reported in *Crown v. Parma Nand* (10), *Ram Nath v. Crown* (11) and *Anup Singh v. Emperor* (12). In all these cases the accused's statement was recorded under s. 164, after he was granted

(4) 49 O 167; 62 Ind. Cas. 578; 25 O W N 788; 22 Cr. L J 562; A I R 1922 Cal. 342.

(5) 4 Pat. 327; 86 Ind. Cas. 814; 26 Cr. L J 878; 6 P L T 598; A I R 1925 Pat. 536; 3 Pat. L R 175 Cr.

(6) A I R 1935 Bom. 28; 154 Ind. Cas. 621; 36 Bom. L R 1117; (1935) Cr. Cas. 27; 7 R B 353; 36 Cr. L J 539; 59 B 120.

(7) A I R 1927 Mad. 1112; 100 Ind. Cas. 359; 28 Cr. L J 279.

(8) 16 Cr. L J 632; 30 Ind. Cas. 456; 9 S L R 43.

(9) 16 L 594; 162 Ind. Cas. 180; A I R 1936 Lah. 353; 37 P L R 715; (1936) Cr. Cas. 294; 37 Cr. L J 515; 8 R L 867.

(10) 14 L 507; 142 Ind. Cas. 776; Ind. Rul. (1933) Lah. 303; 34 Cr. L J 469; A I R 1933 Lah. 321; 34 P L R 421; (1933) Cr. Cas. 564.

(11) 9 L 608; 108 Ind. Cas. 514; 29 P L R 165; 29 Cr. L J 413; A I R 1928 Lah. 320; 10 A I Cr. R 76.

(12) A I R 1933 Lah. 910; 146 Ind. Cas. 677; (1933) Cr. Cas. 1297; 6 R L 265; 35 Cr. L J 168.

pardon and he was free to make a statement on oath. Whether that section permits the recording of the statement on oath or solemn affirmation is also a vexed question. The point is discussed in *Crown v. Parma Nand* (10), but it is unnecessary to pursue the point here as the accused person in the present case was not put on his trial for perjury.

From the foregoing discussion it is clear that any statement made by an accused person before he receives pardon under s. 337, must, if it is of a confessional nature, be recorded strictly in accordance with the procedure prescribed for the record of confession by ss. 164 and 364, or that the statement of the accused after he has been pardoned may be recorded in his character of a witness under s. 164, Criminal P. O., or his statement may be one which is recorded formally as that of a witness examined in the course of an enquiry or trial. The word "statement" contemplated in sub-s. 2 of s. 339, Criminal P. O. appears primarily to refer to a statement made by him as a witness as contemplated in sub-s. 2 of s. 337, in the course of an enquiry or trial. This was the view taken in *The Local Government v. Mullu* (13). It may also include a statement recorded under s. 164, after the tender of pardon but it can in no case include a confessional statement made by an accused person before the tender of pardon unless it was recorded in accordance with the strict procedure provided for recording confessions.

The statement Ex. P-25 under consideration was neither a confession nor a statement recorded under s. 164, Criminal P. O. nor one recorded in terms of sub-s. 2 of s. 337. It was, therefore, not a statement following within the ambit of sub-s. 2 of s. 339 for the reason that the statement contemplated there, refers to "full and true disclosure" which the accused person makes after he receives pardon in accordance with s. 337 (1), Criminal P. O.

If Ex. P-25, is excluded from the evidence as it ought to be there is left no evidence worth the name to warrant the conviction. It must, therefore, be set aside and the appellant directed to be released forthwith.

In Criminal Appeal No. 300 of 1939.

Per Guer, J.—I agree that the appellant ought to be acquitted in this case, as the statement he made on November 12, 1938, should not be used against him and the remaining evidence is, without

(13) 11 N L R 59, (65); 28 Ind. Cas. 993; 16 Cr. L J 417.

such corroboration, too flimsy to sustain a conviction.

I wish to add only a few remarks.

The learned Advocate-General contended that this statement of the appellant recorded prior to grant of pardon on November 12, 1938, falls under s. 339 (2) of the Criminal P. O. It may possibly be held that grammatically the statement made by a person who has accepted a tender of pardon, may include a statement made by such person before the tender was made to him. But I do not believe that the sub-section was ever meant to apply to such a statement. The learned Advocate relies on *Gangram v. Emperor* (14), *Ram Nath v. Crown* (11) and *Crown v. Parmanand* (10). In the first case it is stated that the approvers were examined by the Magistrate who tendered pardon on October 3, 1922. But it cannot be said from this whether the Magistrate examined them before or after tendering pardon. In the other two cases it is clear that the examination was made after pardon had been tendered. There can be no doubt that such statements made after pardon (even if made immediately thereafter) fall under this sub-section. Before pardon was tendered, the approver was in the position of an accused. After pardon had been conditionally given, he ceased conditionally to be an accused and became a potential witness. Any confessional statement, therefore, recorded before pardon, would be governed by s. 164 and would be admissible in evidence only if the essential provisions of that section had been followed. As the statement was not so recorded in the present case, it is to be ruled out of consideration.

It may be said that the Judge has to ascertain what the approver is likely to state before he can record reasons under s. 337 (1) (a), for tendering pardon. That could be done informally, without taking down what the approver said. But I fully approve of the suggestion made in *Crown v. Parma Nand* (10), that it might be very necessary to obtain a detailed statement of what the person accepting the pardon has to say, in order to complete the investigation and enquiry and to ascertain what corroboration of his statement might be forthcoming, and it might very well be extremely difficult to wait for that information till the magisterial enquiry commenced. I also agree with the learned Judges in that case that in recording a

(14) A I R 1925 Nag. 172; 82 Ind. Cas. 715; 25 Cr. L J 1355.

statement after an acceptance of pardon, the Magistrate has the power of administration of oath or solemn affirmation under s. 164, Criminal P. C. The proper procedure then to be followed by a Magistrate is to record the statement of the approver immediately after, and not before, tendering pardon. A statement so recorded is clearly admissible in evidence under s. 339 (2), Criminal P. C.

s.

Appeal allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 942 of 1937

January 31, 1940

AGARWALA AND ROWLAND, JJ.

SATRUHAN PRASAD SINGH AND OTHERS

—PLAINTIFFS—APPELLANTS

versus

UDAI PRATAP NARAIN SINGH

AND OTHERS, DEFENDANTS AND

BALKRISHNAI SAHAI AND OTHERS

—PLAINTIFFS—RESPONDENTS

Specific Relief Act (I of 1877), s. 42—Suit for declaration—Relief for unqualified right to maintain and cut bunds according to necessities of irrigation—Right subject to permission of Collector—Maintainability of suit—Second appeal—Interference with discretion of lower Appellate Court.

A suit for declaration in which the relief claimed by the plaintiff is an unqualified right to maintain and cut a part of the existing bunds according to necessities of irrigation and to close and repair them is maintainable and the declaration cannot be said to be based upon a mere contingent right merely because the right claimed is subject to the permission of the Collector as a result of a Notification under s. 6, Ben. Embankment Act of 1882. 150 Ind. Cas. 360 (1), 63 Ind. Cas. 38 (2) and 37 Ind. Cas. 161 (3), distinguished, *Ieri Dutt Koer v. Hansuthi Koerain* (4), relied on.

The High Court does not interfere ordinarily with the discretion of the Court below when that discretion has been exercised judicially on a full consideration of the evidence in the case. Where, however, the Court below has not directed its mind to the evidence in the case at all, but has disposed of the suit on a preliminary objection, the High Court would not be deviating from the ordinary rule when it does not accept the decision of the Court below in a case where the discretion has not been exercised judicially.

A. from a decision of the District Judge of Muzaffarpur, dated January 2, 1937.

Messrs. Ray Gurusaran Prasad and Ray Paras Nath, for the Appellants.

Mr. Brahamdeva Narayan for Mr. B. P. Sinha, for the Respondents.

Agarwala, J.—This is an appeal by the plaintiffs from a decision of the District

Judge of Muzaffarpur reversing a decision of the Munsif of Sitamarhi. The plaintiffs are the proprietors of Mauza Kushahar in the Sub-Division of Sitamarhi. The defendants, who are residents of villages Harnahi, Sundarpore, Mahuarua, Rasidpur, Kamarauli, Siubar and Parsauni on the north and north-west of village Kushahar, have been sued in a representative capacity. The plaintiffs claim that they have a right to maintain and to cut a part of the existing bunds in the Lapaha Nala and Kabiria Bari and Bhuthie pynes according to the necessities of irrigation of the lands in Mauza Kushahar and also to close and repair the bunds. In 1911, by a Notification under s. 6 of the Ben. Embankment Act of 1882 the provisions of cl. (b) of s. 76 of the Act were extended to the District of Muzaffarpur. This had the effect of prohibiting the obstruction of any water course within the boundary of the Muzaffarpur District without the previous permission of the Collector of the district. In 1924 the plaintiffs erected a bund in the pynes mentioned above and on a dispute arising with Nawab Singh and others, who are defendants in the suit out of which this appeal has arisen, the latter were prohibited by an order under s. 144 of the Criminal P. C. from interfering with the bunds. In 1928, some of the plaintiffs again erected bunds and were prosecuted under s. 76 (b) of the Embankment Act and fined for having erected the bunds without having obtained the permission of the Collector. As a result of this dispute between the plaintiffs and the defendants regarding the right to erect and cut the bunds as occasion requires the plaintiffs instituted the present suit to establish the right which they claimed. The suit was decreed by the first Court after consideration of all the issues raised in the case. On appeal by the defendants the learned District Judge has held that the suit was not maintainable by reason of provisions of the Embankment Act read with s. 42 of the Specific Relief Act. He has, therefore, dismissed the plaintiffs' suit without considering the other issues raised in the case. The reason for the learned District Judge's decision is that in his view the plaintiffs were not entitled to what he calls declaration based on a mere contingent right. This contention has been supported by the learned Advocate for the respondents. The learned Advocate contends that the effect of the Notification under s. 6 of the Embankment Act was to abrogate any right the plaintiffs may have

had to erect or demolish the *bunds* complained of except with the permission of the Collector of the District and that as it is impossible to predicate whether the Collector's decision would be granted or withheld, the claim for a declaration which would be of use to the plaintiffs only if the Collector permitted them to erect or demolish the *bunds* should not be granted. Reliance was placed on a decision of the Allahabad High Court in *Faryad Fatima Bibi v. Mujahid Abbas* (1), in which it was held that

"Declaratory relief being in the discretion of the Court, it should not be granted in anticipation of a contingency which may not arise."

It may be observed, however, that the ground of the decision was that the learned Judges of the High Court were of opinion that in the circumstances of the case the Court below was not justified in exercising its discretion in granting the relief claimed by the plaintiff. No reference was made to Illus. (c), (d) or (e) of s. 42 of the Specific Relief Act which are all cases of declaratory reliefs founded upon contingent rights, and the case was decided purely on its own facts. The next case referred to was *Rafiq-ud-din v. Asgar Ali* (2), in which a claim for a declaration that the plaintiff was entitled to contribution from the defendants if and when the occasion arose was negatived. The learned Judges who decided that case pointed out that the plaintiff was neither claiming a declaration as to his legal character nor a declaration of his rights to any property in the sense in which the word "property" is used in s. 42, that is to say, a right to existing property. Here, in the present case, the plaintiffs are claiming an existing right in respect of the *bunds*. The decision of the Privy Council in *Janaki Ammal v. Norayanasami Aiyar* (3), was also referred to. That was a case in which the Privy Council held that a presumptive reversionary heir was not entitled to a declaration of his right as reversionary heir during the lifetime of the widow of the last male-holder. The decision in that case does not appear to have any bearing on the facts of the present case. In the case of *Isri Dutt Koer v. Hansbutti Koerain* (4) the

(1) A I R 1934 All. 1064; 152 Ind. Cas. 360; 7 R A 325.

(2) 1 Pat. 1; 63 Ind. Cas. 38; A I R 1922 Pat. 392; 3 P L T 793.

(3) 39 M 634; 37 Ind. Cas. 161; 20 M L T 168; 31 M L J 225; 14 A L J 997; (1916) 2 M W N 188; 20 C W N 1323; 18 Bom. L R 856; 24 O L J 309; 4 L W 530; 43 I A 207; A I R 1916 P C 117 (P O).

(4) 10 C 324; 10 I A 150; 13 O L R 418; 4 Sar. 459; 7 Ind. Jur. 557 (P C).

Privy Council held that although the granting of a declaratory decree is discretionary with a Court yet in the class of case before it, which was a suit during the lifetime of a Hindu widow by a presumptive heir for a declaration that an alienation by her operated only during her lifetime, the grounds for the discretionary refusal of the decree should be very strong. This decision follows Illus. (d) of the section and gives effect to it. In my view, therefore, the ground given by the learned District Judge for holding that the plaintiffs were not entitled to a declaration sought for is not sustainable.

As I have already pointed out above the relief which the plaintiffs claimed in their plaint was an unqualified right to maintain and cut a part of the existing *bunds* according to necessities of irrigation and to close and repair them. Whether the effect of the Notification under s. 6 of the Act is to abrogate the existing right to open or close *bunds* according to the practice prevailing at the date of Notification, for the purposes of irrigation, I have myself considerable doubt; but it is not necessary in the present appeal to decide that question because the learned Advocate for the plaintiffs-appellant stated that he would be satisfied with a declaration that subject to the permission of the Collector the plaintiffs have the right to maintain and cut the *bunds* as claimed.

The learned Advocate for the respondents contends that the plaintiffs are not entitled to this qualified right inasmuch as the right they claimed in the plaint was an unconditional right. The only case on which reliance was placed to this proposition is the decision of the Privy Council in *Maina v. Brijmohun* (5). That was a case, however, in which their Lordships held on the evidence that the plaintiffs had failed to establish the rights which they claimed. The last objection of the learned Advocate of the respondents was that this Court should not interfere with the discretion of the Court below in refusing a declaration. This Court does not interfere ordinarily with the discretion of the Court below when that discretion has been exercised judicially on a full consideration of the evidence in the case. In the present instance the Court below has not directed its mind to the evidence in the case at all but has disposed of the suit on a preliminary objection. We are

(5) 12 A 587; 17 I A 187; 5 Sar. 624 (P O).

not, therefore, deviating from the ordinary rule of this Court in the matter of interfering with the discretion of the Court below when we do not accept the decision of the Court below in a case where the discretion has not been exercised judicially.

I would, therefore, set aside the order of the Court below and direct under O. XLI, r. 23, that the appeal be re-admitted and disposed of in accordance with law. The costs of this appeal will abide the result.

Rowland, J.—I agree.

The Munsif had framed nine issues and the District Judge refers only to the plea raised by the defence that the provisions of the Embankment Act are a bar to the suit. This was Issue No. 4. Now the relevant provision of the Civil P. C. is s. 9 which enacts that the Courts shall, subject to the provision herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. There is nothing in the Embankment Act which is a bar to any right of suit. In discussing this issue the learned District Judge mixed up considerations of the effect of the Embankment Act which, it was contended, had taken away private rights. This appears to be the subject-matter of Issue No. 9; but that issue is not recited as one of the points for determination. The learned District Judge also refers to s. 42 of the Specific Relief Act which has nothing to do with the question whether the provisions of the Embankment Act are a bar to the suit and which section incidentally he refers to as s. 41. I think it desirable that Courts of Appeal in writing judgments should bear in mind the provisions of O. XLI, r. 31 of the Civil P. C., which are analogous to those of O. XX, r. 4, regarding the judgment of the First Court. Each point which is for determination should be clearly set out otherwise confusion of mind arises as in this case in which it hardly seems clear whether the District Judge regards himself as having disposed of Issue No. 9 or not.

s.

Order accordingly.

OUDEH CHIEF COURT.

Civil Revision Application No. 13 of 1937

February 28, 1940

YORKH, J.

SITAL PRASAD NIGAM—PLAINTIFF

—APPLICANT

versus

THE UNITED PROVINCES THROUGH

THE D. O., LUCKNOW—DEFENDANT

—OPPOSITE PARTY

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 3, s. 25—Tenderer depositing money with tender for supply of grass to prison department—Conditions of tender not fulfilled—Deposit forfeited by Inspector-General of Prisons—Suit for return of deposit—Jurisdiction of Small Cause Court to entertain—Powers of High Court under s. 25.

Article 3, Sch. II, Small Cause Courts Act, operates to take out of the purview of Small Cause Courts claims arising out of an act or order purporting to be done by an officer of Govt. in his official capacity, and no distinction arises from the fact that such an order, which is actually made by an officer of Govt. in his official capacity, might have been made by a private person in his private capacity.

The applicant tendered for the supply of grass to the jails. He submitted the tender in the prescribed form with the cash certificate for Rs. 500 to the Inspector-General of Prisons, and the tender was accepted. Under the terms, however, it was a condition of the acceptance of tenders that the tenderer should execute an agreement embodying the conditions of contract, a copy of which was annexed to the tender; and deposit the security mentioned in the said conditions within such time as might be allowed by the Inspector-General of Prisons. In the event of the tenderer's refusing or failing to execute the agreement, or to deposit the security within the said time, the Inspector-General was to be at liberty to cancel the acceptance of the tender and to forfeit the earnest money deposited by the tenderers. The tenderer failed to execute the agreement within the time fixed by the Inspector-General, and the Inspector-General cancelled the acceptance of the tender and ordered forfeiture of the security money. In consequence the tenderer instituted a suit against the Secretary of State for India praying for a decree for Rs. 322 by way of damages and for an order to the defendant to return the said postal cash certificate. The suit was instituted in the Court of Small Causes:

Held, that the very essence of the suit was that it was a claim founded on the allegation that the Inspector-General of Prisons was not entitled to cancel the acceptance or at any rate forfeit the security money and that the U. P. Govt. was liable for damages arising out of other consequences of that act. The suit was therefore excepted from the cognizance of a Court of Small Causes under Art. 3, Sch. II, Prov. Small Cause Courts Act. *Secretary of State for India in Council v. Munshi Niaz Ahmad* (1), relied on. *Gopal Sahai v. Secretary of State* (2), not followed.

Held, also that the power of the High Court under s. 25 of the Act being very wide, the applicant should be allowed by it an opportunity of having his suit properly determined by a competent Court.

O. R. App. of the order of the Judge, Small Cause Court, Lucknow, dated September 30, 1936.

Mr. Kashi Pershad Saksena, for the Appellant.

The Assistant Govt. Advocate, for the Respondent.

Order.—This is an application under s. 25 of the Provincial Small Cause Courts Act by Sital Prasad Nigam whose suit to recover Rs. 322 by way of damages and for the return of a postal cash certificate of the face value of Rs. 500 and present actual value Rs. 428 was dismissed by the Judge, Small Cause Court, Lucknow.

The facts are stated in the judgment of the Small Cause Court. The applicant tendered for the supply of *moonj* grass to the jails of this Province for the year 1935. He and his partner Jai Krishna submitted the tender in the prescribed form with the cash certificate for Rs. 500 to the Inspector-General of Prisons on December 24, 1934, and the tender was accepted the same day. Under the terms of the instructions to tenderers, however, it was a condition of the acceptance of tenders that the tenderer should execute an agreement embodying the conditions of contract, a copy of which was annexed to the tender, and deposit the security mentioned in the said conditions within such time as might be allowed by the Inspector-General of Prisons. Paragraph 7 of the instructions proceeds as follows:

"In the event of the tenderer's refusing or failing to execute the agreement or to deposit the security within the said time, the Inspector-General will be at liberty to cancel the acceptance of the tender and to forfeit the earnest money deposited by the tenderer."

The applicant and his partner at first sought adjudication of the proper stamp duty for the deed of agreement but they failed to get it, and as a result they failed to execute the agreement within the time fixed by the Inspector-General and the Inspector-General on January 28, 1935, cancelled the acceptance of the tender and ordered forfeiture of the security money. In consequence the applicant and his partner, presumably after some correspondence with the jail department or authorities on June 2, 1935, served a notice on the Secretary of State for India in Council expiring on August 2, 1935, and thereafter on March 19, 1936, the present applicant alone instituted a suit against the Secretary of State for India in Council through the Deputy Commissioner, Lucknow. In this suit he prayed for a decree for Rs. 322 by way of damages and for an order to the defendant to return the said postal cash certificate. He founded his claim on the refusal of the jail authorities to return the earnest money of Rs. 400 represented

by this cash certificate of Rs. 500. The damages he claimed with reference to his having supplied two orders for *moonj* grass at Lucknow and Benares jails on January 22 and 21, 1936, and as damages for the loss caused to him by the withholding of the cash certificates deposited by him other than the cash certificate for Rs. 500. The suit as it stands is in no sense a suit to enforce the contract or a suit to recover money due under the contract.

The learned Judge of Small Cause Court framed no less than 7 issues. On issue No. 2 he held against the plaintiff that the plaintiff was himself to blame for cancellation of the *theka*, and the acceptance was rightly cancelled. On Issue No. 1 he held that the contract was not to be a completed one unless and until the *thekadar* executed an agreement deed. It followed that the acceptance of the tender did not amount to appointment of the plaintiff as *thekadar*, and the plaintiff never was so appointed. On Issue No. 3 it was held that the earnest money was forfeited. On Issue No. 4 it was held that as the defendant was competent to cancel the tender, the plaintiff was not entitled to recover any loss on account on that action. On Issue No. 5 as to the responsibility for delay in the return of Rs. 700, it was held that the defendant's officers could not be held responsible for the delay in question as the plaintiff had himself failed to help the jail authorities. On Issue No. 6 it was held that the plaintiff had not suffered any loss on account of the conduct of the defendant's jail officers, and finally on Issue No. 7 it was held that the plaintiff was not entitled to sue alone.

The plaintiff being dissatisfied with the dismissal of his suit as a result of the above findings has come to this Court under s. 25. The learned Assistant Govt. Advocate has raised three preliminary objections which I shall take in the reverse order to that in which they have been argued before me. First he raised a point about the soundness of the notice served on the Secretary of State for India in Council under s. 80 of Civil P. C. On the view I take of this case that point may have to be raised at some future date in some other Court, and I will not therefore discuss it. His second point is in regard to limitation. I will merely state what the point is, because again this may be raised at some future stage. The point raised is that this suit was filed on March 9, 1936, against the Secretary of

State for India in Council and was dismissed on September 30, 1936. The application under s. 25 was filed on January 12, 1937. On April 1, 1937, s. 179 of the Govt. of India Act of 1935 came into force, and it became necessary to substitute the U. P. Govt. for the Secretary of State for India in Council as defendant opposite party. No application for this purpose was made until August 17, 1938, and it is contended that by that date, taking the cause of action from the two dates given in the plaint, namely December 24, 1934 and August 2, 1935, the suit was time-barred. The reply put forward on behalf of the applicant is that this was only a change of designation and not a change of person, and that really the Secretary of State for India in Council and the U. P. Govt. ought to be regarded as essentially the same person. I do not propose to decide the question which again will be one which may arise for decision at a later stage.

The third point which he has urged is that on the facts as stated and the frame of the plaint in this case the Judge of the Small Cause Court had no jurisdiction to entertain this suit. The Second Schedule of the Prov. Small Cause Courts Act contains a list of suits excepted from the cognizance of a Court of Small Causes. Article 3 of this relates to:

"A suit concerning an act or order purporting to be done or made by any other officer of the Govt. in his official capacity."

The very foundation of this suit, it is contended, is not the contract alleged to have been executed but the act or acts of the Inspector-General of Prisons in cancelling the acceptance of the tender and forfeiting the earnest money. Learned Counsel for the applicant has contended strenuously that this is a simple money suit for money due under a contract, but I am unable to see how this contention can be supported for a moment. The very essence of the suit is that it is a claim founded on the allegation that the Inspector-General of Prisons was not entitled to cancel the acceptance or at any rate forfeit the security money and that the U. P. Govt. is liable for damages arising out of other consequences of that act. The learned Assistant Govt. Advocate has referred to *Secretary of State for India in Council v. Munshi Niaz Ahmad*, (5 O. C., 403) (1), in which reference was made to two former cases, in one of which it was held that before a suit can be held to fall under Art. 3 of Sch. II of the Prov.

Small Cause Courts Act, the plaintiff must allege some particular act of some particular official which has given rise to the suit. That is precisely the situation which does exist in the present case. Learned Counsel for the applicant placed his reliance on *Gopal Sahai v. Secretary of State*, (91, P. L. R. 1902) (2). I have not got the original of that case before me, but the wording, presumably of the head-note, which appears in Mitra's Prov. Small Cause Courts Act (7th Edition, 1935) at p. 111 runs as follows:

"A suit by a contractor for recovery of earnest money ordered by a commissariat officer to be forfeited is not within this Article, because the order given by the officer forfeiting the money was such an order as might have been passed by any private person with whom the tenderer might have contracted to supply goods and to whom earnest money might have been paid."

With the greatest possible respect for the Judge or Judges who arrived at that decision, I am unable to see how on the facts stated the case was taken out of the purview of Art. 3 merely on the ground that the order was such an order as might have been passed by any private person. Article 3 operates precisely to that end to take out of the purview of Small Cause Courts claims arising out of an act or order purporting to be done by an officer of Govt. in his official capacity, and no distinction appears to me to arise from the fact that such an order, which is actually made by an officer of Govt. in his official capacity, might have been made by a private person in his private capacity. I am of opinion that that case is of no help to the decision of the question which arises in the present case. The learned Assistant Govt. Advocate points out that consent cannot confer jurisdiction on a Court and has referred to two cases on this point, but as the point is not contested on behalf of the applicant I need not quote them. Learned Counsel for the applicant did refer to s. 21 of the Civil P. O., but no argument can be founded on that section which relates really to irregular assumption of jurisdiction and not to absolute want of jurisdiction. It has been held that where the Court has no inherent jurisdiction over the subject-matter of a suit its decree is a nullity, even though the parties may have consented to the jurisdiction of the Court. Strictly speaking that is the position here. However at the same time the position as it stands before me at this moment is that the plaintiff's suit has been dismissed by the Judge of the Small Cause Court, he having no

jurisdiction even to entertain the suit, the applicant has come under s. 25, and under that section he can ask this Court to pass such order with respect to the suit as it thinks fit, and the order which he suggests, on the assumption of my finding that the Small Cause Court had no jurisdiction to entertain the suit, is that the trial Court should be ordered to return the plaint for presentation to the proper Court.

As regards this suggested order the learned Assistant Govt. Advocate, while recognising that an order under O. VII, r. 10 can be passed by the trial Court or even by an Appellate Court, suggests that such an order would not ordinarily be made in the exercise of revisional jurisdiction, the exercise of that power being purely discretionary. I might have been prepared to accept this view had the case fallen under s. 115 and had the point ever been raised at an earlier stage; but the power of this Court under s. 25 of the Small Cause Court Act is very wide, and on the whole I think that the plaintiff-applicant should be allowed an opportunity of having his suit properly decided by a competent Court. At the same time it is his fault that the case has come up to this stage and for that reason he must necessarily meet the costs of the U. P. Govt. I order accordingly that subject to the payment as a condition precedent of the costs ordered by the lower Court and the costs of the Govt. incurred in this Court, the plaint may be returned to the applicant for presentation to the proper Court. The applicant will be allowed a period of two months only for payment of this amount of costs. Failing deposit of the costs within that time his application will stand dismissed.

D.

Application dismissed.

RANGOON HIGH COURT

Second Appeal No. 116 of 1939

July 12, 1939

DUNKLEY, J.

U WIN TSU—APPELLANT

versus

SECRETARY OF STATE—RESPONDENT

Burma Municipal Act (III of 1898), s. 43—Municipal councillor, position of—Liability for misapplication by his own acts or by his agents—Civil Procedure Code (Act V of 1908), s. 100—Finding of fact.

The position of councillors with regard to the Municipal fund is in law that of trustees. As trustees they would be bound to exercise over trust properties the same degree of caution and care as a man of ordinary prudence would exercise in the

case of his own property. They would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees by their own acts or by the acts of their agents.

Held, on facts that the President of the Municipal Committee was guilty of acts of malfeasance, on account of loss caused by the embezzlement of the tax collector whom he had appointed without taking security, though he had no power to do so and consequently he was liable to make good the loss under s. 43, Burma Municipal Act. 33 Ind Cas. 428 (2), relied on.

In a second appeal under the provisions of s. 100, Civil P. O., the findings of fact of the first Appellate Court are binding upon the High Court, however gross the appellant may assert those findings to be.

S. A. against the decree of the District Court, Toungoo, dated February 2, 1939.

Mr. C. H. Campagnac, for the Appellant.

Mr. U. Thein Maung, Advocate-General, for the Respondent.

Judgment.—This is a second appeal under the provisions of s. 100, Civil P. O. and therefore the findings of fact of the first Appellate Court are binding upon me however gross the appellant may assert those findings to be. *Durga Choudhrani v. Jawahir Singh* (1). I have listened on behalf of the appellant to a long argument which has been mainly directed to showing that on the evidence the learned Judges of the Courts below should have held that the deceased *akunwun* was responsible for the embezzlement and that the appellant who was President of the Municipal Committee at that time, had no responsibility for it. Out of this argument two questions of law arose. One was that there was no evidence whatever in support of the two findings of fact, first, that the President received from U Min Din father of the defaulting tax collector, Ba Zan, prior to his appointment, a letter warning him of Ba Zan's bad character. In regard to this matter the conclusion must be that there is no evidence to show that the appellant ever got this letter. Consequently, I must hold that that letter has not been proved but, in fact, the District Judge on first appeal attached no importance to it. The second finding of fact in regard to which it is alleged that there was no evidence is the finding that the appellant received from the *akunwun* at different times a number of reports warning him that Ba Zan had not furnished the required security and further warning him that Ba Zan would not permit his tax tickets and collections to be checked, and ultimately warning him that a report of the

(1) 18 O 23; 17 I A 122; 5 Sar. 560 (P. O.).

contumacy of Ba Zan ought to be made to the District Superintendent of Police and the Deputy Commissioner. In regard to this matter the appellant's own evidence is sufficient proof, to my mind, that these reports were received by him.

He admits that on April 18, 1934, he made a detailed answer to charges which had been framed against him by the Committee when he was called upon to make good the loss of Municipal funds. In charges Nos. 3 and 4 these reports were set out; altogether there were six of them. In his answer to these charges the appellant did not deny that he had received any of these reports. The appellant has further admitted in his evidence that at a special meeting, which was held to consider the explanation of the *akunwun* on September 9, 1933 this explanation was read and discussed. This explanation mentioned all these reports and attached to it were copies of the reports themselves. The appellant admits that at the meeting he did not deny that these reports had been received by him. There was therefore in my opinion ample evidence on which the learned District Judge could hold that all these reports had been received by the appellant. The second question of law which has been raised is that even on facts which have been found, it has not been established in law that the appellant is liable for the loss which has been incurred by the Municipal Committee. The responsibility of a member of the committee rests upon the provisions of s. 43, Burma Municipal Act, which is as follows:

"Every person shall be liable for the loss, waste or misapplication of any money or other properties belonging to the committee if the loss, waste or misapplication is a direct consequence of his neglect or misconduct while a member of the committee....."

The construction of the provisions of a section of the Bom. Dist. Municipalities Act, similar to this section of the Burma Municipal Act, was considered by a Bench of the Bombay High Court in *Manilal Gangadas v. Secretary of State* (2). In the course of his judgment Batchelor, J. said at p. 175:

"The position of councillors with regard to the Municipal fund is in law that of trustees and their liabilities therefore must be determined upon this footing. As trustees there can be no doubt that they would be bound to exercise over trust properties the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property..... As trustees therefore it seems to me that they would be liable for any loss of the trust fund

which was facilitated by the gross neglect of their duties as trustees and upon this footing their liability would be the same whether loss was caused by an act from moral turpitude or by a crime."

And Hayward, J. said:

"The councillors have thus been placed in the position of public trustees and would therefore be liable under the ordinary law for any misapplication whether by their own acts or by any other agency through their neglect of the property to the Municipality."

With these observations I am in entire agreement. It is idle for the appellant to set up that, because the *akunwun* did not take certain steps in this matter, which if they had been taken would have prevented the embezzlement, therefore any negligence of which he himself had been guilty cannot make him liable under the provisions of s. 59 Municipal Act, because, as the *akunwun* has intervened, the loss cannot be held to be a direct consequence of his neglect. On the contrary, if the *akunwun's* act led to this embezzlement and to the situation which arose therefrom, in which the Municipal Committee was unable to recover either from the tax collector or his sureties the amount embezzled, then, whatever further negligence on the part of some other persons may have intervened, the loss to the Municipal Committee is plainly the direct consequence of the appellant's neglect. Now, according to the bye-laws of the Toungoo Municipality, the President is the chief executive authority in all departments; that it is for him to see that the subordinates of all departments carry out their duties in the manner prescribed. Under r. 9 in Chap. XI, Part IV of the Rules under the Burma Municipal Act, it is laid down that every officer or servant of a committee who is appointed, whether permanently or temporarily, to a post in which he is required to receive or disburse money belonging to such committee, shall give security to such sufficient amount the committee may fix in each case and the security shall be of such a nature as is required by the Local Govt. from a Govt. servant of similar class who performs similar duties. Maung Ba Zan was appointed a tax collector by order of the appellant. The appellant admits that he had no authority to appoint a tax collector as tax collectors could be appointed by the Committee only. By an order of the appellant as President tax tickets were handed over to Maung Ba Zan on June 6, 1932. The *akunwun* received this order and was of course compelled to obey it. He duly handed over the tax tickets to Ba Zan although on that date Ba Zan was

(2) 40 B 166 (175); 33 Ind. Cas. 428; A I R 1915 Bom. 197; 17 Bom. L R 1115.

not a tax collector or employed by the Committee in any capacity whatever there was no vacancy of tax collector and Ba Zan himself had not made an application for appointment. Incidentally: of course, Ba Zan had furnished no security.

On June 7, that is the next day, one of the tax collectors applied for leave to the appellant. On June 8, Ba Zan applied for this leave vacancy. This application instead of being presented at the Municipal office as it ought to have been, was presented direct to the appellant. On the reverse thereof the appellant passed an order appointing Ba Zan to this vacancy and directing that the usual security should be taken from Ba Zan. He made no attempt to find out whether Ba Zan furnished it or not. He admits himself that he made no inquiries about Ba Zan as to whether he was a man suitable for the appointment, or whether he was able to furnish security, or whether persons whom he had named in the application as willing to stand surety for him were prepared to stand surety, or even if prepared to stand were persons of property who were likely to be suitable as sureties. On June 9, there was a meeting of the Municipal Committee. This appointment of Ba Zan was not mentioned by the appellant at this meeting although he presided at it. Yet he admits himself that he made an appointment which he had no authority to make. And although he had an opportunity on June 9, of getting the appointment confirmed by the Committee he did not take the opportunity and for very obvious reasons. On June 17, he received from the *akunwun* a report to the effect that Ba Zan had not furnished security. He took no action whatever on the report. On July 6, the appointment of Ba Zan came before one of the sub-committees of the Municipal Committee for a confirmation of the President's order of appointment. The appellant did not mention to the sub-committee that Ba Zan so far had not furnished security. He now alleges that he did not do so because the *akunwun* or secretary, I am not sure which he means, informed him that the practice was that no security need be given until the appointment had been confirmed by the Committee. If such information was given it was of course contrary to the provision of Statutory r. 9 of Chap. XI in Part IV of Burma Municipal Act. But it is quite clear that no such information was given to him because, already on June 17,

the *akunwun* had reported Ba Zan's failure to give security.

This appointment of Ba Zan was confirmed by the sub-committee although, quite clearly, it could not have been confirmed if the sub-committee had been apprised of the true facts or at least if it had been confirmed then the negligence would have passed on to the Committee, unless the Committee took steps to see that the security was immediately furnished. On July 9, the proceedings of the sub-committee came before a full meeting of the Committee over which the appellant presided for confirmation and again no mention was made of the fact that Ba Zan had failed to furnish any security. During July, August, September and October the *akunwun* made no less than five reports to the appellant in which he set out that Ba Zan still had not furnished any security; further that he had attempted on several occasions to check his collections and his tax tickets but had not been able to do so. He asked for the President's orders but received no orders. These reports of the *akunwun* were, to use familiar language, burked by the appellant. Now on November 3, the *akunwun* took action on his own authority and he seized the tax tickets from Ba Zan. On checking them he found that there was a shortage of over Rs. 4,000. What did the appellant do in this extremely serious state of affairs? Nothing. Unless we are to believe the evidence which has been called on behalf of the plaintiff-respondent that the appellant was delaying matters in order to assist Ba Zan to find the money to make good the shortage. Instead of doing what any reasonable, prudent and honest man would have done, that is, call an immediate meeting of the Committee, he called no meeting of the Committee at all until December 19, and in the meantime no action of any kind was taken against Ba Zan and only upon the orders of the Committee which were passed at that meeting was a report made to the Police against Ba Zan. These are the simple facts of the case. The acts of which the appellant was guilty were acts of the grossest malfeasance, not merely of misfeasance. It is clear that owing to the appellant's failure to perform his duty and his gross misconduct Ba Zan was appointed tax collector without any security being furnished and was allowed to break all the rules and regulations for the periodical checking of his accounts. It cannot be said that the loss to the Municipi-

pal Committee has not been directly caused by the misconduct of the appellant. The decisions of the lower Courts were plainly correct and the appellant is certainly responsible to make good the loss to the Municipal funds. The appeal is therefore dismissed with costs: Advocate's fee 20 gold mohurs.

D.

Appeal dismissed.

ALLAHABAD HIGH COURT

First Appeal No. 394 of 1934

October 6, 1939

BENNET AND VERMA, J.J.

RAM KUMAR SINGH AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

PARAM SINGH AND ANOTHER—DEFENDANTS
—RESPONDENTS

Hindu Law—Debts—Antecedent—Debt by father by exchanging villages—Subsequent mortgage in favour of stranger to pay off this debt—At time of incurring debt, subsequent mortgage in contemplation—Debt, if deprived of its character of antecedency—Pleadings—Amendment—New claim involving extensive amendment of plaint and entirely changing the nature of the case held could not be allowed at the appellate stage.

Where father incurred debt by exchanging villages and subsequently executed a mortgage in favour of a stranger to pay off the earlier debt, the earlier debt is an antecedent debt, in fact as well as in time. The character of the debt cannot be altered by the fact that at the time of incurring the debt the father knew that he would not be able to meet the liability and had in contemplation the execution of the subsequent mortgage to pay the debt.

The great-grandson instituted a suit challenging the mortgage executed by his father, grandfather and great-grandfather, on the ground that the debt for the discharge of which it was executed was not antecedent. In the Appellate Court he prayed to be allowed to challenge the original debt itself:

Held, that the claim could not be put forward as it involved extensive amendment of the plaint and would entirely change the nature of the case.

F. A. from the decision of the Sub-Judge, Moradabad, dated May 31, 1934.

Messrs. S. K. Dar and S. B. Johari, for the Appellants.

Mr. K. N. Malaviya, for the Respondents.

Verma, J.—The appellants were the plaintiffs in the suit. The principal reliefs claimed in plaint were these:

(a) It may be declared that the property bounded as set forth below and owned by the plaintiffs is not liable to be sold at auction in satisfaction of the decree, dated December 17, 1931, passed in suit No. 10 of 1930, *Param Singh v. Chaudhari Narain Singh* by the Court of the Additional Subordinate Judge, Moradabad.

(b) If in the opinion of the Court the plaintiffs may be entitled to the relief in respect of a portion of the

property instead of the entire property the plaintiff's right may be declared in respect of that portion of the property."

The Court below has granted to the plaintiffs a declaration that the property in question is liable to be sold in execution of the mortgage-decree No 50 of 1930

"for the amount due under the decree minus Rs. 3,588-3-0 being part of the principal of the mortgage of February 1, 1926, and interest allowed on this part of the mortgage consideration by the decree."

The plaintiffs have filed this appeal and the defendant-mortgagee-decree-holder, Param Singh, has filed cross-objections with regard to this sum of Rs. 3,588-3-0. The plaintiffs are the minor sons of Raghunath Singh who is the son of Umrao Singh and Umrao Singh's father was Narain Singh. Thus, the plaintiffs are the great-grandsons of Narain Singh. Between the years 1921 and 1924 Narain Singh purchased by means of several deeds *zamin-dari* property in a village called Athain. The family also owned a village called Kuchauli. It has been found by the Court below that this was the ancestral property of the plaintiffs and this finding has not been challenged by the respondents. One Shiam Singh was the owner of a village called Uchaiti. In the year 1925 it was agreed between Shiam Singh on one side and Narain Singh and his son Umrao Singh and grandson Raghunath Singh on the other that these two villages, namely, Kuchauli and Uchaiti, be exchanged between the parties. Accordingly, on May 23, 1925 a deed of exchange was executed. It is Ex. 16 and is printed at p. 101 of the paper book. The parties to this transaction were agreed that Kuchauli was worth Rs. 40,000 and Uchaiti was worth Rs. 60,000. Narain Singh and his son and grandson had therefore to pay the difference, namely, Rs. 20,000 to Shiam Singh. The manner in which this payment was made was this. Shiam Singh had on July 14, 1921 borrowed a certain sum of money from Param Singh, the present defendant-respondent and had hypothecated half of Uchaiti. On the date of exchange, it was found that the amount due on this mortgage from Shiam Singh to Param Singh was Rs. 10,656-8-0. Narain Singh, Umrao Singh and Raghunath Singh took this liability upon themselves. There was another debt which Shiam Singh had to pay to Kanhai Lal and Kalyan Rai. The details of this debt are these. At one time Shiam Singh did not own the whole of Uchaiti and his cousin Ganga Dutt had a share in it. By a deed of

exchange dated January 3, 1923 Shiam Singh gave to Ganga Dutt certain property situated in villages Sultanpur and Phalenda Iahapur and took from him in exchange his share in village Uchaiti. Ganga Dutt it appears had borrowed Rs 2,500 from Kanhai Lal and Kalyan Rai under a deed of simple mortgage of July 5, 1922 and Shiam Singh had undertaken this liability.

On May 25, 1925 the amount due to Kanhai Lal and Kalyan Rai was found to be Rs. 3,300 and Narain Singh, Umrao Singh and Raghunath Singh took over this liability of Shiam Singh also. A sum of Rs. 457-8-0 was paid in cash by Narain Singh, Umrao Singh and Raghunath Singh to Shiam Singh. The total of these three items came to Rs. 14,414 leaving a balance of Rs. 5,586. The payment of this amount to Shiam Singh was made by means of another transaction. Narain Singh owed money to Kanhai Lal Kallu Mal under a registered bond dated June 22, 1921 and the amount was Rs. 5,414. Along with the deed of exchange a deed of simple mortgage was executed by Narain Singh on May 25, 1925 in favour of Shiam Singh for Rs. 11,000 and the *zamindari* property in village Athain mentioned above was mortgaged. Out of the mortgage money, Rs. 11,000, the sum of Rs. 5,414 was left in the hands of Shiam Singh for payment of the debt due from Narain Singh to Kanai Lal and Kallu Mal and the balance, namely, Rs. 5,586, was acknowledged by Narain Singh as having been received because of the liability under the deed of exchange. Narain Singh and this son and grandson were unable to discharge the liabilities which they had undertaken under the deed of exchange and failed to pay the amounts due to Param Singh and Kanhai Lal Kalyan Rai. Consequently they executed on February 1, 1926 a deed of simple mortgage in favour of defendant-respondent Param Singh for Rs. 20,000 and mortgaged village Uchaiti. The mortgage money, Rs. 20,000, was made up of four items. The amount due to Param Singh under the mortgage deed dated July 14, 1921 executed in his favour by Shiam Singh had by this time become Rs. 11,095-10-0 and this sum was allowed credit for. A sum of Rs. 1,792-6-0 was left in the hands of Param Singh for payment to Shiam Singh in liquidation of a portion of the liability that rested on Narain Singh and his family in respect of the sum of Rs. 5,586 mentioned above. The amount due to Kanhai Lal and Kalyan Rai under the deed executed by Ganga Dutt on July 5, 1922 had by

this time reached the figure of Rs. 3,529-3-0 and this sum was also left in the hands of Param Singh for payment to those creditors. The balance, namely, the sum of Rs. 3,588-3-0 was paid by Param Singh to Narain Singh in cash before the Registering Officer at the time of registration of the mortgage-deed. Param Singh brought suit No. 50 of 1930 against Narain Singh for the recovery of the amount due on foot of this mortgage and obtained a mortgage-decree for sale. The declaration prayed for by the plaintiff in the suit out of which this appeal has arisen is in respect of this decree. The Court below has held that the consideration of the mortgage-deed in question was valid to the extent of Rs. 16,411-13-0 as it constituted antecedent debt and that no legal necessity for the balance Rs. 3,588-3-0 was proved.

Learned Counsel appearing for the plaintiff-appellants has urged that the Court below is not right in holding that the liability incurred by Narain Singh, Umrao Singh and Raghunath Singh under the deed of exchange of May 25, 1925 constituted antecedent debt. His argument is that at the time of the execution of the deed of exchange Narain Singh, Umrao Singh and Raghunath Singh must have known that they would not be able to pay the debts which they were undertaking to pay and that therefore it follows, as a matter of necessary inference, that the mortgage which was ultimately executed on February 1, 1926, was in contemplation even at that time. We are unable to accept this argument. It is clear, and is not disputed, that Param Singh had absolutely nothing to do with the deed of exchange which was executed on May 25, 1925. It is conceded that there is absolutely nothing to show that he in any manner brought it about or had any connection with it. The argument thus resolves itself into this, that the mortgage deed subsequently executed in favour of Param Singh must be invalidated because of a certain frame of mind which Narain Singh, Umrao Singh and Raghunath Singh, are alleged to have had on May 25, 1925.

In the first place there is absolutely no evidence to show that Narain Singh, Umrao Singh and Raghunath Singh at that time contemplated the execution of a deed of mortgage in future in favour of Param Singh or of anybody else for the liquidation of the liabilities which they had undertaken. For aught we know to the contrary, they may have hoped to be able to meet those liabilities out of the income of their pro-

erty. Secondly, we fail to see how Param Singh can be penalized for what Narain Singh, Umrao Singh and Raghunath Singh might have had in contemplation at the time of the execution of the deed of exchange between them and Shiam Singh. In essence what happened on May 25, 1925, was this. Narain Singh, Umrao Singh and Raghunath Singh had to pay a sum of Rs. 20,000 to Shiam Singh on account of the difference in the value of the two villages, Kuchauli and Uchaiti. Not having got the money to pay to Shiam Singh in cash they incurred debts for the purpose of making payment to Shiam Singh. The manner in which they incurred these debts was this that they took over certain liabilities of Shiam Singh. In lieu of the liabilities thus incurred, they subsequently gave the mortgage in question to Param Singh, the antecedent liabilities forming part of the mortgage money to the extent of Rs. 16,411-13-0. In our opinion, this did constitute antecedent debt. Learned Counsel has referred to the observations of their Lordships of the Privy Council in *Brij Narain v. Mangal Prasad* (1) and has relied on the proposition that

"antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached."

Now, the transaction impeached in this case is the mortgage of February 1, 1926, in favour of Param Singh. The antecedent debts relied upon by Param Singh consist of the liabilities incurred by Narain Singh and his son and grandson on May 25, 1925, in consequence of the transaction of exchange into which they entered with Shiam Singh. We fail to see how such a debt can be said to offend against the rule laid down by their Lordships of the Privy Council. Accordingly, we hold that the decision of the Court below that the consideration of the mortgage deed in question was valid to the extent of Rs. 16,411-13-0 is correct.

Learned Counsel appearing for plaintiff-appellant has next urged that he should be allowed in appeal to challenge the transaction of exchange itself and to pray for its cancellation. The reliefs prayed for in the plaint have been quoted above. No relief in respect of the exchange of May 25, 1925, was claimed. It is true that in the body of the plaint it was stated that Narain Singh,

Umrao Singh and Raghunath Singh should not have exchanged village Kuchauli with village Uchaiti but no relief was asked for in respect of it. The position thus is that the plaintiffs treated village Uchaiti as their ancestral property as it had been acquired by giving in exchange the ancestral village of Kuchauli and claimed the reliefs mentioned above on the footing that village Uchaiti belonged to them. It is conceded that the plaintiffs cannot put forward the claim mentioned above without undertaking extensive amendments of the plaint which will entirely alter the nature of the case. The plaintiffs cannot in our judgment be allowed in these circumstances to change the whole nature of their claim and to ask for any relief in respect of the transaction of exchange.

We come now to the cross-objection filed by Param Singh defendant-respondent. It has been urged that legal necessity for the sum of Rs. 3,588-3-0 is proved. No necessity for this borrowing in cash is mentioned in the mortgage deed itself. Learned Counsel has laid before us the statements made by his client Param Singh in the witness-box in the Court below. The case put forward by him in his deposition was that he asked Narain Singh why he was borrowing Rs. 3,588 in cash and that the latter replied that

"he wanted this money to get a new well constructed and to fit his old well with a Persian wheel and tube. He said the new well he would construct would also be fitted with a Persian wheel and tube."

Prompted by his Counsel by means of the question 'what further necessity did he mention?' Param Singh came out with the further story that Narain Singh said that he would purchase bullocks for improving cultivation and camels for the Persian wheels and that he required some money for household expenses. In cross-examination he stated that Raghunath Singh had got a well constructed six years ago. He admitted, however, that he had not seen this well. He further stated:

"I have not seen the old well either. I have not seen any of the Persian wheels I have stated about above. All that I heard about the wells and the Persian wheels was from Shib Lal. I have no personal knowledge about the wells or the Persian wheels or the tubes. No camel or bullock was purchased by Narain Singh in my presence. Shib Lal told me about the purchase of camels and bullocks by Narain Singh."

It is noteworthy, however, that this Shib Lal had been examined as a witness for Param Singh a day before and not a single question had been put to Shib Lal with regard to these matters. Lower down in

(1) 46 A 95; 77 Ind. Cas. 689; A I R 1924 P O 50; 51 I A 129; 21 A L J 934; 46 M L J 23; 5 P L T 1; 28 C W N 253; (1924) M W N 68; 19 L W 72; 2 Pat. L R 41; 10 O & A L R 82; 33 M L T 457; 26 Bom. L R 500; 11 O L J 107; 10 W N 48 (P O).

cross-examination he made these statements :

"I did not ask Narain Singh as to what were the household expenses for which he was taking cash. I had no idea what these expenses were likely to be. I did not ask him what amount he needed for household expenses or other expenses. The above talk took place 15 days before the execution of the mortgage deed for Rs. 20,000. I did not consider it necessary to ask anyone else respecting the necessity during the said interval of 15 days."

These statements of Param Singh make it perfectly clear that the story which he has related about the necessities for which this sum of Rs. 3,588-3-0 was borrowed is untrue and has been invented for the purposes of this case. It is also falsified by the evidence of his witness, Jagat Singh, who is an attesting witness of the mortgage deed in question. He stated that "Rs. 3,000 or Rs. 3,500 was given in cash towards the consideration of the said deed." Counsel then put the question, "Was any necessity for this amount mentioned?" and the reply given by the witness was :

"By whom, Param Singh, Narain Singh or anybody else did not give the necessity but I asked Umrao Singh about it. He said he wanted money for purposes connected with cultivation. I did not ask him what these purposes were."

We are unable therefore to place any reliance on the testimony of Param Singh. We hold, in agreement with the Court below, that no valid necessity for the advance of this sum of Rs. 3,588-3-0 has been made out. Learned Counsel for defendant-respondent has referred to s. 53, Civil P. C., and has urged that his client is entitled to a personal decree against the plaintiffs as the suit was filed within six years of the execution of the deed of mortgage and as Narain Singh has died during the pendency of this appeal. He asks us to give him a declaration that he is so entitled. In our judgment, no such declaration can be given to defendant Param Singh. It is not necessary for us in this case to express any opinion as to whether Param Singh is entitled to any decree against the plaintiffs or any other member of their family or not. If, and when, Param Singh takes any proceedings for obtaining any decree the Court in which such proceedings are taken will consider the point. For the reasons given above we dismiss both the appeal and the cross-objection with costs.

D.

Appeal dismissed.

LAHORE HIGH COURT

Second Appeal No. 1317 of 1933

October 16, 1939

BHIDE, J.

BASHO RAM AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

Mst. SARUPI AND OTHERS—DEFENDANTS
—RESPONDENTS

Custom (Punjab)—Gaur Brahmins of Karnal town—Burden to prove that they are governed by custom lies on them—Their settlement in town from time of Mughal Emperors or being notified as agricultural tribe, whether proof that they follow custom—Custom, how to be established.

Where the parties are Gaur Brahmins and are residents of Karnal town the burden of proof as regards the alleged custom lies on them and the burden is heavy as the parties are Hindus of the highest caste. 4 Ind. Cas. 947 (1), 73 Ind. Cas. 759 (2), 90 Ind. Cas. 1045 (3) and 134 Ind. Cas. 302 (4), relied on.

The mere facts that the Gaur Brahmins have been settled in the town of Karnal from the time of the Mughal Emperors and that Gaur Brahmins of Karnal District have been also notified as an agricultural tribe would not necessarily show that Brahmins of Karnal town follow custom. 134 Ind. Cas. 302 (4), relied on.

Custom is a question of fact and it has to be established by proof in the shape of instances, etc., and a finding as to custom cannot be based on mere inferences. The *riwaj-i-am* would undoubtedly raise a strong presumption in plaintiff's favour, if it is held to be applicable to the parties. 38 Ind. Cas. 354 (5), relied on.

S. A. from the decree of the District Judge, Karnal, dated May 9, 1938.

Mr. Mukand Lal Puri, for the Appellants.

Messrs. Shamair Chand and Ram Chander, for Respondents Nos. 1 to 3.

Judgment.—This is a second appeal arising out of a suit by the reversioners of one Mst. Sarupi for a declaration that a gift of land made by her in favour of her daughter's sons was not binding on them according to custom. The defendants pleaded *inter alia* that the parties were governed by Hindu Law and not by custom, and the Courts below have found this issue in their favour and dismissed the plaintiffs' suit. From this decision, a second appeal is preferred by the plaintiffs, supported by a certificate from the learned District Judge on the question of custom.

The sole point for decision in this appeal is whether the plaintiffs have proved that they are governed by custom and not by Hindu Law and whether according to that custom the daughter's sons in whose favour the gift in question was made were not entitled to inherit the property, as they would under Hindu Law. The parties are

Gaur Brahmans and are residents of Karnal town. The burden of proof as regards the alleged custom admittedly lay on them and the burden was heavy in the present case as the parties are Hindus of the highest caste: cf. *Maya v. Gurdit Singh* (1), *Salig Ram v. Badhawa* (2), *Khazunchand v. Paras Ram* (3) and *Bhagwani v. Sitaram* (4), etc. The oral evidence of the plaintiffs was vague and of little value as the learned District Judge has shown and I agree with him. The plaintiffs were unable to produce any documentary evidence in the shape of judicial decisions, etc. to support their case. The only evidence on which the learned Counsel relied before me was the *riwaj-i-am* of Pargana Karnal of the year 1880 (Exs. p 11 to p. 15 of which copies have been placed on the record). It was contended that this *riwaj-i-am* is a strong piece of evidence in plaintiffs' favour and the presumption arising therefrom has not been rebutted in the present case. I am however unable to accept these contentions. It seems to me very doubtful in the first place if the *riwaj-i-am* produced in this case can be held to be applicable to the parties to the suit, who are residents of a town and not of a village and belong to a caste, which is usually dependent not on agriculture but on other occupations. The learned District Judge has pointed out that according to the evidence, about half of the Brahmans living in Karnal town do not own any land at all and most of them follow other occupations. Many of them follow their priestly avocation. They are owners of 2,000 *bighas* out of a total of 60,000 *bighas*.

It was urged that these Brahmans have been settled in the town of Karnal from the time of the Mughal Emperors and that Gaur Brahmans of Karnal District have been also notified as an agricultural tribe. But these facts would not necessarily show that Brahmans of Karnal town follow custom. Even if the Brahmans have been residents of Karnal from the time of the Mughal Kings, they may well be following their personal law as regards succession, etc., and the fact that Gaur Brahmans in the district have been notified as an agricultural tribe would not necessarily show

(1) 1 P R 1910; 4 Ind. Cas. 947; 145 P L R 1909; 128 P W R 1909.

(2) 4 L 254; 73 Ind. Cas. 759; A I R 1923 Lah. 501.

(3) 6 L 524; 90 Ind. Cas. 1045; A I R 1925 Lah. 646; 26 P L R 627.

(4) A I R 1931 Lah. 491; 134 Ind. Cas. 302; 32 P L R 284; Ind. Rul. (1931) Lah. 926.

that they (and especially those who are residents of a town) follow custom: see *Bhagwani v. Sitaram* (4). Custom is a question of fact and it has to be established by proof in the shape of instances, etc., and a finding as to custom cannot be based on mere inferences. The *riwaj-i-am* would undoubtedly raise a strong presumption in plaintiffs' favour, *Beg v. Allah Ditta* (5), if it were held to be applicable: but as stated above it seems to me very doubtful if it can be properly held to be applicable to the parties to this suit. I had occasion to consider a similar question in the case of Mahajans of Hissar town in *Patrumal v. Badri Parshad* (6) and I held therein that the *riwaj-i-am* was not applicable to them. Most of the reasons given in that judgment will, I think, apply to the present case also.

The learned Counsel for the appellants mainly relied on the fact that from the introduction to the Customary Law of the district it appears that Brahmans were consulted at the time of the preparation of the *riwaj-i-ams* of the Karnal District. But this general statement would not necessarily show that residents of Karnal town were consulted. In the list of tribes, who were consulted, Rajputs of Panipat town are specifically mentioned in addition to Rajputs of the district generally and if the Gaur Brahmans of Karnal town were consulted they might have been expected to be mentioned separately in the list. The Settlement Officer who was responsible for the preparation of the *riwaj-i-am* of 1880 noted about the Brahmans of the district as follows in para. 218 of his report:

"The Brahmans have in almost all cases followed the clients from their original abodes to villages in which they are now settled. They hold so little land that I have made but few inquiries about them. (See report of the Revision of the Settlement of the Panipat Tahsil and Karnal Pargana by D. O. J. Ibbetson published in 1883.)"

It is, also noteworthy that in statistical tables Nos. 23, 24 and 25 attached to the report relating to the principal tribes of the district, cities of Karnal and Panipat are excluded. As the learned Judge of the trial Court has pointed out the heading of the *riwaj-i-am* itself shows that the customs recorded are those relating to residents of villages (*dehat*). There is no direct evidence that representatives of Brahmans of Karnal town were consulted and in view

(5) 45 P R 1917; 38 Ind. Cas. 354; A I R 1916 P O 129; 44 I A 89; 44 O 749; 12 P W R 1917; 21 M L T 310; 32 M L J 615; 19 Bom. L R 388; 15 A L J 525; 21 O W N 842; 26 O L J 175 (P O).

(6) A I R 1938 Lah. 461; 177 Ind. Cas. 403; 40 P L R 781; 11 R L 313.

of all the facts stated above, I do not think it would be safe to presume that they were so consulted. In *Sardar Darchan Khan v. Sohaura Mal* (7), even the attestation of the *riwaj-i-am* by a non-agriculturist who had invested in some land in a village was held to be not sufficient to show that he was governed by custom. The present case for the plaintiffs is still weaker as there is no direct evidence to show that the representatives of Gaur Brahmans of Karnal town were actually consulted when recording the custom. It was pointed out that some of the illustrations given in the Manual of the Customary Law of the Panipat Tahsil and Karnal Pargana prepared in 1910 relate to Brahmans of Karnal. It is not quite clear whether these illustrations refer to Karnal town. Besides, it appears from the preface that these illustrations were added later and I doubt whether it would be safe to presume therefrom that representatives of Brahmans of Karnal town were consulted in preparing the *riwaj-i-am*. In any case, even if it be assumed that the *riwaj-i-am* applies to Gaur Brahmans of Karnal town, the presumption has been in my opinion, sufficiently rebutted by the evidence on the record.

It has been stated above that the plaintiff's oral evidence was vague and of little value. But it is significant as pointed out by the learned District Judge that their own witnesses have admitted instances of daughters' succession which go against their case. The plaintiffs have not been able to produce any reliable documentary evidence in the shape of judicial decisions relating to Gaur Brahmans while the defendants have produced several such decisions—one of them relating to Karnal town, and others to Panipat. The best proof of custom, after all, consists of instances in which it has been followed and if the custom amongst Gaur Brahmans of Karnal town on the point in question is alleged by the plaintiffs, there is no reason why they should not have been able to produce some reliable documentary evidence in the shape of instances in support of it. Lastly, there is evidence in the shape of an important admission by Ganga Dutt, one of the plaintiffs, and Sham Sundar, a son of another plaintiff (*vide* Exs D-7 and D-11). The former admitted in the course of his evidence in another suit that amongst Gaur Brahmans daughters succeed in preference to collaterals. It was urged that this state-

ment was not put to Ganga Dutt. But the copy of Ganga Dutt's statement was produced as evidence of an admission by him and was apparently allowed to be put in without any objection. It is significant that he did not go into the witness-box to explain it and no explanation of the statement was offered on his behalf even in the course of the arguments in Ex. D-11 also Sham Sundar seems to have clearly based his claim to a succession certificate on Hindu Law. No explanation was offered as to this fact either. In view of all the facts discussed above, I see no good reason to dissent from the findings of the Courts below on the question of custom. I dismiss the appeal with costs.

S.

*Appeal dismissed.***MADRAS HIGH COURT**

Criminal Revision Cases Nos. 799 and 800 of 1938

Criminal Revision Petitions Nos. 759 and 760 of 1938

December 9, 1938

LAKSHMANA RAO, J.

SOUTH INDIAN GENERAL ASSURANCE AND CO., LTD. AND OTHERS—ACCUSED Nos. 1, 6 AND 7—PETITIONERS

versus

THE REGISTRAR OF LIFE INSURANCE COMPANIES, MADRAS—COMPLAINANT—RESPONDENT

Criminal Procedure Code (Act V. of 1898), s. 248—Withdrawal of complaint against some accused—If involves withdrawal of whole complaint.

There is nothing in s. 248, Criminal P. C., which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused. 81 Ind. Cas. 117 (1), followed.

Or. R. Cases and Or. R. Ps. under ss. 435 439 of the Criminal P. C., 1898, praying the High Court to revise the order of the Second Presidency Magistrate of the Court of the Presidency Magistrates, G. T. Madras, dated October 13, 1938 and made in C. C. Nos. 1129 of 1938 and 1130 of 1938.

Messrs. V. Rajagopalachari and A. S. Mannadi Nair, for the Petitioners.

The Crown Prosecutor, for the Crown.

Order.—The complaints were sought to be withdrawn against some of the accused and the Magistrate acquitted them. There was no formal withdrawal of the complaint and as pointed out in *Anantia v.*

Crown (1), in which all the decisions were considered there is nothing in s. 24b which involves a withdrawal of the whole complaint merely because the complaint is withdrawn as against some of the accused. There is therefore no substance in these petitions and they are dismissed.

N.S.

Petitions dismissed.

(1) 5 L 239, (251); 81 Ind. Cas. 117; 25 Cr. L J 629; A I R 1924 Lah. 595.

BHOPAL HIGH COURT

Full Bench

Second Civil Appeal No. 75 of 1939

March 23, 1939

MOHAMMAD AHMAD KHAN, C. J., P. C. BIRDIE
AND FAZLE AZIM, JJ.

KANAYYALAL—PLAINTIFF—

APPELLANT

versus

ZALIM SINGH—DEFENDANT—

RESPONDENT

Bond—Instalment bond with default clause—Instalments not paid and some becoming time-barred—Time, if begins to run against whole amount from date of first default—Creditor, whether can sue for remaining portion of debt treating relinquishment as act of waiver within Art. 75, Limitation Act (Bhopal) (IX of 1908)—Held on facts that suit was time-barred.

If instalment bond for the payment of debt contains a provision that in the event of failure of any instalment the creditor shall have a right to recover the whole amount thereunder and the debtor fails to pay several instalments, time will run from the failure of the instalments against the whole amount and the creditor is not entitled to forego such instalments as have become time-barred, and sue for remaining portion of his debt treating his relinquishment as an act of waiver within the meaning of Art. 75 of the Lim. Act. 138 Ind. Cas. 779 (3), explained and distinguished, Bhopal High Court Reports pp. 231 and 304 and *Balkishan v. Harparshad* decided on June 11, 1931, by Bhopal High Court, referred to.

If a creditor keeps quiet and does not prefer any suit to enforce his right of realizing the whole amount under an instalment bond with a default clause, time begins to run against him from the date of first default.

An instalment bond contained a default clause giving the creditor a right to realize the whole amount due in the event of failure of any instalment. No instalment had been paid and eleven instalments had become time-barred since the dates of their falling due, and a suit was brought to recover the remaining seven instalments under the bond:

Held, that the suit was time-barred.

A. against the order of the District Judge, Eastern District?

Mr. Prem Dayal Verma, for the Appellant.

Mr. Jagdish Prasad, for the Respondent.

M. A. Khan, C. J.—On a reference being made by a Bench of this Court, the Full Bench considered the point referred to it during the second appeal filed by the defendant. This appeal has been filed by the defendant against the order of the District Judge, Eastern District, reversing the decree of the Court of the first instance. The facts of the case are that the plaintiff filed a suit in the Court of the Munsif at Udaipura on the foot of a bond dated January 24, 1923 stipulating the payment of Rs. 900 to be paid by the defendant in yearly instalments of Rs. 50. The said bond contained the usual default clause giving the creditor a right to realize the whole amount due in the event of failure of any instalment. The plaintiff at the time of his filing his suit had stated that no instalment had been paid and that eleven instalments had become time-barred since the dates of their falling due, and the suit is brought to recover the remaining seven instalments under the bond. The learned Munsif dismissed the plaintiff's suit as time-barred and held that the failure of the first instalment had given the plaintiff a right to sue for the whole amount due under the bond. Therefore time had begun to run from the failure of the very first instalment. On appeal the learned District Judge reversed the finding holding that the condition of realizing the whole amount was for the benefit of the creditor who may or may not avail of it. On second appeal the Bench of the High Court was divided on the point of limitation in the suit and referred it to the Full Bench in the following terms:

"If instalment bond for the payment of debt contains a provision that in the event of failure of any instalment the creditor shall have a right to recover the whole amount thereunder and the debtor failing to pay several instalments, will time run from the failure of the instalments against the whole amount or is the creditor entitled to forego such instalments as have become time-barred, and sue for remaining portion of his debt treating his relinquishment as an act of waiver within the meaning of Art. 75 of the Lim. Act? Whether on the facts proved and admitted in the case under appeal the plaintiff's claim is time-barred."

This reference has been necessitated probably on account of diversity of judicial opinion in British Indian High Courts on the subject. The Lahore High Court has no doubt held in *Kundanlal v. Indar Singh*, 163 Ind. Cas. 165 (1) that the plaintiff's abstinence in filing a suit on

the failure of the first instalment indicates his intention of waiving his right that had accrued to him under the bond. Similarly the Oudh Chief Court has in *Raja Jagatjit Singh v. Manodat*, 164 Ind. Cas. 431 (2) held likewise. This trend of judicial opinion is due to a Privy Council decision in *Lasadin v. Gulab Kunwar*, 138 Ind. Cas. 779 (3). At a cursory glance it would appear that the Privy Council decision mentioned above had overruled the established practice of a quarter of a century in India. But in 1935 the Madras High Court threw a flood of light on *Lasadin's case* (3) and held that the Privy Council ruling did not affect suits based on bonds for the payment of money. Such suits were governed by Art. 75 of the First Schedule of the Indian Lim. Act and not by Art. 132. *Lasadin's case* (3) clearly fell under Art. 132 on account of its being a suit on the foot of a mortgage. The learned Judge of the Madras High Court dissenting from an Allahabad case *Lalta Prasad v. Gajadhar Shukul* (4) definitely opined that *Lasadin's case* (3) itself decided that Art. 132 was applicable to suits under mortgage bonds and Art. 75 was applicable to simple money bonds. This argument of the learned Privy Council was based on an English case in which a similar default clause was in issue as would appear from the following quotation :

"According to Indian law the case would not fall under Art. 132 but would be governed by Art. 75 which has been specially worded."

From this view of the case it clearly follows that according to the learned Privy Council's decision in *Lasadin's case* (3) Art. 75 is applicable to all simple bond suits in which instalments are fixed and the default clause added giving the creditor a right to sue for the whole amount at the failure of any one instalment. A conflict of decisions arose chiefly on account of the interpretations put by various Courts on *Lasadin's case* (3). The Allahabad High Court did not take long to overrule their previous decisions by a Full Bench decision which laid down that in simple money debts, the question did not arise that the creditor could wait on account of having a sufficient security as was the

(2) 164 Ind. Cas. 431; 1936 O W N 665; 1936 O L R 452; 9 R O 69; A I R 1936 Oudh 384.

(3) 138 Ind. Cas. 779; 9 O W N 638; Ind. Rul. (1932) P O 251; 63 M L J 187; A I R 1932 P O 207; 36 O W N 1017; 36 L W 246; 56 O L J 237; (1932) A L J 913; 7 Luck. 442; 34 Bom. L R 1600 (P O).

(4) 55 A 283; 149 Ind. Cas. 181; A I R 1933 All. 235; (1933) A L J 550; 6 R A 852.

case in mortgage suits. Later on Nagpur Judicial Commissioner's Court in *Shamrao v. Moreshwar*, 151 Ind. Cas. 97 (5) followed the same view as was expressed by the Full Bench case of Allahabad. Reference to these rulings of the various High Courts leaves no doubt that in simple money bonds the default clause was not added for the sole benefit of the creditor. If the plaintiff failed to prove that he had in fact waived his right of suing for the whole amount, time would run from the first default. It would not be out of place to point out that *Lasadin's case* (3) is an authority only in suits arising out of mortgage. The trend of the arguments advanced by the learned Tribunal of the highest authority in India irresistibly leads us to this very conclusion. The default clause in the words of their Lordships is solely for the benefit of the mortgagee who is entitled to enforce his security immediately or to keep quiet if he considers the security to be sufficient. If we are to hold that on every default or breach of contract by the mortgagor, the mortgage money becomes immediately payable, the real intention of the parties to the transaction will be frustrated. They have mutually agreed to give the option to the mortgagee but in practice the right would devolve on the mortgagor, because whenever he chooses he can compel the mortgagee to enforce his security regardless of the time for which mortgage was created. A mortgagor by withholding payment could at his will set the default clause in motion and determine the mortgage. For these reasons their Lordships have not considered it just to allow a mortgagor to take advantage of his own default. It would not be good law to hold that merely on account of the mortgagor's default, the mortgage money became payable within the meaning of Art. 132 of the First Schedule of Indian Lim. Act. Mortgage money becomes due when the mortgagor acquires a right to redeem his mortgage or the mortgagee acquires a right to enforce his security. This argument does not leave a shadow of doubt that the learned Privy Council's judgment in *Lasadin's case* (3) had any bearing on the principle of waiver in vogue in simple money debts. Under the circumstances the diversity of opinion on this point in British India is merely transitory and may disappear on a reference to a wider Bench in the light of Full Bench

(5) 151 Ind. Cas. 97; A I R 1934 Nag. 180; 7 R N 56; 30 N L R 314.

rulings of the Allahabad High Court and of other High Courts in British India. Now we may recapitulate Bhopal High Court decisions on this subject as briefly as possible. A Full Bench of this Court in *Balkishan v. Harparshad*, decided on June 11, 1931, had ruled that in the event of the failure of any instalment the whole amount became due and time began to run from the first failure. This view has been followed in later cases, such as, *Nathuram v. Ratanlal*, decided on September 11, 1932 and *Gulabchand v. Sundarlal*, decided on December 19, 1932, and reported in Bhopal High Court Reports, 1932, pp. 231 and 304. Therefore considering our own Courts practice and in the light of the opinion of the learned High Courts of British India we would answer this reference in the negative. In the suit under appeal the plaintiff has neither pleaded any waiver nor proved the same by any fact. If a creditor keeps quiet and does not prefer any suit to enforce his right of realizing the whole amount, time begins to run against him from the date of first default and on this principle the plaintiff's suit is clearly time-barred.

Therefore, we answer the reference in the negative.

S.

Order accordingly

RANGOON HIGH COURT

First Appeal No. 79 of 1939

November 8, 1939

MOSLEY AND SHARPE, JJ.

O. R. M. M. S. P. S. V. CHETTYAR

FIRM—APPELLANT

versus

O. V. R. A. T. FIRM—RESPONDENT

Compromise—Time essence of contract—Compromise between parties that amount due under mortgage decree should be paid by instalments and that mortgagor should furnish additional security within specified time—Time essence of contract—Failure of mortgagor to furnish security within time—Court held could not enlarge time.

The plaintiff obtained a mortgage decree against the defendant and then the parties came to a compromise whereby the defendant agreed to pay the balance under the decree in certain instalments and that in addition to the properties covered by the mortgage decree, he would furnish further security and execute a bond and register it within one month. It was further agreed that time was of the essence of the contract, and that on failure to pay any one of the instalments or on failure to furnish security within the time specified, the plaintiff would be at liberty to proceed with the sale for the amount due against the properties covered by the mortgage decree and the security bond. The security was not

furnished by the due date but was shortly furnished and the first instalment was duly paid. The plaintiff applied for the sale of the property:

Held, allowing the application that the Court could not enlarge time specified in the compromise petition for furnishing security.

F. A. against the order of the Assistant District Court, Hanthawaddy, in Civil Execution No. 7 of 1938.

Mr. P. K. Basu, for the Appellant.

Mr. Anklesaria, for the Respondent.

Mosley, J.—The plaintiff-appellant, the O. R. M. M. S. P. S. V. Chettyar Firm, obtained a final mortgage decree against the defendant-respondent, the O. V. R. A. T. Chettyar Firm. Subsequently, the parties came to a compromise and filed a joint application on January 28, 1939 by which they agreed that the balance due under the decree was Rs. 6,635 which was to carry interest at six annas per cent. per mensem until realization, that the defendant would pay Rs. 500 with interest on the amount outstanding, on or before March 30, 1939, and that he would pay the balance by three subsequent annual instalments of some Rs. 2,000 each on or before March 30, 1940 and subsequent years, and that in addition to the properties covered by the mortgage-decree, he would furnish further security (specified), and execute a bond and register it within one month of the date of the application, i. e., by February 28, 1939. It was further agreed that time was of the essence of the contract, and that on failure to pay any one of the instalments or part thereof, or on failure to pay the interest, or on failure to furnish security within the time specified, the plaintiff would be at liberty to proceed with the sale for the amount due against the properties covered by the mortgage-decree and the security bond. It was also agreed that on payment of any one of the instalments the defendant and the plaintiff would file a joint petition, i. e., certifying the payments to the Court. Security was not furnished by the due date, though the instalment of Rs. 500 and the interest due was deposited by the defendant on March 30, 1939. There was no joint application on certification to the Court.

It would appear that after this the defendant executed a security bond on March 25, in favour of the Judge, which was registered on March 31, and copied by April 1. There is no entry in the suit diary to show when this bond was filed in Court. Immediately after this, on

April 3, the decree-holder filed a petition asking that the mortgaged properties be sold as the security bond had not been executed within the stipulated time. It would appear that this application was not entered in the diary until, at all events, April 6. The diary of April 3, purports to have ordered notice to issue to the other side, but that notice was never issued. From the wrong date "April 6," given in the margin before date "April 3," it is obvious that these two diary entries of different dates were written at the same time. Notice was eventually issued to the other side, and the judgment-debtor filed an affidavit in which he said that he was ill and unable to appear before the Court to sign the bond; and that this fact was mentioned to the Judge when he appeared before him to sign the bond. The bond itself is not witnessed by the Judge and does not show that it was signed before the Judge nor does the affidavit say what the duration of the defendant's illness was or what its nature was. This affidavit was never answered; but it would, of course, take a great deal more than this vague assertion of the defendant to make the Court believe that the defendant had been ill, and, what is more, the Judge never relied on that affidavit or referred to it in his judgment, nor, as a matter of fact, was it necessary for the defendant ever to appear in Court in order to have this bond in favour of the Judge executed or registered. These facts are really immaterial and I only refer to them in order to draw attention to the irregularities which appear in this case to have characterized the proceedings of the Judge. Finally the parties were heard, and the Judge passed the following order:

"The first instalment was paid on due date. The bond was executed before the payment of the first instalment, and the decree-holder's position has already been secured. The decree-holder did not raise objection before the bond was executed and registered (it was executed and registered without his knowledge). The application for execution of the decree by the decree-holder is dismissed."

The Judge actually went on to give costs against the decree-holder. The main ground of appeal is that the Judge had no power or jurisdiction to vary the decree which rests upon the compromise petition. It is, of course, ordinarily the case with a consent decree that it cannot be altered except by consent of the parties. It has been held in an English case *Australian*

Automatic Weighing Machine Co. v. Walter (1)—and the law on the subject is the same in India—that where the time for doing an act has been fixed by a consent order, it cannot be enlarged except by consent. It is otherwise, of course, where the period has been granted by the Court, and time can be enlarged by the Court (s. 148, Civil P. C.). This was not a case at all of a stipulated penalty (s. 74, Contract Act) where the Court can give relief to a party, as the plaintiff did not ask for sale of the fresh security. The law on the subject is contained in s. 55, Contract Act, which says:

"When a party to a contract promises to do a certain thing at or before a specified time... and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract."

For the respondent *Akkach Mondal v. Aminuddi Mollick* (2), was cited. This was a case where more time was given for payment of a final mortgage decree; no reasons were given, and it appears that the other side did not object to the time being enlarged. The matter is discussed in *Nand Rani Kuer v. Durga Das Narain* (3), but that was a case where the time was not of the essence of the contract. Here the parties agreed that time was of the essence of the contract. Even though, as the Judge said, the plaintiff was eventually no worse off pecuniarily as regards the decretal amount than he would have been if the compromise had been strictly adhered to, there is of course always the extra expense and trouble to the plaintiff to be considered. Various rulings have been quoted on behalf of the plaintiff-appellant to show that the Court has no power except in the case of preliminary mortgage-decrees (where power is specifically given by the Code) to interfere with the terms of a consent order, at all events one where time is of the essence of the contract. These rulings are: *Sajjadi Begam v. Dilawar Hussain* (4), which was followed in *Kandhaiya Singh v. Musammât Kundan* (5), *Hari Singh v. Bulaqi Mal & Sons* (6), *Chandanbala Debi v. Prabodh Chandra* (1) (1891) W N 170 (Eng).

(2) 23 O W N 439; 50 Ind. Cas. 937; A I R 1919 Cal. 68.

(3) 2 Pat. 906; 82 Ind. Cas. 505; A I R 1924 Pat. 387; 5 P L T 401.

(4) 40 A 579; 47 Ind. Cas. 4; A I R 1918 All. 98; 16 A L J 625.

(5) 42 A 639; 57 Ind. Cas. 16; A I R 1920 All. 173; 18 A L J 826.

(6) 11 L 93; 119 Ind. Cas. 494; A I R 1930 Lah. 20; 31 P L R 375; Ind. Rul. (1929) Lah. 910.

Ray (7) and Harakh Singh v. Saheb Singh (8).

It is unnecessary for the purposes of this case to express an opinion whether, in a case between creditor and debtor, where there has been a short unavoidable delay in making a payment or doing anything necessary under the consent decree the Court has not an inherent power to treat the short unavoidable delay as no delay or no breach of the contract. But this is really merely another form of the legal maxim *de minimis non curat lex*. Certainly in the present case the delay was not negligible and was a breach of the contract. For these reasons this appeal will be allowed and the order of the trial Court dismissing the plaintiff-appellant's application will be set aside with costs. Advocate's fee five gold mohurs.

Note.—I desire to express an opinion at the same time that in all probability the plaintiff-appellant, once he has had his application restored, and the order for costs against him (which should under no circumstances ever have been made) set aside, and has received the costs of this appeal, will have suffered no substantial damage or loss, and that it would be only equitable for him to forgo his strict rights under the contract and to allow the defendant-respondent to make payment of the decretal amount by instalments in the way and at the time specified by the consent decree. I am given to understand by the Advocate for the plaintiff-appellant that there is a reasonable prospect of this being done.

Sharpe, J.—I agree that this appeal must be allowed, and I share my brother's hopes for the future.

Appeal allowed.

(7) 36 C. 422; 2 Ind. Cas. 338; 9 C. L. J. 251.
(8) 6 C. L. J. 176.

BHOPAL HIGH COURT

First Civil Appeal No. 491/155 of 1939

May 17, 1939.

FAZLE AZIM, J.

RAM NARAIN AND ANOTHER—PLAINTIFFS

—APPELLANTS

versus

NEMICHAND—DEFENDANT

—RESPONDENT.

Hundi—Suit on—Defendant admitting execution—Burden of proving consideration—Hundi or bill of exchange, nature of—Bilateral document, if hundi—Hundi drawn by A on his own firm in favour of B—Document is pro-note—Such document not properly stamped under Arts. 39 and 12 (b), Bhopal Stamp Act is inadmissible under s. 33—Acknowledgment—Nature of.

Where in a suit based on *hundi* the defendant has

admitted its execution, the burden of proving that it was without consideration lies heavily on him.

A *hundi* or a bill of exchange being a negotiable document is drawn by one person who is called a drawer, on another person who is called a drawee, who is ordered to pay the amount thereof to a third person who is the holder. Thus three persons are parties to a bill of exchange. A document which is not of this nature is not legally a *hundi* or bill of exchange. A document which is only bilateral cannot be called a bill of exchange. 145 Ind. Cas. 662 (1), relied on.

Where therefore a *hundi* is drawn by A on his own firm ordering the amount thereof to be paid to B after certain days, the transaction virtually is that A borrowed money and passed a *hundi* drawn on himself as security for the debt to B. It is thus a clear case of the execution of a promissory note pure and simple. Such a document if not properly stamped as required under Arts. 39 and 12 (b), Bhopal Stamp Act is inadmissible in evidence under s. 33 of the Stamp Act, even on payment of proper duty and penalty.

An acknowledgment does not contain any promise to pay.

F. C. A. from the judgment of the Court of the Munsif, Bhopal.

Mr. Mohammad Nasiruddin, for the Appellant.

Molvi Syed Mohammad, for the Respondent.

Judgment.—This is an appeal of Ram Narain and Ballabdas minor, through Ram Narain as next friend, plaintiffs, from the judgment of the Court of Munsif, Bhopal dismissing plaintiffs' claim for Rs. 278 principle and interest against Nemichand owner of firm Lakhmichand Nemichand, defendant, based on a *hundi* executed by the defendant. The plaintiffs' suit was that on *Miti Phagun Sudi 10, Sammat, 1992*, corresponding to March 2, 1936, the defendant passed a *hundi* for Rs. 245 payable after 121 days drawn on his own firm in favour of the plaintiffs. After the stipulated time when the plaintiffs presented the *hundi*, the defendant refused payment. Thus the plaintiffs claim against the defendant the amount of *hundi* plus the interest on it at the rate of Re. 0-12-0 per cent. per month in accordance with the mercantile usage. Along with the plaint the plaintiffs have filed the *hundi* as basis of the suit. This document is in Marwari Hindi language and appears to have been drawn by Lakhmichand Nemichand on his own firm and the amount thereof was payable to Ram Narain and Ballabdas after 121 days. It was stamped with only three annas adhesive stamp. The defendant in his pleading raised objections about the *hundi* that it was not duly stamped and hence was inadmissible in evidence and

that it could not be admitted in evidence even on payment of the requisite stamp and penalty, besides the *hundi* in suit was without consideration. The defendant did not deny its execution, but he stated that he had executed the *hundi* in favour of another person named Ratanlal from whom too he had not borrowed any money. About the execution of *hundi* his statement deserves no credit. He could not clearly deny its execution, but merely stated that it was executed in favour of Ratanlal although the *hundi* itself clearly shows that it was executed in favour of the plaintiffs. It being admitted that the *hundi* was executed by the defendant, the burden of proof that it was got without consideration heavily lay on the defendant, who excepting his own solitary statement could not adduce any evidence to discharge it. Therefore not agreeing with the finding of the lower Court I hold that the *hundi* was executed by the defendant and it was not without consideration. The way in which the lower Court has decided this case shows that the real contention with regard to the burden of proof was not approached in strict accordance with law. In this case the most important point was the documentary nature of the *hundi* and its admissibility in evidence. If it was held inadmissible in evidence for want of proper stamp, transaction could not legally be proved by any oral evidence, with the result that the plaintiffs could not succeed. Although it has been termed a *hundi* yet in legal phraseology a bill of exchange being a negotiable document is drawn by one person who is called a drawer, on another person who is called a drawee, who is ordered to pay the amount thereof to a third person who is the holder. Thus three persons are parties to a bill of exchange and due to its this very nature it is negotiable. A document which is not of this nature is not legally a *hundi* or bill of exchange as has been held in *Mohamad Hafiz Umarkhaz Khan v. Mohammad Akbar Khan* (1), by the learned Judicial Commissioner, who laid down that a document which was only bilateral could not be called a bill of exchange. In my opinion this principle is sound. The *hundi* in suit was drawn by Lakhmichand Nemichand on his own firm ordering the amount thereof to be paid to the plaintiffs after 121 days. The transaction virtually was that one person borrowed money and passed a *hundi* drawn

(1) A. I. R. 1934 Pesh. 1; 145 Ind. Cas. 662; 6 R. Pesh. 6.

on himself as security for the debt to the creditor. It was thus a clear case of the execution of a promissory note pure and simple. Under Art. 39 and Art. 12, cl. (b) of Bhopal Stamp Act such a document ought to have been stamped with Re. 0-4-0 stamp. As it bears only a Re. 0-3-0 stamp, therefore under s. 33 of Bhopal Stamp Act it is inadmissible in evidence even on payment of proper duty and penalty. Therefore the plaintiffs' suit has no ground to stand upon. In this appeal it is argued on behalf of the plaintiffs that the document was an acknowledgment of debt. But in law an acknowledgment does not contain any promise to pay. The document in question clearly contains a promise to pay, therefore the plaintiffs' contention fails. With the sole exception of the objection regarding burden of proof of consideration all other grounds are merely futile and deserve no consideration. They have not been even pressed in argument by the plaintiffs. The suit was based on the *hundi*, which is inadmissible in evidence, therefore I reject the plaintiffs' appeal with costs.

s.

Appeal rejected.

BOMBAY HIGH COURT

Summons in Suit No. 185 of 1938

July 3, 1939

KANIA, J.

HIRJI RAMJI—PLAINTIFF

versus

DAULATRAM RATANJI AND Co.

—DEFENDANTS.

Pleadings—Amendment—Plaint amended as a result of counter-claim—Amendment of written statement, whether plaintiff's duty—Civil Procedure Code (Act V of 1908), O. XXII, r. 4—Counter-claim—Abatement of.

When the plaintiff has amended the plaint as a result of the counter-claim it is not his duty to amend the title of the written statement itself. The plaintiff can amend his own pleadings and if the defendant wants to amend the title of the counter-claim it is his duty to obtain the order for the purpose.

A counter-claim stands in the same category as a cross-suit for the purposes of the Civil P.O. The counter-claim abates by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record in the counter-claim.

Mr. M. C. Setalvad, Advocate-General, for the Plaintiff.

Mr. C. K. Daphtary, for the Defendants.

Judgment.—The first contention raised in this summons is that the counter-claim has not abated because (a) it is not necessary to insert a separate title as no other

party than the parties to the original suit was impleaded in the counter-claim; and (b) there being no other defendant to the counter-claim, the provisions of O. XXII, r. 4, do not in terms apply. I do not agree with these contentions. Rule 130 of the High Court Rules, which permits the filing of a counter-claim, states that counter-claim shall have the same effect as a cross-suit. There are provisions in the rules for service of the counter-claim, for making persons other than the original parties defendants to the counter-claim, filing of a reply to the counter-claim by the plaintiff or by the additional defendants, and a provision that in default of such a reply the defendant to the suit will be entitled to have the suit put on board for an *ex parte* decree on the counter-claim. Whether a separate title is made or not is not important. It is important to note, however, that it is permissible to frame a counter-claim against persons other than the plaintiff. It is common knowledge that applications for affidavits of documents, motions, and such interlocutory proceedings are taken in respect of the counter-claim alone, which are not directly related to the suit. Having regard to this it appears to me clear that a counter-claim stands in the same category as a cross-suit for the purposes of the Civil P. C. The contention of the applicants that the counter-claim has not abated by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record in the counter-claim must fail. It is next urged that the plaintiffs had amended the plaint by bringing the heirs on record and they took an order for amendment of the plaint and also the third party proceedings which were taken by the plaintiffs as a result of the counter-claim. It is urged that it was therefore the duty of the plaintiffs to amend the title of the written statement itself. In my opinion, that contention is wrong. The plaintiffs can amend their own pleadings and if the defendants wanted to amend the title of the counter-claim it was their duty to obtain the order for the purpose. It is next urged that as the plaintiffs had obtained the order to amend the plaint and the third party notice which arose out of the counter-claim defendants thought that the written statement would also be accordingly amended. In the affidavits the blame is sought to be put on the plaintiffs for not doing so. Counsel on behalf of the applicants has urged that in light of the rules framed by the Court and the interpretation put on them by the legal

advisers of the applicants, the applicants did not think that they were bound to come to Court and they have taken out this summons as a matter of precaution. If their contention as to the construction of the rules is incorrect, the applicants should not suffer for the advice tendered to them by the legal advisers and their claim should not be prejudiced. I think this argument cannot be disregarded. There is thus a sufficient cause under the circumstances of this case and the abatement is therefore set aside. The summons is made absolute. The applicants to pay the costs of the summons and bear the costs of the amendment of the title of the written statement and the consequential amendments. Leave granted to the plaintiffs to amend the title of their reply to the counter-claim. The time to amend the third party proceedings extended up to July 10, 1939. Counsel certified.

D.

Summons made absolute.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeals Nos. 20 and 21 of 1937
September 12, 1939

LOBO, J. C. AND O'SULLIVAN, J.

FAKIR DOST MAHOMED—APPELLANT

versus

Seth CHAINRAI AND OTHERS—

RESPONDENTS

Muhammadan Law—Waqf—Proof of—Dedication, if must be proved—Whether can be proved by evidence of user—Private ownership of plot—Inference—Record of Rights—Notice by Deputy Collector referring certain plot as waqf—If instrument of title—Second appeal—Question of fact—Whether instances of burial proved are adequate to infer dedication is question of fact.

Waqf implies dedication by a person professing the Mussalman faith of any property for charity, or for religious objects or purposes, or for an object of public utility. Waqf property, is subject to certain rare exceptions, inalienable and a suit for a declaration that property belongs to a waqf can be brought by Muhammadans interested in the waqf. In order to establish a waqf the necessary dedication must always be proved. Lapse of time frequently renders it difficult or impossible to establish dedications by direct evidence, but waqf may be established by evidence of user. 17 Ind. Cas. 714 (2), relied on. [p. 230, col. 2.]

Private ownership of a plot is incompatible with dedication of it under a waqf as a graveyard for Muhammadans in general. [p. 233, col. 1.]

Notices by Deputy Collector referring certain plot as waqf are not instruments of title or otherwise the direct foundation of rights. 122 Ind. Cas. 316 (3), relied on. [p. 231, col. 1.]

Whether instances of burial proved in any particular cases are "adequate in character, number and extent" to justify an inference of dedication is a question of pure fact. [p. 231, col. 2.]

[Case-law discussed.]

S. As. against the decree of the First Class, Sub-Judge, Sukkur, dated January 5, 1937.

Syed M. Aslam, for the Appellant.

Messrs. Lulla & Co. and Dipchand & Co. for the Respondents (Shikarpur Municipality and Chainrai, respectively).

O'Sullivan, J.—These are appeals from a judgment of the First Class, Sub-Judge, Sukkur, dated January 5, 1937, reversing the decision of the Sub-Judge, Shikarpur. The appellant, one Fakir Dost Mahomed, brought a suit against the Shikarpur *panchayat* and the Shikarpur Municipality, the respective respondents in these appeals, to establish that plot of land bearing City Survey No. 109 in the town of Shikarpur was once a Muhammadan graveyard. The plaint filed on April 13, 1928, alleged that the plot was *waqf* property comprising a graveyard in which "there were graves of several Syeds," and that the Shikarpur Municipality had unauthorizedly sold the plot to the Shikarpur Panchayat. A declaration as to the *waqf* and a mandatory injunction to restrain interference by the said bodies were claimed. The suit was not a representative suit under O. I. r. 8, Civil P. C. On May 1, 2, 3 and 6, 1928, the learned Subordinate Judge, in whose Court the suit was filed, caused certain excavations to be made on the disputed land at the request of the appellant. These took place in the presence of the parties and the result was set down in notes which have been exhibited in the record of the case as Exs. 42, 43 and 143. An area of approximately six by seven feet in the north-west corner of the plot was first excavated, and portions of a human skelton were found. Subsequently at another spot what appeared to be a grave of bricks containing an almost complete human skelton was discovered lying north and south. Excavations were made at three other places side by side and in two of these there were found pieces of bones. Digging was then abandoned. It is to be noted that neither party at any stage of the case applied to the Court for the appointment of a commission for a local investigation. The respondents in their respective written statements denied that the property was *waqf* or that it was a graveyard and contended that the land had belonged to Govt. that Govt. had sold it to the Shikarpur Municipality, who in turn sold it to the Shikarpur *panchayat*. They also raised several legal pleas. The

following issues were framed ;

"1. Is the plot No. 11/109 in suit the *waqf* property as alleged in the plaint ? 2. Has the plaintiff right to bring this suit. Is the point *res judicata* on account of order dated June 25, 1928 ? 3. Is the suit as brought open to the objection under s. 42, Specific Relief Act, if so, what order should be made. Is the point *res judicata* on account of order dated June 25, 1928 ? 4. Is the joinder of the Secretary of State necessary in the suit ; if so, what is the consequence of his non-joinder and what order should be made ? 5. Should the Collector of Sukkur be joined in the case and is s. 92, Civil P. C., bar to the suit ? Whether this point is *res judicata* on account of order dated June 25, 1928 ? 6. Is the suit within time ? 7. Is the suit insufficiently stamped ? 8. Is the suit not maintainable without permission being obtained under O. I. r. 8, whether the point is *res judicata* on account of the order of June 25, 1928 ? 9. Is the suit against defendant No 1 not maintainable without the joinder of all the members of the *panchayat* ? 10. Is the plaintiff not entitled to bring this suit on account of delay and acquiescence as urged by defendant No. 1 ? 11. What should the decree be ?"

The suit ultimately came up for hearing in 1934 and a number of witnesses were examined on each side. The appellant did not produce any direct evidence of dedication of the property as *waqf*, or as to the origin of the alleged *waqf*, but relied upon evidence of user to establish dedication. His evidence may briefly be summarized as follows : (a) The result of the excavations at the sight. (b) Documentary comprising notices Exs. 202 (a) to 202 (c) issued in September 1898, by the then Deputy Collector to three persons Gamboshah, son of Lalshah, Lalshah, son of Hydershah, and Ganishah, son of Lalshah, to the following effect :

"The *mukam* (graveyard) that is outside Lakhi Gate Shikarpur on which Masand Hiranand lays claim on behalf of the heirs of Diwan Mushtakram, but you also lay claim over that *mukam* as your property, this is to require you to appear before me on September 21, 1898, for enquiry.

(Sd.) Deputy Collector, Sukkur Division."

It was appellant's contention that the land in dispute is identifiable as the *mukam* or graveyard mentioned in the notices and that the use of the expression *mukam* shows that the plot was a Muhammadan graveyard. The notices were relied upon as admissions by Govt. that the plot was a graveyard. (c) The oral testimony of ten Muhammadan witnesses who claim to have seen graves on the plot a number of years ago. One of these witnesses has stated that he participated in one or two burials on the plot between 50 and 60 years ago. (d) The circumstances that no attempt had been made to build upon the plot until shortly before the suit although it was valuable land in the middle of

Shikarpur. The respondents' evidence consisted of: (a) The testimony of about thirty-six old Hindu residents of Shikarpur directed to show that no graves had within living memory been observed on the plot, but that since they could remember the plot had been a flat open space used by boys as a playground or for fairs and festivities. (b) Documentary and oral evidence as to the history of the plot from 1862 to date of suit. This was relied upon as showing that since 1862 the plot had been treated as ordinary Govt. land until a survey of Shikarpur city in 1925 when the plot was transferred by Govt. to the Municipality. The Municipality decided in 1926 to auction the property and this was subsequently done, the Shikarpur *panchayat* being the purchasers. The Govt. and Municipal Records did not show that the property had ever been referred to as a graveyard. On April 16, 1934, the Sub-Judge of Shikarpur decreed appellant's suit with costs. He found on all the issues in his favour except Issue No. 9 which he held did not arise. The opponents filed appeals and on January 5, 1937, the First Class Sub-Judge, Sukkur reversed the judgment and decree of the lower Court, and allowed the appeals with costs.

On the main issue in the case, as to whether the plot in suit was a Muhammadan graveyard, the subject of *waqf*, the learned Judge after a very full discussion of the facts and the legal aspect came to the conclusion that the appellant had failed to establish his case. He also came to the conclusion that it was not even proved that the plot was a private graveyard. The learned Judge also considered that certain of the legal defences should prevail. We have heard sustained arguments from appellant's Counsel on various aspects of the case but we consider that we can dispose of the appeal on the aforesaid main issue and that it is unnecessary to embark upon a consideration of the other defences set up.

In holding against the appellant the following are in brief the main findings of fact of the lower Appellate Court: (a) That the oral evidence produced by the appellant failed to establish that within living memory there had been any graves to be seen on the plot. In arriving at this conclusion the learned Judge emphasized that the plaintiff's witnesses were men of no substance and that it was significant that no Muhammadan of importance had come forward to support plaintiff's case. (b) That

the respondents' witnesses were persons of position, to be relied upon, and had established that within living memory no graves had been seen on the disputed land, and that it had never been regarded as a graveyard. (c) That the history of the plot controverted the plaintiff's case. This aspect of the matter is referred to by the learned Judge at lines 372 to 428 of the judgment:

"Now I shall show that from 1862 the plot in suit had been considered to be a Govt. plot. Dandumal, Ex. 307, who served the Shikarpur Municipality in various capacities from 1884 to 1929, says that the Shikarpur Municipality came into existence in 1855. He states that he had seen the map of Shikarpur prepared in 1862-63 (which had been burnt on account of fire of 1925) and the plot in suit was not shown as graveyard. By the Act VI of 1873 all the land vested in the Municipality. This was amended in 1856 by which all building sites were declared to be property of the Govt. The Municipality laid claim by Resolution No. 17 dated July 28, 1886 (copy Ex. 308), but the Govt. by the G. R. No. 7609 dated October 17, 1886, did not agree (copy Ex. 309). Thereafter the Govt. deputed two supervising Tapedars who prepared sketches of all the open spaces in the Municipal limits. List of plots is Ex. 310 and serial No. 2 in it is the plot in suit. This was a finding of the committee consisting of *mukhtiar* and two Hindus and two Mussalmans. Exhibits 310 and 218 are part of the list. Exhibit 339 is the full list. Exhibit 339 is part of the report dated August 12, 1910 and it was resolved that serial No. 2 (the plot in suit) should be kept open for the public convenience and use and should not be sold. Exhibit 339 mentions over 250 open sites and the committee saw each one of them and passed resolutions with respect to them. Some of them were shown as *mukams* or *masjids*. Obviously therefore in 1910 even the two Mussalmans and two Hindus as members of the local Municipality saw no graves on the plot in suit. Exhibit 310, sketch of the plot in suit prepared on May 25, 1899, shows it to be an open plot. No mention is made either of graves on it or its being *waqf*. Note on Ex. 310 is that this plot was seen again in 1906 and there was no construction of any kind. This plot was held to be of the Govt. Exhibit 312 is the City Survey map of Tak No. 11 in which the plot in dispute is shown as 109 and 88. After 1914, i. e., after the City Survey of Shikarpur Municipal limits, by G. R. No. 5494 dated August 29, 1925, the plot became the Municipal plot. One Hiranand deceased made application (Ex. 224) that the plot be sold to him; managing committee by resolution dated October 2, 1926 (copy Ex. 226) resolved (Ex. 227) that it should be auctioned. The General Board (Ex. 228) also decided likewise. None objected to the sale. Auction was held and even some Mussalmans gave bids. The sale was confirmed with votes of the Muslim members of the Shikarpur Municipality, *vide* Ex. 237. All this points out that such a plot never had a visible grave within the living memory of the generation of men now living or those who had to deal with it in 1890 or so. It is for this reason that I am of opinion that the record of Govt. the conduct of the Mussalman members of the public in general, and evidence of so many Hindu witnesses all belie the plaintiff's witnesses who are most probably drawing on their imagination about having seen graves 20 or 30 years back."

(d) That the notices Exs. 202-a to 202-c

did not appertain to the plot in suit, but to a graveyard outside the town. The learned Judge pointed out that the notices mentioned a *mukam* "outside the Lakhi Gate" whereas the plot in dispute is inside the Lakhi Gate. He also found that, assuming the notices were in the nature of admissions by Govt. and referred to the plot in suit, there was no evidence to support the conclusion that there had been an ultimate decision by Govt. that the *mukam* was the property of the recipients of the notices or the property of the Muhammadan community. A full discussion regarding Exs. 202-a to 202-c is to be found at lines 512 to 590 of the judgment.

(c) That the graves and bones discovered in consequence of the excavations was not sufficient evidence of user to prove the *waqf*. The question of the results of the excavation has been discussed at lines 440 to 510 and 599 to 620. The learned Judge's conclusions on this matter are summed up as follows:

"The plaintiff had to prove by evidence of user that there was a public burial ground. What the evidence of user should be is held by the Lahore High Court in *Raushan Din v. Mahomed Sharif* (1) 'user from which dedication can be implied must be clearly established and must be of such nature as to be only consistent with dedication..... user or dedication was required to be public user or public dedication.' The plaintiff has failed to prove evidence of user or dedication as required by the Lahore High Court which also held that where the evidence showed no more than that certain persons were many years ago buried in the place, it did not amount to evidence of public user. It seems to me that the present case is indistinguishable from one reported in *Raushan Din v. Mahomed Sharif* (1), if it be presumed that bones and grave found were of some Mussalmans."

The learned Judge's final conclusions on the main issue in the case are set out thus:

"Considering therefore all the evidence I am of the opinion that the plaintiff has failed to prove that the plot was *Sayads' kabristan* or a public graveyard."

These are the findings of fact by the lower Appellate Court and this is a second appeal. The question for us is whether the appellant has made out grounds under s. 100, Civil P. C., for reversing the judgment and decree. The learned Advocate for the appellant was at the outset inclined to proceed though this were a first appeal and to initiate a discussion at large on points which he was later constrained to concede were purely questions of fact. On being reminded more than once of the limitation imposed by s. 100, Civil P. C. as to the grounds upon which a second

appeal lies, the learned Advocate eventually confined his observations to the question of the inference to be drawn from the result of the excavations. His contention was that the learned Judge has made an error of law in not holding that the graves and human remains which had been discovered constituted sufficient evidence of user to establish by inference that the disputed ground was *waqf* property.

We have carefully considered the whole judgment of the lower Appellate Court on the main issue and it does not appear to us that the decision thereon is in any manner "contrary to law or to some usage having the force of law." That there was any error or defect in procedure has not been suggested. *Waqf* implies dedication by a person professing the Mussalman faith of any property for charity, or for religious objects or purposes, or for an object of public utility. This definition is not exhaustive but sufficient for the purposes of this case. *Waqf* property is, subject to certain rare exceptions, inalienable and a suit for a declaration that property belongs to a *waqf* can be brought by Muhammadans interested in the *waqf*. As indicated above it is unnecessary for the purpose of this appeal to go into the question of the maintainability of the suit in the present form by the present plaintiff. In order to establish a *waqf* the necessary dedication must always be proved. Lapse of time frequently renders it difficult or impossible to establish dedications by direct evidence, but *waqf* may be established by evidence of user. This principle of Muhammadan Law in its application to graveyards was recognized by their Lordships of the Privy Council in *Court of Ward v. Ilahi Bakhsh* (2) and in a number of decisions of Indian High Courts, reference to some of which will hereafter be made. Not unnaturally no attempt was made in this case to establish dedication by direct evidence. A summary of the material relied upon by the appellants has already been given and the learned Judge's conclusions therein stated.

The conclusions as to the truth or otherwise of the oral evidence are so manifestly pure questions of fact as to require no further comment. Likewise no point arises in the case as to the interpretation of or legal inference to be drawn from any docu-

(1) A I R 1936 Lah. 87; 161 Ind. Cas. 610; 8 R L 778.

(2) 40 C 297; 17 Ind. Cas. 744; 40 I A 18; 27 P R 1913; 1 P W R 1913; 11 A L J 265; 13 M L T 318; (1913) M W N 270; 17 O L J 360; 83 P L R 1913; 15 Bom. L R 436; 25 M L J 61 (P O).

ment, nor is it suggested that the first Appellate Court made any error as to the meaning of any document. The only documents relied upon by the appellants were the notices Exs. 202 (a) to (c). These are certainly not "instruments of title or otherwise the direct foundation of rights" within the meaning of that phrase in the judgment of Sir Binode Mitter in *Wali Mahomed v. Mahomed Bakhsh* (3). The question of the construction or meaning of these notices were not, in any event, in issue. It had been sought to establish from them the fact that the disputed land had once been referred to as a *mukam* or graveyard. The learned Judge found as a fact that they did not relate to the disputed land and no further question regarding these documents arises. Unlike many other cases of a similar nature, the appellants in this case had not been in a position to produce any Record of Rights or other instrument of title in which the disputed land has been shown as a graveyard.

The remaining question resolves itself into one of small compass and that is as to whether from the graves and human remains discovered an inference of dedication was justified. As to this the learned first Appellate Judge placed reliance on the observations of Monroe, J., in the Lahore case in *Raushan Din v. Mahomed Sharif* (1) referred to above, and we agree with him that that decision is in point. The judgment of the Privy Council in *Ballabh Das v. Nur Mahomed* (4) has also considerable bearing on this aspect. Proceedings had been instituted to establish that a particular plot of land was an ancient Muhammadan graveyard. A number of witnesses were called but the oral evidence was found to be of little assistance. The principal items of evidence relied upon by the plaintiffs were a survey *khasra* of 1868 together with a map in which the plot was shown as a *qabristan* or graveyard and the finding of a "very few *pucca* graves." The *khasra* and map were held to be instruments of title in favour of plaintiffs and it was the opinion of their Lordships that the word *qabristan* in the *khasra* meant, *prima facie*, that the land was a graveyard in the

sense known to Muhammadans. Their Lordships however considered that the plaintiffs' case would have stood on a different footing had it rested solely on the evidence as to the finding of the graves. Sir George Rankin in delivering the judgment of the Board said:

"If the plaintiffs had to make out dedication entirely by direct evidence of burials being made in the ground and without any record such as the *khasra* of 1868 to help them, they would undoubtedly have to prove a number of instances adequate in character, number and extent to justify the inference that the plot of land in suit was a cemetery. The plaintiffs however are not in this position. The entry *qabristan* in the *khasra* of 1868 has to be taken together with the map which shows the whole of the plot No. 108 to be a graveyard."

Whether instances of burial proved in any particular cases are "adequate in character, number and extent" to justify an inference of dedication is undoubtedly a question of pure fact. It was observed by Sir Binode Mitter in *Wali Mahomed v. Mahomed Bakhsh* (3) at p. 207*, referring to the decision in *Nafar Chandra Pal v. Shukar* (5):

"The proper legal effect of a proved fact is essentially a question of law, but the question whether a fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact."

No question arises here as to the legal effect of proved facts. The question for decision is merely as to whether the evidence available is sufficient to make out dedication. This Court has on more than one occasion of late had reason to draw attention to the limited scope of second appeals. We would refer to the case in *Gulabrai v. Indian Equitable Insurance Co., Ltd.* (6) in which Davis, J. O. said:

"This is a second appeal, and we must therefore decline the invitation so constantly made to us by the learned Advocate for the appellant to deal with the facts of the case."

The learned Judicial Commissioner then proceeded to refer to a series of decisions by the Judicial Committee of the Privy Council as to the powers of the Appellate Court in second appeals. Special reference might be made to one of these, *Durga Chowdurani v. Jawahir Singh Chowdhari* (7) at p. 30, in which Lord Macnaghten observed:

"It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect of procedure and that there is no jurisdiction to entertain a second appeal on the ground of

(3) 57 I A 86; 122 Ind. Cas. 316; A I R 1930 P O 91; 11 L 199; (1930) A L J 292; Ind. Rul. (1930) P O 124; 31 P L R 145; 31 L W 321; 32 Bom. L R 480; 51 C L J 518; 59 M L J 54 (P O).

(4) A I R 1936 P O 83; 160 Ind. Cas. 579; (1936) O W N 113; 1936 O L R 100; 1936 A L R 203; 8 R P O 161; 2 B R 312; 38 P L R 182; 40 C W N 449; 17 P L T 177; 10 M L J 415; (1936) A L J 480; 1936 R D 147; 43 L W 685 (P O).

(5) 45 I A 183; 51 Ind. Cas. 760; A I R 1918 P O 92; 46 C 189; 23 C W N 345; 9 L W 552 (P O).

(6) 30 S L R 371; 167 Ind. Cas. 929; A I R 1937 Sind 51; 9 R S 207.

(7) 18 O 23 (30); 17 I A 122; 5 Sar. 560 (P O).

an erroneous finding of fact however gross or inexcusable the error may seem to be."

Assuming however that the inference to be drawn as to dedication from the proved facts is a question of law, the learned Judge of the first Appellate Court has at considerable length discussed the law applicable and we think he has fully and correctly comprehended the legal aspect and made no error. Reliance was placed by learned Counsel for the appellant on the cases in *Ballabh Das v. Nur Mahomed* (4) *Court of Wards v. Ilahi Bakhsh* (2), *Sajjad Ali Khan v. Jagmohan Das* (8), *Mehraj Din v. Ghulam Mahomed* (9) and *Mahomed Isaq v. Balmukund Lal* (10). The first mentioned case in *Ballabh Das v. Nur Mahomed* (4) already mentioned above in some detail, is of no assistance to the appellant. The case in *Court of Wards v. Ilahi Bakhsh* (2) also does not help the appellants as the facts are entirely dissimilar. In that case the Record of Rights appertaining to the disputed area described it as a "qabristan or chair mumkin kabristan" (graveyard or unculturable land forming part of a graveyard). There were clusters or graves dotted all over the disputed area, and it was admitted that it had been used as a Muhammadan graveyard from time immemorial. The legal point decided was that *waqf* may be established by user. In *Sajjad Ali v. Jagmohan Das* (8) the property in dispute was a house and this house held to be *waqf* property and a graveyard had been described in the pleadings and evidence of both sides as *imambara*. The following passage in the judgment of the Appellate Court describes it:

"The evidence further establishes that the house has borne this description for over 50 years. In the rooms and in the opening spaces of the house there are graves, 23 of which have been definitely traced. Indeed the whole place, in so far as its physical appearance is concerned, as shown by the Commissioner's report, is dotted with graves. The inscriptions on some of the graves show that they were more than 80 years old, and on the evidence accepted by the Courts below it is further established that the graves are not only of the relations of original owner of the house but also of friends. The further fact proved is that the building is not only an *imambara* in name but that it has all along been used as such by the celebration of *majlises*; that a *Quran Khawan* has generally lived there and had occasionally been reciting the holy book and that lastly it has never been used as a residential house."

Quite clearly no parallel can be drawn

(8) A I R 1927 Oudh 534; 101 Ind. Cas. 563; 4 O W N 320.

(9) 12 L 540; 134 Ind. Cas. 492; A I R 1931 Lah. 607; 32 P L R 276; Ind. Rul. (1931) Lah. 940.

(10) A I R 1929 All. 116; 113 Ind. Cas. 762; Ind. Rul. (1929) All. 186.

between that case and this. The facts in *Mehraj Din v. Ghulam Mahomed* (9) also bear no resemblance to those in the present case. The property in that case consisted of the mausoleum of a devout saint who died two or three hundred years previously. The Muhammadans of the locality were in the habit of burning lamps in the mausoleum and praying there. The defendant in the suit who claimed the property as his own was the son of a man who had been appointed caretaker. It is of importance to note however that Lahore High Court, there held that the finding of the lower Appellate Court on an appreciation of the evidence that the property was *waqf* was one of fact and could not be disputed in second appeal. *Mahomed Isaq v. Balmukund Lal* (10), related to the effect of a local examination. The Appellate Court was, *inter alia*, of opinion that a decision based entirely on a local inspection by a Judge is bound to be unsatisfactory. We are not in the present case concerned with the points of law under consideration in that case.

It has already been observed above that the finding of the first Appellate Court in this case was that it had not been established that the disputed land was either a private graveyard belonging to a family of *Syeds* or a public Muhammadan graveyard. This double finding of fact on the main issue was presumably necessitated by the self-contradictory nature of the appellant's case. In the plaint it was averred that the graveyard contained the "graves of several *Syeds*." In his evidence the appellant stated that the plot was known as *Syed Gumboshah's* graveyard and that only *Syeds* were buried there. The notices Exs. 202 (a) to 202 (c) relied on by the appellant were addressed to three *Syeds* and the terms thereof indicate that these *Syeds* were claiming the graveyard as their own property. It was clearly suggested by the appellant that the graveyard was the personal property of a family of *Syeds*. It was also however appellant's case that the rights of Mussalmans generally were involved. The relevant issue as framed by the trial Court was merely "is the plot No. 11-109 in suit *waqf* property as alleged in the plaint?" The learned trial Judge realized that the plaintiff's allegation could be taken as implying that the graveyard was the private property of certain *Syeds*, for he discussed this aspect of the matter in the following terms and came to the conclusion that the graveyard was a public

one :

"According to the plaintiff and his witnesses dead bodies of *Syeds* are buried in the graveyard which is known as *Syeds'* graveyard. If it had been a private cemetery, it would have surely been walled around by *Syeds* or any one else taking care of the same. But because it was a public graveyard, none seems to have taken care of it because of apathy of the Muhammadan community. The word *mukam* in the notices also refer to it as being a public graveyard. The contention of the *Syeds* that it was their own property as recited in the notices appears to have been overruled, for surely it would have been declared as their own property if the enquiry had resulted in their favour."

The learned first appellate Judge formulated the questions arising under issue No. 1 as follows, "was the plot in suit a public or private graveyard of Mussalmans" so as presumably to cover both aspects of the appellant's case. His findings on these are set out above, and as we have indicated are findings of fact which we cannot disturb. The learned first Appellate Judge did not overlook the apparent inconsistency of appellant's case as appears from the following remarks :

"It has been rightly contended that in para. 4 of the plaint the plaintiff stated that the plot in suit was *Syeds' qabristan* and that the lower Court was not justified even if it believed every one of the plaintiff's witnesses to make out a case that the plot was a public graveyard. It is settled law that the Courts are not entitled to set up a case for the plaintiff which he did not set up : *vide Jnanendra Mohan Sen v. Hari Ram*, 40 Ind. Cas. 467 (11), *Anant Ram v. Bharat National Bank Ltd. Delhi*, 56 Ind. Cas. 638 (12) and 31 Ind. Cas. 286 (sic) and several others."

We consider that there is force in these observations. Clearly private ownership of the plot is incompatible with dedication of it under a *waqf* as a graveyard for Muhammadans in general. In *Ballabh Das v. Nur Mahomed* (4), Sir George Rankin indicated the distinction by saying :

"The purpose of the suit is to establish that this plot of land is a graveyard in the sense of Muhammadan Law, that is to say extra commercium and dedicated to the benefit of Muhammadans in general in such sense that private ownership does not exist."

The appellant was not a *Syed* and did not purport to sue on behalf of any *Syed*. We consider that the appellants have made out no grounds for interference with the decision of the first Appellate Court. We dismiss the appeal with costs.

s.

Appeal dismissed.

(11) 40 Ind. Cas. 467; A I R 1918 Cal. 686.

(12) 56 Ind. Cas. 638; A I R 1920 Lah. 165; 2 Lah. L J 609.

PRIVY COUNCIL

Appeal from the Lahore High Court

February 22, 1940

VISCOUNT MAUGHAM, LORD PORTER AND
SIR GEORGE RANKIN

RAMA SHAH—APPELLANT

versus

LAL CHAND—RESPONDENT

Limitation Act (IX of 1908), s. 20—Interpretation.—Interest bearing debt—Payment of part amount on open account in handwriting of debtor—Appropriation by creditor—Amount not paid as interest "as such"—Whether should be regarded as part payment of principal—Appropriation by creditor should be before expiry of limitation—Practice—Evidence.—Party calling opponent's clerk as his witness—Practice condemned.

Section 20, Lim. Act must be construed carefully according to its terms, and effect must be given to the consideration that in order to give a fresh period of limitation interest must be paid as such though there is no similar requirement in the case of a part payment of principal. It is not reasonable as a matter of construction of a statute to suggest that the words "as such" can be ignored; or that their meaning has changed; or that they can be given their meaning but only as regards payments made before January 1, 1928. [p. 236, col. 1.]

By the amendment of s. 20 the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. Appropriation by the creditor can have effect under the section as it now stands and the character of the payment need not necessarily be determined at the time when the payment is made. [p. 237, col. 1.]

The section cannot be read as governed by any such principle as that it must be read as proceeding upon an acknowledgment by the debtor of his liability familiar though it be in the law of England. There is no sufficient reason for the assumption that the section is an expression of any single principle. In the Lim. Act, s. 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise; and it is difficult to see why s. 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The words in s. 20 by which the matter must be judged are "where part of the principal of a debt is paid." As it is not prescribed by the section that the payment should be intended by the debtor to go towards the principal debt at all, the words "as such" having no place in this part of the section, it is not correct to require that the payment should have been made of part as part. *Observations of Sulaiman, C. J., in 159 Ind. Cas. 387 (1) and 157 Ind. Cas. 259 (13), not approved, 165 Ind. Cas. 723 (12), approved. [p. 237, col. 2.]*

It cannot be maintained that a payment on general account is either a payment of interest as such or a part payment of principal. The disjunction is incomplete; there are additional possibilities as well. There are indeed four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go

against both interest and principal, (4) no intention of appropriation as between interest and principal. This is a common enough frame of mind when a payment is made generally on account of a debt—an "open payment" as it is called. 35 Ind. Cas. 638 (14), not approved, 159 Ind. Cas. 387 (1), approved. [p. 238, col. 1.]

In the case of "open" payment the creditor's act of appropriation of the payment to the principal debt is a very different matter. It cannot have been intended by the Legislature that at the end of the prescribed period the right to sue should be barred and yet that the creditor might thereafter remove the bar at his own choice by making an appropriation. Though it need not be shown that the creditor's appropriation has within the time limited been communicated to the debtor, the language of the section cannot be regarded as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended s. 20 part payment of principal has not been established. The result may be regarded as unfortunate since the fresh period begins or does not begin according as the creditor has or has not taken some step in consequence of the debtor's act, whereas the essential matter is really the debtor's act, but unless either a part payment of principal is required to be made as such in order to stop the running of the statute or a payment on account of an interest bearing debt, though made generally on account, is made sufficient for that purpose there is no escape from this conclusion.

Held, on evidence that the debtor paid Rs. 100 in his own handwriting and the creditor appropriated it towards principal straightaway. This payment must be held to be part payment of principal. 172 Ind. Cas. 455; reversed. [p. 240, col. 1.]
The practice of calling as his own witness by a party the clerk of his opponent condemned. [p. 240, col. 1.]

Messrs. L. P. E. Pugh, K. C. and J. Chinna Durai, for the Appellant.

Messrs. J. P. Eddy, K. C. and R. Ritson, for the Respondent.

Sir George Rankin.—This appeal raises questions as to the true construction and effect of s. 20 of the Indian Lim. Act (IX of 1908) as amended by the Indian Lim. Amendment Act (I of 1927). Conflicting decisions in India have made it desirable that their Lordships should construe the section, and as in the present case the High Court has differed from the trial Court on the facts, the evidence must be examined.

The plaintiff-appellant, Rama Shah is

described as a banker and carries on a business at Jhelum which includes the lending of money. The defendant Lal Chand is a timber merchant of the same town who on various occasions between October 17, 1929, and July 17, 1931, took a loan from the plaintiff, giving to him a promissory note for the amount of the loan with interest at twelve per cent. per annum. Two small loans not covered by promissory notes were alleged by the plaintiff to have been made and were disputed by the defendant, but five promissory notes are admitted by the defendant and a number of substantial payments are admitted by the plaintiff to have been received in respect of them. There has, however, been considerable dispute between the parties as to the proper allocation of the payments to promissory notes. In the result, when the plaintiff on January 24, 1936, brought in the Court of the Subordinate Judge at Jhelum the suit out of which this appeal arises, he brought it as a suit for the balance due upon a promissory note for Rs. 18,500 dated February 4, 1930. He claimed that the amount outstanding for principal and interest was Rs. 11,463. The learned Subordinate Judge was satisfied as to the correctness of this figure but the High Court having reduced it to Rs. 10,334-9-3 the plaintiff by his Counsel has accepted the lower figure as the sum to be decreed if it be held that his suit succeeds.

The promissory note of February 4, 1930, being expressed to be payable on demand the period of limitation for a suit on the note was three years from its date (Art. 73) so that the plaintiff's suit of January 24, 1936, was *prima facie* barred. There was an endorsement, however, on the note in the writing of the defendant dated January 24, 1933, signed by him: "*Paid Rs. 100 to-day in this pro-note (Sgd.) Lal Chand, Bahri, January 24, 1933.*" This date was within the period of three years from the date of the note but only by a few days, and the probable object of the endorsement is reasonably plain. The defendant admitted that he had made the endorsement on January 24, 1933, but denied that any money passed. Both Courts in India have disbelieved him on this point and it is not now disputed that the sum of Rs. 100 was paid as the endorsement states.

The proviso at the end of the first sub-section of s. 20 of the Lim. Act of 1908 was the subject of amendment made by Act I of 1927 and the amended sub-section

stands as follows:

"20.—(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

Provided that, save in the case of a payment of interest made before January 1, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment."

Before 1927 the proviso read:

"Provided that in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

There is no room for the contention that the sum of Rs. 100 exceeded the amount of principal or of interest outstanding in respect of the note at the date of the payment so that part of it at least must of necessity have been intended to go towards interest or towards principal.

Applying the amended sub-section to the present case, the learned Subordinate Judge found on the evidence that the payment of Rs. 100 on January 24, 1933, was immediately appropriated by the plaintiff towards the principal of the debt, and was a part payment of principal from which a fresh period of limitation began to run. He accordingly gave judgment for the plaintiff (June 9, 1936). On appeal, the High Court at Lahore (Dalip Singh and Skemp, JJ.) held that the sum of Rs. 100 was never appropriated by the debtor or by the creditor either to interest or to part-payment of principal until the date of suit (January 24, 1936), or at earliest until December 18, 1935—that is, until long after three years had elapsed from the date of the note. On this view of the facts the High Court, by the decree* (April 14, 1937) now under appeal, dismissed the suit as time-barred, being of opinion that a payment made generally on account of an interest-bearing debt becomes a payment towards the principal only by appropriation thereto and must (in order to have the effect of preventing limitation) be appropriated before the period of limitation has expired. In so holding the learned Judges followed a decision of the High Court at Allahabad in *Udaypal Singh v. Lakshmi Chand* (1)—a Full Bench case in

which two of the five members of the Full Bench had dissented. It appears that some dissent has since been expressed in the High Court at Patna (*Liquidator, Bagha Co-operative Society v. Debi Mangal Prasad Sinha* (2) and *Bankanidhi Tantra v. Godipatna Co-operative Society* (3). *Khan Sahib v. Uchal Lebbay* (4) is also inconsistent with the Full Bench decision.

A recent case *Kesar Singh v. Wasir Singh* (Civil Revision No. 559 of 1938) before the Lahore High Court in revision under s. 25 of the Provincial Small Cause Courts Act (IX of 1887) was referred by Tek Chand, J. to a Division Bench by an order dated June 9, 1939, which has been laid before the Board. In this order the different views taken by High Courts in India as to the correctness of *Udaypal's case* (1) have been usefully set out, and it would appear that in some respects that decision is not consistent with certain previous decisions, and that the decision of the Lahore High Court now under appeal has not since been uniformly followed in that Court.

It will be convenient that their Lordships should state their opinion as to the effect of s. 20 in a case where the debtor has made a payment on account of an interest bearing debt without appropriating the sum paid either towards interest or principal, and where the creditor has made no appropriation until after the expiry of the period of limitation. The view taken by the dissenting Judges in *Udaypal's case* (1) is that as the debtor in making the payment must have meant it to go either towards interest or principal a fresh period of limitation must always begin to run if the requirement as to writing is satisfied. This view has in one or other of the cases upon the subject been defended both by regarding the words "as such" retained in the amending section, as nugatory; and also by contending that if the payment was not intended by the debtor as a payment, of interest he must have intended it as a payment on account of principal and that in any case it was a part-payment of principal, even if not of principal as such. On the other hand the view taken by Sulaiman, O. J. in *Udaypal's case* (1) was that where no

(1) 58 A 261; 159 Ind. Cas. 387; A I R 1935 All. 946; (1935) A L J 1029; 1935 A L R 1107; 8 R A 428 (F B).

*See 172 Ind. Cas. 455.—[Ed.]

(2) 16 Pat. 27; 170 Ind. Cas. 130; 18 P L T 309; A I R 1937 Pat. 410; 10 R P 83; 3 B R 669.

(3) 16 Pat. 294; 174 Ind. Cas. 1005; 18 P L T 563; A I R 1938 Pat. 183; 10 R P 565; 4 B R 496.

(4) (1938) Rang. 591; 176 Ind. Cas. 865; A I R 1938 Rang. 280; 11 R Rang. 88.

appropriation is made by the debtor the creditor may appropriate; if he appropriates the payment towards interest it becomes a payment of interest though not paid by the debtor as such; if he appropriates it towards principal it becomes a part-payment of principal and saves limitation notwithstanding that it was not paid as such. The learned Chief Justice rejected the doctrine that the debtor's payment must be either a payment of interest as such or a part payment of principal.

So far, their Lordships are of opinion that the learned Chief Justice was in the right. When the amendment of 1927 extended the requirement of writing to the case in which interest had been paid, this amendment was carried out by altering the language of the proviso at the end of the sub-section leaving the language of its main provision to stand as before. The words "as such" had long been given a settled meaning importing the intention of the debtor that his payment should go towards interest as distinct from principal. Though the amendment raised in a pointed manner the question whether the words "as such" should be retained, it is clear that the Legislature decided to retain them; and it is not reasonable as a matter of construction of a statute to suggest that they can be ignored; or that their meaning has changed; or that they can be given their meaning but only as regards payments made before January 1, 1928. Though interest and principal are under the section on a different footing as regards the person making the payment, it is not very clear why the legislature should have hesitated to drop the words "as such" and it may well be that the difficulty could best be resolved by their omission. But the section must be construed carefully according to its terms, and effect must be given to the consideration that in order to give a fresh period of limitation interest must be paid as such though there is no similar requirement in the case of a part-payment of principal.

In *Firm Rai Bahadur Het Ram Bcdh Raj v. Firm Seth Aya Ram-Tola Ram* (5) the Board had to consider a case in which a judgment debt was by certain terms of compromise payable by instalments. The first instalment was to have been paid on

January 27, 1929, and was to be Rs. 13,000 with a year's interest to that date—that is from January 27, 1928, to January 26, 1929. It was stated by Lord Russell of Killowen delivering the judgment of the Board:

"The last payment made in respect of the first instalment and interest was a sum of Rs. 825 paid as admitted by the parties on February 15, 1929. The payment was made, and necessarily made, in respect of principal and interest; it was therefore a payment of interest on a debt as such by the person liable to pay the debt. Further, in a letter addressed to the decree-holders, and signed by Both Raj, he says, referring to the Rs. 825, 'Deduct from this the amount that is due to you for my first instalment according to accounts and keep the rest in my name Send me a formal receipt of the amount of the first instalment together with interest by registered post.' These facts are sufficient to show that a 20 has come into play, and that accordingly the period of limitation must be computed from February 15, 1929."

This was a decision under the amended section and it shows that the words "as such" have lost nothing of their previous meaning which involves that the intention of the debtor must be shown to have been that the payment should go towards interest. The case also shows, however, that the intention of the debtor may be proved not only by statements made by him at the time of payment but in any other manner and may clearly appear from the circumstances of the case. This doctrine had been settled law in India under the un-amended section—see *Gopinath Singh v. Hardeo Singh* (6), *Charu Chandra Bhat-tacharjee v. Karam Bux Sikdar* (7). Even when the requirement as to writing is satisfied it is still insufficient to give rise to a fresh period of limitation that the debtor has made the payment generally on account and that the creditor has appropriated it to interest. Nor in the absence of an intention on the part of the debtor does a payment amount to a payment of interest as such by reason of the rule that it is the right of a creditor to have payments treated in account as liquidating the interest before the principal—the "old rule" recognised by the Board in *Venkatadri Appa Row v. Parthasarathi Appa Row* (8), citing Rigby, L. J., in *Parr's Banking*

(6) 31 A 285; 1 Ind. Cas. 137; 6 A L J 207.

(7) 27 O L J 141; 43 Ind. Cas. 812; A I R 1918 Cal. 477.

(8) 48 I A 150; 61 Ind. Cas. 31; 19 A L J 465; 33 O L J 447; 40 M L J 549; 23 Bom. L R 644; (1921) M W N 347; 3 U P L R (P O) 27; 44 M 570; 14 L W 25; 26 O W N 33; 30 M L T 26; A I R 1922 P O 233 (P O).

(5) 42 O W N 509; 172 Ind. Cas. 990; 1938 O L R 98; 1938 A L R 129; 10 R P O 196; (1938) A L J 150; 4 B R 308; (1938) O W N 310; 47 L W 606; 40 P L R 66; (1938) M W N 662 (P O).

Co. v. Yates (9). The rule was stated with precision by Lord Macmillan *Income-tax Commissioner v. Maharajadhiraja of Dharmabanga* (10); in the following terms :

"Where interest is outstanding on a principal sum due and the creditor receives an open payment from the debtor without any appropriation of the payment as between capital and interest by either debtor or creditor, the presumption is that the payment is attributable in the first instance towards the outstanding interest."

On the other hand, it remains true that the section when dealing with part payment of principal contains no similar stipulation as to the debtor's intention. The words "as such" are not repeated and the contrast between the two classes of payments is too marked to be mistaken or overlooked. Of course a payment may be shown to have been intended by the debtor to go—in part at least—towards the reduction of the principal debt by direct proof or *e. g.*, by the fact that the amount of the payment exceeded the interest then due. But the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. *In re Ambrose Summers* (11), was a case where the debtor had sent to his bank a cheque for Rs. 600 to be placed to the credit of his loan account, and the bank had thereafter charged interest on the principal sum less Rs. 600. Sale, J., held that this operated in fact as a part payment of the principal debt. In numerous cases it has been held that a payment made without appropriation by the debtor will if it be appropriated by the creditor towards the principal debt be sufficient to give rise to a fresh period of limitation.

Their Lordships cannot accept the contention of learned Counsel for the respondent that appropriation by the creditor can have no effect under the section as it now stands or that the character of the payment must necessarily be determined at the time when the payment is made. Stress was laid on the change in the proviso from "the fact of the payment appears" to "an acknowledgement of the payment appears," but neither expression affords in

their Lordships' opinion any ground for holding that the character of the payment as intended to go towards interest or towards principal, must appear by the writing, still less that it must be ascertainable or ascertained at the date of the payment.

In *Udaypal's case* (1) Sulaiman, C. J., lent the weight of his authority to the view that the section must be read as proceeding upon an acknowledgment by the debtor of his liability though the learned Chief Justice agreed that the section is not professedly based upon any such principle. Accordingly he put the case of a payment insufficient to discharge the debt in full but made upon the footing that no more was due, and he expressed the opinion that such a payment would not be within the section. Their Lordships cannot agree that the section is to be read as governed by any such principle as is suggested familiar though it be in the law of England. They can discover no sufficient reason for the assumption that the section is an expression of any single principle. In English Law effect was first given to acknowledgments and payments by reason of general principles of exception applied by the Courts to the Statute of Limitation (1623) which did not contain express exceptions in these respects, and though the exceptions were in the end made statutory they retained much of their original character. In the Indian Lim. Act, s. 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise; and it is difficult to see why s. 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The Indian Legislature may well have thought that a payment if made on account of the debt and evidenced by writing gave the creditor some excuse for further delay in suing, or was sufficient new proof of the original debt to make it safe to entertain an action upon it at a later date than would otherwise have been desirable. The words in s. 20 by which the matter must be judged are "where part of the principal of a debt is paid." As it is not prescribed by the section that the payment should be intended by the debtor to go towards the principal debt at all, the words "as such" having no place in this part of the section, it is not in their Lordships' view correct to require that the payment should have been made of part as part. On this point the view taken in *Municipal Committee, Amrit-*

(9) (1898) 2 Q. B. 460, (466); 67 L. J. Q. B. 851; 47 W. R. 42.

(10) 60 I. A. 146, (157); 142 Ind. Cas. 437; Ind. Rul. (1933) P. O. 77; A. I. R. 1933 P. O. 108; (1933) M. W. N. 439; 64 M. L. J. 612; 12 Pat. 318; 37 L. W. 701; 37 C. W. N. 598; (1933) A. L. J. 527; 14 P. L. T. 341; 35 Bom. L. R. 731; 57 C. L. J. 318 (P. C.).

(11) 23 C. 592, (598).

sar v. *Ralia Ram* (12), is, to be preferred to the view taken in *N. A. M. Appasami Pillai v. Morangam Muthirian* (13), which applied the English decisions.

The main contention of the learned Judges who were in the minority in *Udaypal's case* (1) and of others who dissent from that decision is that if a payment be made by a debtor without allocating it to principal or to interest it can correctly be regarded as a part payment of principal by reason of the mere fact that it was not made on account of interest as such. In cases decided before 1927 there is some trace of the opinion that where the requirement of writing was satisfied it mattered nothing whether the payment was for interest as such, since if not it was a part payment of principal. This appears to have been the view of Fletcher, J., in *Hem Chandra Biswas v. Purna Chandra Mukherji* (14). Their Lordships agree with the majority of the Full Bench in *Udaypal's case* (1), in rejecting the attempt to maintain that a payment on general account is either a payment of interest as such or a part-payment of principal. The disjunction is incomplete: as Sulaiman, O. J., put it "there are additional possibilities as well" (p. 273*). There are indeed four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, (4) no intention of appropriation as between interest and principal. This is a common enough frame of mind when a payment is made generally on account of a debt—an "open payment" as it was called by Lord Macmillan in a passage already cited in this judgment.

The facts of *Udaypal's case* (1), were that the payment was made by the debtor without any appropriation as between principal and interest; it was appropriated by the creditor to interest; and the suit was brought to recover the whole of the principal debt with certain further interest. In these circumstances it appears to their

Lordships that it was rightly held by the Full Bench that the payment was neither a payment of interest as such nor a part-payment of the principal debt. It is no answer to say that the part-payment of principal need not be made as such: on these facts there was no payment of principal at all.

The subject of "appropriation of payments" is dealt with in the Indian Contract Act by ss. 59 to 61 inclusive. Section 60 provides that when the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor. This is the same rule as that laid down as English Law by the House of Lords in *Cory Brothers & Co. v. Owners of Turkish Steamship "Mecca"* (15), and under it the creditor has a right to appropriate a payment by the debtor to the principal or to the interest of the same debt. There is no obligation upon the creditor to make the appropriation at once (*Income-tax Commissioner v. Maharajahdiraja of Dharbhanga* (10), (*supra*), 146, 162*, *Kunjamohan Shaha Poddar v. Karunakanta Sen Chaudhuri* (16), though when once he has made an appropriation and communicated it to the debtor he would have no right to appropriate it otherwise (cf. per Lord Herschell, in *Cory's case* (15) *supra* at p. 292†). Lord Macnaghten's language in that case is equally applicable under ss. 60 and 61 of the Indian Contract Act—"Where the election is with the creditor it is always his intention expressed or implied or presumed, and not any rigid rule of law that governs the application of the money" (p. 294†).

What then in the case of an "open" payment is required in order that it may be said in the words of s. 20 that before the expiration of the prescribed period part of the principal of the debt has been paid by the debtor? Learned Counsel for the appellant pointed to the decisions whereby it has been held that the writing in which appears an acknowledgment of the payment (before 1928, the fact of the payment) need not have come into existence within the prescribed period though the payment itself has to be made within the period and the

(12) 17 L. 737, (756); 165 Ind. Cas. 723; A I R 1936 Lah. 629; 9 R L 285.

(13) 68 M L J 73; 157 Ind. Cas. 259; A I R 1935 Mad. 371; 41 L W 747; (1935) M W N 783; 8 R M 131.

(14) 44 O 567; 35 Ind. Cas. 638; 22 O W N 190; A I R 1918 Cal. 891.

(15) (1897) A O 286.

(16) 60 O 1265, (1270-1); 149 Ind. Cas. 262; A I R 1934 Cal. 40; 6 R O 552.

*Page of 58 A.—[Ed.]

*Pages of 80 I. A.—[Ed.]

†Pages of (1897) A. O.—[Ed.]

fresh period of limitation begins to run from the date of the payment. He contended that a similar principle should be applied to the creditor's act of appropriation and that so long as the payment was made within time the appropriation towards the principal debt might be made at any subsequent time and would give rise to a fresh period computed from the date of payment. Learned Counsel conceded that in no case had this yet been held and it was forcefully maintained for the respondent that it is impossible, after the prescribed period has run out, to regard anything done by the creditor without even the debtor's consent as effective to extend the time. Their Lordships, while not throwing doubt on the principle that the writing evidencing the payment may come into existence at any time, are of opinion that the creditor's act of appropriation of the payment to the principal debt is a very different matter. It cannot, they think, have been intended by the Legislature that at the end of the prescribed period the right to sue should be barred and yet that the creditor might thereafter remove the bar at his own choice by making an appropriation. While not of opinion that it need be shown that the creditor's appropriation has within the time limited been communicated to the debtor, they are unable to regard the language of the section as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true that until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended s. 20 part-payment of principal has not been established. The result may be regarded as unfortunate since the fresh period begins or does not begin according as the creditor has or has not taken some step in consequence of the debtor's act, whereas the essential matter is really the debtor's act, but unless either a part-payment of principal is required to be made as such in order to stop the running of the statute or a payment on account of an interest-bearing debt, though made generally on account, is made sufficient for that

purpose there is no escape from this conclusion.

It remains to consider what happened in the present case when the defendant on January 24, 1933, paid Rs. 100 to the plaintiff in respect of the promissory note of February 4, 1930. The main contest at the trial was upon the question whether any money was paid. The defendant's denial in the witness-box has been held by both Courts in India to be untrue. He did not produce his ledger at all. The plaintiff at the first hearing (O. XIII, r. 1, Civil P. C.) produced an account sent by him to the defendant on December 18, 1935, shortly before suit. He also produced his books of account from 1929 to 1936 containing the account of the defendant in the ledger as well as a rough cash book and cash book (*kachi* and *pukki rokar*). That the defendant had full opportunity to inspect and examine these appears from the cross-examination on behalf of the defendant. That the trial Judge closely examined them appears from his judgment. In one passage he says "the plaintiff's *kachi rokar* is silent as to this payment but *pukki rokar* and ledger have got the entry" and at the end he says "I am not satisfied with plaintiff's method of keeping his *kachi rokar* in which admittedly there are blank spaces here and there... But inasmuch as the plaintiff's case is proved otherwise as also by production of *pukki rokar* and the ledger where (whose) entries are further strengthened by defendant's withholding of his books I would allow plaintiff a decree. But as a matter of punishment to plaintiff for keeping a perfunctory *kachi rokar* I would allow him only half costs." At the trial each party followed the practice (still common in certain parts of India notwithstanding repeated condemnation by the Courts and by this Board) of calling as his own witness the clerk of his opponent. The defendant's clerk was called by the plaintiff to prove receipt of a certain sum of Rs. 200, but in cross-examination on behalf of his master he produced his cash book which contained no entry of the payment of Rs. 100 on January 24, 1933, and stated (falsely as it must now be taken) that the promissory note was endorsed in his presence without any payment having been made. The plaintiff's *Munib* Godar Mall, called by the defendant said that the account dated December 18, 1935, was copied by him correctly from the plaintiff's ledger, that

"our *kachi* and *pukki rokars*, are regular." The plaintiff also deposed that "our *bahis* are regularly kept" and spoke to the payment of Rs. 100 and to a number of other matters of account. He explained that in his books there was only one ledger account of the defendant. The account dated December 18, 1935 (Ex. D-1 is the Hindi original) is made out on what is called the *katauti* principle—that is to say, interest is calculated on both sides of the account at the same rate so that to any sum paid by the defendant is added interest thereon before deduction is made from the total sum shown to be due for the principal and interest upon each loan. In the plaint it was incidentally alleged that "deduction of interest at *katauti* rate" entered into the account in respect of this promissory note. At the trial specific questions addressed to the appropriation of the sum of Rs. 100 do not appear to have been asked of any witness, the contest being upon the fact of payment; but when the evidence was closed much argument was expended upon the question whether the writing was an acknowledgment of part-payment of principal. The learned Subordinate Judge rightly directed himself that the plaintiff had to prove that he appropriated the sum towards the principal debt before the expiry of the period of limitation for a suit on the promissory note. He held that the account of December 18, 1935, sent to the defendant showed that the plaintiff had given credit for the sum as against the principal sum and that had the defendant not intended this to happen he would have protested at once. "In the present case the defendant pays Rs. 100 in his own handwriting and the plaintiff appropriates it towards principal straightaway. This payment in my opinion, must be held to be part-payment of principal." The learned Judges of the High Court have reversed this finding of fact mainly on the ground that they were not prepared to hold that the account dated December 18, 1935, and the evidence of the plaintiff's *munib* proved that in the plaintiff's ledger the sum of Rs. 100 had been treated as a part-payment of principal. They appear to agree that the account was drawn up from items entered in the ledger but not that it was a copy of the defendant's account, holding that it was merely prepared for the purposes of the suit. They considered that this view was fortified by the last entry in the account which was out of its proper order according to date. The

plaintiff's books, notwithstanding that he produced them, deposed to their regularity, and was cross-examined on their details, were in the High Court treated as though they could only be guessed at on the basis of the account of December 18, 1935, and the plaint of January 1934. The High Court might have been saved from taking this course had the trial Judge been careful to mark the plaintiff's books and all the entries referred to at the trial either as exhibits or for identification. But with all respect to the learned Judges, their Lordships think that the course adopted in the High Court was unduly hard upon the plaintiff, more particularly as the trial Judge had gone very fully into the plaintiff's books and the question was not merely a question as to one item but as to the character of the account of the defendant in the books of the plaintiff—whether it was kept on the *katauti* method. Upon this, the refusal of the defendant to produce any relevant book of account kept by himself, save and except an untrue cash book, and the High Court's finding that the Rs. 100 were paid, made the burden on the plaintiff light and their Lordships are unable to hold that there was sufficient reason for reversing the finding of the Subordinate Judge.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the decree of the High Court at Lahore dated April 14, 1937, set aside; that the decree of the Subordinate Judge at Jhelum dated June 9, 1934, be restored with the variation that instead of the sum of Rs. 11,463-8-0 therein mentioned the sum of Rs. 10,334-9-3 be substituted. The respondent must likewise pay the plaintiff's costs in the High Court and of this appeal.

D.

Appeal allowed.

Solicitors for the Appellant:—Messrs. Hy. S. L. Polak & Co.

Solicitors for the Respondent:—Messrs. Nehra & Co.

LAHORE HIGH COURT

Civil Revision No. 975 of 1938

April 14, 1939

TEK CHAND, J.

KUNDA SINGH—AUCTION-PURCHASER—
PETITIONER

versus

OFFICIAL RECEIVER AND ANOTHER—

INSOLVENTS—RESPONDENTS

Provincial Insolvency Act (V of 1920), s. 68—Sale conducted by Official Receiver—Insolvent, if can appeal under s. 68 to set it aside.

On the wording of s. 68 of the Prov. Insol. Act, the insolvent has clearly a right to appeal to the Insolvency Judge against the act of the Receiver to set aside the sale by him of property. 136 Ind. Cas. 267 (2), relied on:

[Case-law distinguished].

O. R. from an order of the Additional District Judge, Ferozepore, dated August 2, 1938.

Mr. Charan Singh, for the Petitioner.

Mr. R. P. Khosla, for the Respondents (Insolvent).

Order.—On October 29, 1936, Nidhan Singh, respondent No. 2, was adjudicated insolvent on his own application. The Official Receiver duly took possession of his property and on June 9, 1937, he sold by public auction three parcels of agricultural land to Kunda Singh (petitioner) Sada Ram and Ram Lal, respectively. Within 21 days from this date the insolvent "appealed" to the Insolvency Court under s. 68, Prov. Insol. Act, alleging that the sales had not been properly proclaimed or conducted and that the price realized was much below their real value. The auction-purchasers opposed these "appeals" on two grounds, *firstly*, that the insolvent was not competent to apply to the Court under s. 68 for reversal of the sales conducted by the Official Receiver. *Secondly*, they urged that the sales had been properly and fairly conducted and the price realized was much above the insolvent's own estimate as given in his petition for insolvency. The Insolvency Judge sustained the first objection and held that the insolvent had no *locus standi* to "appeal" under s. 68 to set aside the sales. He then proceeded to examine the insolvent's objections on the merits and, after reviewing the evidence, found that the sales had not been properly conducted. In view of his finding on the first point however he dismissed the "appeal". From this order the insolvent, Nidhan Singh, appealed to the Additional District Judge, who affirmed the finding of the Insolvency Judge that the

sales had not been properly and fairly conducted. He however held that the insolvent was competent to "appeal" to the Insolvency Court under s. 68 of the Act. In the result, the learned Judge accepted the insolvent's appeal and set aside the sales in question. One of the auction-purchasers, Kunda Singh, has come in revision and it has been urged on his behalf that the decision of the learned District Judge is incorrect on both points.

Before considering the provisions of s. 68 and the rulings cited by Counsel for the parties, I think it necessary to say that the Single Bench ruling of this Court, *Ramchand v. Mohra Shah Attarchand* (1), relied upon by the learned District Judge has no bearing on the point involved in this case. In that case no question of the interpretation of s. 68, Prov. Insol. Act, arose, nor was any reference made to that section in the judgment. The sale had not been conducted by the Receiver but under the direct orders of the District Judge himself. Objections to the sale had been filed before the District Judge and were rejected by him. From this order of the District Judge, the insolvent had appealed under s. 75 to the High Court and the question was whether he was competent to appeal to this Court and this question was answered in the affirmative. In that case, certain decisions under s. 46 of Act III of 1907 and s. 8 (2), Presidency Towns Act, were distinguished, as their wording was different from that of s. 75 of Act V of 1920. That ruling therefore has no bearing on the point involved in this case. I consider however that the final order of the learned District Judge on this point is otherwise correct. Section 68, Prov. Insol. Act of 1920, which provides for "appeals" to the Court against the acts or decisions of the Receiver, reads as follows:

"If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Receiver, he may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

Provided that no application under this section shall be entertained after the expiration of twenty-one days from the date of the act or decision complained of."

It will be seen that the insolvent is one of the persons specifically mentioned in the section as entitled to "appeal" to the Court, if he is "aggrieved" by the act or

(1) A.I.R. 1929 Lah. 622; 119 Ind. Cas. 427; 30 P.L.R. 320; 11 Lah. L.J. 198; Ind. Rul. (1929) Lah. 891.

decision of the Receiver complained of. The only decision of this Court which is directly in point is *Shakar Khan v. Sanmukh Singh* (2). In that case, Broadway, J. pointed out that the Receiver is an officer of the Court, whose acts are subject to the control of the Insolvency Court. He then held that s. 68 empowered the insolvent, when aggrieved by any act of the Receiver, to move the Court, and on being so moved, the Court was bound to examine the proceedings and decide whether the act of the Receiver should be upheld or not; the insolvent must however take action within the period prescribed by the section which lays down that no application under this section shall be entertained after the expiry of 21 days from the date of the act or decision complained of.

The learned Counsel for the petitioner cited three Single Bench decisions of this Court, *Bhagwandas v. Amritsar National Bank* (3), *Muni Lal v. Bari Doab Bank Ltd., Hoshiarpore* (4), and *Asa Nand v. Jugal Kishore* (5). None of these cases however has any bearing on the point. In the first two, it was held that when a judgment-debtor had been adjudicated an insolvent during the pendency of the execution proceedings, he had no right to appeal against the order of the executing Court confirming the sale of the property sold in execution of the decree. In neither case was the act or decision of the Receiver questioned and no question of "appeal" under s. 68, Insol. Act, arose. The third case, also, was on a different point altogether. There, property, which had been mortgaged before adjudication, was sold by the Receiver without reservation of the mortgagee rights. It was held that the proper person to object to the sale was not the insolvent but the mortgagee, who was the only person affected by the sale. Counsel also referred to *Sakhawat Ali v. Radha Mohan* (6), and *Hari Rao v. Official Assignee, Madras* (7), which had been relied upon by the Insolvency Judge. In the Madras case the objection by the insolvent against the sale of his property by the

Official Assignee had been entertained by the Insolvency Judge, but rejected by him on the merits. From this order of the Insolvency Judge the insolvent appealed under s. 8 (2), Presi. Towns Insol. Act, and it was held that he (insolvent) was not competent to do so. The wording of that section is materially different from that of s. 68, Prov. Insol. Act. In the latter Act, it is specifically provided that if the insolvent, any of the creditors, or other person is aggrieved by an act or decision of the Receiver, he may "appeal" to the Court. In s. 8 (2), Presi. Towns Insol. Act, however no such right is given to the insolvent. The case is therefore distinguishable. In *Sakhawat Ali v. Radha Mohan* (6), also, the real question was whether an appeal by the insolvent lay to the High Court under s. 46 of Act III of 1907 from the order of the Insolvency Judge rejecting an application by the insolvent against a sale by the Receiver, and the question was answered in the negative. In s. 46 of Act III of 1907, too, no right of appeal from the order of the Insolvency Judge was expressly given to the insolvent, as it has been given in s. 75 of Act V of 1920. That section was worded exactly like s. 8 (2), Presi. Towns Insol. Act. This case also is therefore distinguishable. There are, no doubt, certain observations by the learned Judges with regard to the meaning of the expression "person aggrieved," which are really in the nature of *obiter dictum*, based on reasons in certain English cases. I do not consider it necessary to discuss here those dicta, though I may say with great respect, that there are remarks to the contrary in other English cases, which do not appear to have been considered: see e. g. *Ex parte Official Receiver; In re Reed Bowen & Co.* (8), and *In re Lamb* (9). It is however not necessary to pursue the matter further as, in my opinion, on the wording of s. 68 of Act V of 1920, the insolvent had clearly a right to appeal to the Insolvency Judge against the act of the Receiver, in this case. I hold that the decision of the learned District Judge on the first point is correct.

Counsel for the petitioner next attacked the finding that the sale had not been properly conducted. On this point however both the Courts below have concurrently found against the petitioner, and I do not find any adequate ground for going behind

(2) A I R 1932 Lah. 320; 136 Ind. Cas. 267; 33 P L R 332; Ind. Rul. (1932) Lah. 219.

(3) A I R 1928 Lah. 875; 111 Ind. Cas. 432.

(4) A I R 1936 Lah. 388; 162 Ind. Cas. 299; 38 P L R 108; 8 R L 870.

(5) A I R 1933 Lah. 1008; 147 Ind. Cas. 778; 6 R L 451 (1).

(6) 41 A 243; 49 Ind. Cas. 816; A I R 1919 All. 284; 17 A L J 229.

(7) 49 M 461; 94 Ind. Cas. 642; A I R 1926 Mad. 156; 50 M L J 359; 23 L W 599; (1926) M W N 364 (F B).

(8) (1887) 19 Q B D 174; 56 L J Q B 447; 56 L T 876; 35 W R 660; 4 Morrell 225.

(9) (1894) 2 Q B 805.

that finding in revision. The petition for revision fails and is dismissed. In the circumstances the parties are left to bear their own costs.

D.

Petition dismissed.

MADRAS HIGH COURT

Appeal No. 71 of 1938

August 18, 1939

LEACH, C. J. AND PATANJALI

SASTRI, J.

Pandit SHIVA RAO AND ANOTHER—

APPELLANTS

versus

D. A. SHANMUGHASUNDARASWAMI,

OFFICIAL LIQUIDATOR AND OTHERS—

RESPONDENTS

Registration Act (XVI of 1908), s. 17 (1) (e)—Final mortgage decree, assignment of, if compulsorily registrable—Transfer of Property Act (IV of 1882), ss. 100, 59—Charge, how created.

When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree, itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. A mortgage-decree must therefore be regarded as immovable property and its assignment falls under s. 17 (1) (e), Reg. Act, and must be regarded as compulsorily registrable on the footing, that such a decree represents an interest in immovable property. [p. 244, cols. 1 & 2; p. 247, col. 1.]

[Case-law reviewed.]

The words "so far as may be" in s. 100, T. P. Act, have not the effect of taking s. 59 out of the purview of s. 100. Unless given by statute, a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of ss. 59 and 100 operate to create a charge in law. 183 Ind. Cas 639 (8), relied on. [p. 244, col. 2.]

A. from the judgment and order of Mr. Justice Gentle, dated September 9, 1938.

Messrs. B. Sitarama Rao and K. Vittal Rao, for the Appellants.

Mr. Thyagarajan for Mr. S. V. Shenoi and Mr. K. R. Sheoni, for the Respondents.

Leach, C. J.—The appellants appeal against an order refusing to recognize them as secured creditors of the Lakshmi Forest Co. Ltd., which is now under liquidation under an order for compulsory winding up. On September 3, 1932, by a registered deed the appellants conveyed to the Company certain lands in the village of Shedimane, South Kanara District

and assigned the benefit of a mortgage-decree which they had obtained in the Court of the Subordinate Judge of South Kanara. The consideration was Rs. 80,000, payable in instalments. The deed purported to charge both the immovable property and the mortgage-decree for the due payment of the balance of the consideration. It was also provided that the vendors should remit a sum of Rs. 10,000 if the Company should pay the balance falling due before April 1, 1933, with interest from June 30, 1932. The right to rank as secured creditors was challenged by the liquidator, and the appellants took out a Judge's summons for a declaration that under the general law and also under the provisions of the deed they were secured creditors in respect of the moneys remaining due to them under the deed. The deed had not been registered in accordance with the provisions of s. 109, Companies Act, 1913, and was therefore clearly void against the liquidator and any creditor of the Company if put forward as embodying a charge. The appellants however claimed that they were entitled to rank as secured creditors by reason of the lien given to an unpaid vendor by s. 55 (4), T. P. Act. This claim was disallowed by Gentle, J. The learned Judge held that they were not entitled to the statutory lien because the deed of conveyance contained a contract contrary to the provisions of s. 55 (4) in that it created without any allocation a charge on both movable and immovable property and under the section the appellants could only claim a lien in respect of immovable property. The appellants challenge the decision of the learned Judge on three grounds. In the first place it is said that the mortgage-decree is not movable property, but immovable property. Secondly it is said that the conveyance did not in law effect any charge. In the third place it is said that even if the decree be regarded as movable property the appellants are entitled to a lien as equity had extended the principle of the vendor's lien to movable property of this description.

Before the amendment of s. 17, Reg. Act, there was a conflict of opinion whether a mortgage-decree could be regarded as movable or immovable property. In *Gopal Narain v. Trimbak Sadashiv* (1), the Bombay High Court held that the assignment of a mortgage-decree required registration. The Calcutta and the Allahabad High Courts expressed opinions to the contrary:

(1) 1 B 267.

see *Gous. Mohāmmad v. Khawas Ali Khan* (2), *Baijnath Lohea v. Vinoyendra Nath Palit* (3), *Ram Ratan v. Jogesh Chandra* (4), *Abdul Majid v. Mohammad Faizullah* (5), *Ahmad Khan v. Abdul Rahman Khan* (6) and *Mumtaz Ahmad v. Sri Ram* (7). This controversy has been decided in favour of the Bombay view by the addition made to the provisions of s. 17, Reg. Act, by s. 10, T. P. (Amendment) Supplementary Act, 1929, which came into force on April 1, 1930. That Act added cl. (e) to sub-s. (1) of s. 17, Reg. Act. The clause reads as follows:

"Non-testimentary instruments transferring or assigning any decree, order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

The wording here follows that used in cl. (b). It has been argued by Mr. Thyagarajan on behalf of respondent No. 2 that the Court is not justified in regarding a mortgage-decree as immovable property by reason of the addition of cl. (e) to the section. He says that there has been no amendment of the definition of immovable property to be found in s. 3 (25), General Clauses Act, and in s. 2 (6), Reg. Act, and the considerations which weighed with the Calcutta and the Allahabad High Courts still apply. As I have already indicated, I am unable to accept the argument. By virtue of the amendment of s. 17, Reg. Act, an assignment of a mortgage-decree is placed in the same category as instruments falling within cl. (b), and admittedly such instruments must be regarded as immovable property. When a final mortgage-decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage-deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. The Civil P. O., contains a form for the drawing up of a final mortgage-decree and unless the Legislature regarded the decree to be drawn up in accordance with such form as operating to declare the mortgagee's rights in the mortgaged property the amend-

ment of the section would be idle. For the reasons indicated I hold that a mortgage-decree must be regarded as immovable property.

I am also unable to share the opinion of the learned Judge that the conveyance of September 3, 1932 created a charge, either as regards the lands or as regards the mortgage-decree. Section 59, T. P. Act, requires a mortgage-deed to be signed by the mortgagor, attested by at least two witnesses, and registered. Section 100 provides that where immovable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage the latter person is said to have a charge on the property and all the provisions "hereinbefore contained which apply to a simple mortgage shall, so far as may be apply to such charge." In *Viswanadhan v. M. S. Menon* (8), a Bench of which I was a member, held that the words "so far as may be" had not the effect of taking s. 59 out of the purview of s. 100. Unless given by statute a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. In the present case the Company was not a party to the deed of conveyance and as it has not created a charge by another instrument there is in law no charge at all. The mere fact that the parties regarded the properties mentioned in the deed as being subject to a charge would not, by reason of the provisions of ss. 59 and 100 operate to create a charge in law. In these circumstances it cannot, in my opinion, be said that the parties had entered into a contract which deprived the appellants of the lien under s. 55 (4), T. P. Act.

The appellants' contention that equity has extended the principle of the vendor's lien to movable property of certain descriptions is based on the judgments in *Mycock v. Beaton* (9), *Collins v. Collins* (10), *In re Albert Life Assurance Co; Ex parte Western Life Assurance Co. Society* (11), *Davies v. Thomas* (12) and *In re Stucley*;

(8) 1 L R (1939) Mad. 199; 183 Ind. Cas. 639; A I R 1939 Mad. 202; (1939) 1 M L J 185; 48 L W 952; (1939) M. W. N. 1286; 12 R M 352.

(9) (1880) 13 Ch. D. 384; 49 L J Ch. 127; 28 W R 319.

(10) (1862) 31 Beav. 346; 135 R R 461; 54 E R 1172.

(11) (1871) 11 Eq. 164; 40 L J Ch. 166; 23 L T 726; 19 W R 321.

(12) (1900) 2 Ch. 462; 69 L J Ch. 643; 83 L T 11; 49 W R 68.

(2) 23 C 450.

(3) 6 C W N 5.

(4) 12 C W N 625.

(5) 13 A 89.

(6) 26 A 603.

(7) 35 A 524; 21 Ind. Cas. 462; 11 A L J 815.

Stucley v. Kekewich (13), but holding, as I do, that a mortgage decree drawn up in the ordinary form must now be regarded as immovable property and that the deed of September 3, 1932 did not operate to deprive the appellants of their statutory lien under s. 55 (4), T. P. Act, it is not necessary to consider whether this argument is well-founded, and if well-founded the principle could be applied in India having regard to the provisions of the Sale of Goods Act. The appeal succeeds on the first two points and consequently there will be a declaration in favour of the appellants that they are entitled to a charge on the property conveyed for the balance of the purchase money. The appellants are also entitled to their costs, which will be paid out of the assets of the Company. The Court has been informed that in other proceedings a creditor is claiming priority over the appellants, but this matter is not now before us and therefore cannot be inquired into. To avoid any misunderstanding, I will however add that our decision is entirely without prejudice to any claim to priority.

Patanjali Sastri, J.—The main question argued in this appeal is whether a final decree for sale obtained in a suit brought to enforce a simple mortgage of immovable property is to be regarded as immovable property for the purposes of Chap. III, T. P. Act, relating to sale of immovable property. The facts giving rise to the question have been fully set out in the judgment of my Lord the Chief Justice and it is unnecessary to recapitulate them here. The T. P. Act, does not define the term 'immovable property' except negatively by excluding standing timber, growing crops and grass. The General Clauses Act (X of 1897) contains a definition in s. 3 (25) which is applicable to the T. P. Act. There is also a definition in s. 2 (6), Reg. Act, for the purposes of that Act. According to both these definitions so far as they are material to the present discussion, immovable property includes lands and benefits to arise out of land. We then have the definition of 'mortgage' in s. 58, T. P. Act, as the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced, etc. This interest in the case of a simple mortgage consists of course in the right to bring the mortgaged property to sale for the realization of the debt. A simple mortgage has thus

(13) (1906) 1 Ch. 67; 75 L. J. Ch. 58; 93 L. T. 718; 54 W. R. 256; 22 T. L. R. 33.

a dual character. It is a debt with a right to be recouped from the sale proceeds of specific immovable property.

Now, it has been held in this Court, having regard to these definitions that a debt secured by hypothecation of land is immovable property for the purposes of ss. 54, 55 (2) and 123, T. P. Act. See *Official Receiver, Trichinopoly v. Lakshman Iyer* (14), *Balagurumurthi Chetti v. Ramakrishna Chetti* (15) and *Perumal Ammal v. Perumal Naicker* (16) and this position appears to have been accepted by their Lordships of the Privy Council in the recent decision in *Fanny Skinner v. Bank of Upper India Ltd.*, (17), where it was held that an assignment of a simple mortgage was of no effect as a transfer of the security by reason of non-registration. But the question in what category a final decree for sale obtained on a simple mortgage has to be placed has not been the subject of decision in this Court, though there are conflicting decisions on the point in some of the other High Courts in India. Before referring to these decisions which are not however binding on this Court though, of course, they are entitled to great weight, it is desirable, in my opinion, to consider the question on principle. *Prima facie*, if a simple mortgage is to be treated as an interest in land or as a benefit arising out of land and thus coming within the definition of immovable property, there seems to be no valid reason why a decree directing the enforcement of such mortgage should be regarded anytheless as immovable property. Before the decree, the mortgagee had the right to bring the mortgaged property to sale through Court for the payment of his debt, or he could give up the security and sue for mere recovery of the debt. After the decree however he can no longer seek to recover the debt apart from realizing the security and, unless the security proves insufficient on actual realization, his only right having regard to the provisions of the Civil P. C. in that behalf, is to bring the mortgaged property to sale in execution of the decree. Thus, the decree does not in any way affect the mortgagee's interest in the mortgaged property which still remains in him in full

(14) 41 M. L. J. 453; 68 Ind. Cas. 752; A. I. R. 1921 Mad. 681.

(15) 41 M. L. J. 267; 69 Ind. Cas. 473; A. I. R. 1921 Mad. 277; 14 L. W. 191; (1921) M. W. N. 602.

(16) 44 M. L. J. 196; 61 Ind. Cas. 461; A. I. R. 1921 Mad. 137; 40 M. L. J. 25; 13 L. W. 69; (1921) M. W. N. 5.

(17) 57 A. 314; 155 Ind. Cas. 743; A. I. R. 1935 P. O. 108; 62 I. A. 115; 7 R. P. O. 214; 39 O. W. N. 834; (1935) M. W. 726; 1935 O. W. N. 711; 42 L. W. 172; 69 M. L. J. 158; 37 Bom. L. R. 625; 61 O. L. J. 477 (P. O.).

force, and indeed his remedy is now confined to a realization of that interest, the mortgage debt being, to that extent, deprived of its dual character. It is thus clear that the decree only marks a stage in the process of realizing the security and the only change effected by it in the position of the mortgagee is to effectuate the benefit arising to him out of the land, the subject of the mortgage, by bringing it one step—and that an important step—nearer realization. It is therefore difficult to see on principle why a final decree for sale should be relegated to a different category of property from the mortgage itself on which it is based.

Turning now to the decided cases, we find that the High Courts at Bombay, Allahabad and Calcutta have had occasion to consider this point. The earliest case in Bombay is *Harigovind Joshi v Ramachandra Pandurang* (18), where speaking of a Court sale of a mortgage decree, the learned Judges observed that what was purchased

"was not a mere paper on which the decree was written but the interest in immovable property which was recoverable under that decree and such interest must be regarded as immovable property within the meaning of s. 259, Civil P. C.

In a later case in *Gopal Narain v. Trimbak Sadashiv* (1), the same view was taken and it was held that an assignment of a mortgage decree was compulsorily registrable. The Calcutta High Court in the earlier case *Kooblal Chowdhury v. Nittyanand Singh* (19), held that an unregistered deed of assignment of a mortgage decree was defective so far as it related to the mortgage lien on the property. In a later case, *Gous Mohammad v. Khawas Ali Khan* (2), however that Court adopted the view that s. 17 (b), Reg. Act, does not apply to a deed of assignment of a mortgage decree as it could not be said to be immovable property within the definition contained in that Act. There is no reference to the earlier decision of the same Court and the learned Judges do not refer to the definition of a mortgage in s. 58, T. P. Act, as involving the transfer of an interest in specific immovable property. In a still later decision reported in *Bajinath Lohea v. Binoyendra Nath Palit* (3), the question arose whether a mortgage decree was immovable property for the purpose of O. XXI, r. 90, Civil P. C., when a Court sale of such a decree was sought to be set aside under that provision.

(18) 9 B H C R 64.

(19) 9 O 839; 12 C L R 393.

In this case, the definition of immovable property in the General Clauses Act was referred to, and it was held that a mortgage decree did not come within that definition. Here again the earlier decision of the same Court in *Kooblal Chowdhury v. Nittyanand Singh* (19), was not referred to. In the Allahabad High Court the treatment of the subject followed more or less the same course. In the earliest case in *Bhawani Koer v. Gulab Rai* (20) the question arose whether the sale of a mortgage decree was a sale of movable property within the meaning of s. 252, Civil P. C., which provided that no irregularity in the sale of movable property under an execution shall vitiate the sale and it was held to be a sale of an interest in immovable property. In *Abdul Majid v. Mohammad Faizullah* (5), however the Court held that a deed of assignment of a mortgage decree did not come within the mischief of s. 49, Reg. Act, as it could not be regarded as immovable property. In the two later cases in *Ahmad Khan v. Abdul Rahman Khan* (6), and *Mumtaz Ahmad v. Sri Ram* (7), the decision in *Abdul Majid v. Mohammad Faizullah* (5) was followed. In none of these cases was any reference made to the earlier decision of the same Court in *Bhawani Koer v. Gulab Rai* (20).

In this state of the authorities, the Legislature added cl. (e) to s. 17 (1), Reg. Act, by s. 10, T. P. (Amendment) Supplementary Act, 1929, thereby making compulsorily registrable instruments transferring or assigning any decree or order of Court when such decree or order purports or operates to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property. It is clear to my mind that the object of this amendment was to affirm the Bombay view and supersede the Calcutta and Allahabad decisions referred to above holding the contrary. It is however urged that this newly added clause would not apply to mortgage decrees as the words, "purports or operates to create, declare etc." must, in view of the Privy Council decision in *Bhageshwari Charan Singh v. Jagarnath Kueri*, (21) be construed to mean, "in itself purports or operates to create, declare etc." whereas

(20) 1 A 348.

(21) 11 Pat. 272; 136 Ind. Cas. 798; A I R 1932 P O 55; 59 I A 130; 9 O W N 43; 36 O W N 250; 35 L W 217; (1932) A L J 186; 55 C L J 136; 62 M L J 296; 34 Bom. L R 463; Ind. Rul. (1932) P O 142; 13 P L T 279; (1932) M W N 660 (P O).

a mortgage decree merely declares a pre-existing right, i. e., the mortgage right of the decree-holder. I think that this argument proceeds on a misapprehension of their Lordships' decision in the case referred to above. The distinction which their Lordships had in mind is the one between a mere recital of title as a fact and some thing which in itself creates a title. A reference to the passage from the judgment of West, J. in *Sakharam Krishnaji v. Madan Krishnaji*, (22) which their Lordships quote with approval would make their meaning still more clear. The learned Judge there says:

"There (i. e., in s. 17) 'declare' is placed along with 'create, assign, limit or extinguish a right, title or interest' and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare'. It implies a declaration of will; not a mere statement of fact."

A mortgage decree does not merely recite the pre-existing mortgage right. By its own force, it declares, even if it does not create, the decree-holder's right to have the property sold through the machinery of the Court for the realization of his debt without any further impediment. It embodies the expression of the Court's will that a definite change of the legal relation of the mortgagor to the property should forthwith be brought about by the property being sold in satisfaction of the decree. It seems to me, therefore, idle to contend that a decree stands on the same footing as a document containing merely a recital of an existing right. In one sense, no doubt, a decree or order of Court does not ordinarily bring into existence any right which did not already vest in one of the parties litigant; and to insist that it should do so in order to come within cl. (e) of s. 17 would be to render that provision almost nugatory. The assignment of a mortgage decree thus falls within s. 17 (1) (e), and must now be regarded as compulsorily registrable on the footing, clearly, that such a decree represents an interest in immovable property. It follows that much of the reasoning underlying the decisions of the Allahabad and Calcutta High Courts holding that a mortgage decree cannot be regarded as immovable property falls to the ground and I cannot, therefore, regard them useful precedents on the question now under consideration.

For the above reasons, I am of opinion

(22) 5 B 232.

that a final decree for sale on a simple mortgage must be regarded as immovable property for the purposes of Chap. III, T. P. Act. On the other questions argued at the Bar, I agree in the conclusions of my Lord and have nothing material to add.

N.-S.

Appeal allowed.

NAGPUR HIGH COURT

Second Appeal No. 462 of 1937

November 27, 1939

NIVOGI, J.

DATTU RAMJI MALI—DEFENDANT—
APPELLANT

versus

WAMAN DAMODHAR AND OTHERS—

PLAINTIFFS—RESPONDENTS

C. P. Tenancy Act (IX of 1898), s. 89—Surrender—Surrender by person of his tenant-right though not in possession of holding—Validity.

The surrender of a holding properly understood signifies the relinquishment of the tenant-right in favour of the landlord as affecting the parcel of land which is the subject-matter of the contract of tenancy. Surrender signifies the merger of the tenant-right in the proprietary right so as to convert the tenancy holding into the landlord's *khudkasht*. The tenant-right which means the right to cultivate the land is distinct from actual cultivation just as title is from possession. Delivery of possession is not a necessary ingredient of a validity of a transfer of title or any kind of right recognised by law. *A fortiori*, a relinquishment of a right to be valid need not be accompanied by delivery of possession. There is nothing in law to preclude the tenant from relinquishing his tenant-right because he is out of possession. So long as he has the tenant-right, the holding is his and the relinquishment of the tenant-right must mean relinquishment of the holding. The land may be in possession of a trespasser but the "holding" remains with the rightful tenant. *Ramdayal v. Gulabai* (4), referred to 122 Ind. Cas. 259 (1), held overruled in 186 Ind. Cas. 731 (2).

A. from the appellate decree of the Court of the Fourth Additional District Judge, Nagpur, dated March 31, 1937.

Mr. D. T. Mangalmoorti, for the Appellant.

Mr. R. N. Padhye, for the Respondents.

Judgment.—This is a second appeal from the concurring judgment of the 4th Additional District Judge, Nagpur, in Civil Appeal No. 104-A of 1936, decided on March 31, 1937.

The suit relates to occupancy fields Nos. 15, 18 and 51/3 situate at *Mauza Fetri*, Tahsil and District Nagpur. They were originally held by one Sonba who died in 1922. On his death they devolved on his two widows *Mst. Bhivra* and *Mst. Saloo*. *Bhivra* died in 1923 and *Mst. Saloo* became

the sole tenant of these fields. She died in March 1935 survived by Mahadeo the son of her deceased daughter Gahani. After her death, Mahadeo, on July 9, 1935 surrendered the fields to the *malguzar* Raghunath Rao, the predecessor-in-title of the respondents by a registered instrument. When the *malguzar* went to take possession the defendant (appellant) Dattu asserted that he was the tenant and resisted the taking of possession. Dattu claimed the holdings as being the adopted son of Sonba, the original tenant, and that he had been recognised as tenant by the landlord. Both these pleas were negatived in the two Courts below. Dattu had raised one more contention which was that as Mahadeo was not in actual possession of the holdings he could not validly surrender the tenancy-right. This plea also failed in the Courts below.

Before commencing the discussion of the point of law put forward on behalf of the appellant it is pertinent to note that the defendant Dattu was, like his father, managing the cultivation on behalf of *Mst. Saloo*. His jural relation to Saloo was that of an agent. His possession therefore became adverse on Saloo's death in March 1935.

The question is whether Mahadeo, not being in actual possession of the holdings on July 9, 1935 was not competent to surrender the holdings. It is contended that the surrender of tenancy-rights to be effective, the tenant must have entered upon the holding and have held an estate in possession. Reference is made to *Goura v. Shriram* (1) in which on the authority of the law enunciated in para. 767, Halsbury's Laws of England, Vol. XVIII (1st Edition) it was held that acceptance of the tenancy by the heir on whom the same devolves by descent is essential for the relation of landlord and tenant. The view taken in *Goura v. Shriram* (1) did not commend itself to a Full Bench of this Court in *Punjab Jagoba Teli v. Ramu Chintoo Gond* (2) for the reason that the doctrine of *interesse termini* had been abolished in England by s. 149 of the Law of Property Act, 1925, and it could not be made the basis for the decision in 1929 of the case reported in *Goura v. Shriram* (1): see *Razia Begam v. Muhammad Daud* (3).

(1) 25 N L R 198; 122 Ind. Cas. 259; A I R 1930 Nag. 124; Ind. Rul. (1930) Nag. 131.

(2) 186 Ind. Cas. 731; A I R 1940 Nag 49; 12 R M 234 (F B).

(3) 6 Pat 94; 96 Ind. Cas. 558; A I R 1926 Pat 508.

It is contended that inasmuch as s. 89 of the C. P. Tenancy Act speaks of a surrender of a holding, it must follow that there can be no surrender unless the tenant is in actual possession of the land. This is but another form of the same argument as has been considered above. A holding does not mean merely land but also includes the contractual rights of the tenant. A holding is a parcel of land which is held under one lease or one set of conditions (s. 2 of the C. P. Tenancy Act.) It denotes an extent of land which is the subject-matter of the contract of lease. The jural relation between the landlord and the tenant is primarily governed by the contract of lease and that contract is personal, although it gives rise to an interest in the land. This relation originates in contract which is terminable by the relinquishment of such rights as the tenant acquires under the contract. The surrender of a holding properly understood signifies the relinquishment of the tenant right in favour of the landlord as affecting the parcel of land which is the subject-matter of the contract of tenancy. As explained in *Ramdayal v. Gulabai Bai* (4) surrender signifies the merger of the tenant-right in the proprietary right so as to convert the tenancy holding into the landlord's *khudkasht*. The tenant-right which means the right to cultivate the land is distinct from actual cultivation just as title is from possession. Delivery of possession is not a necessary ingredient of a validity of a transfer of title or any kind of right recognised by law. *A fortiori*, a relinquishment of a right to be valid need not be accompanied by delivery of possession. Similarly a right may devolve on an heir notwithstanding that the subject-matter of the right is in the possession of a trespasser. Section 11 of the C. P. Tenancy Act says that the interest of an occupancy tenant shall on his death pass by inheritance in accordance with her personal law. The interest of the tenant signifies the holding, that is to say that the parcel of land which is held under one lease. The interest will devolve on the heir even though the propositus is not in actual possession at his death, provided of course that the interest is not extinguished by adverse possession. If an interest in property can devolve on the heir even though unaccompanied by possession, there is no reason why it cannot be transferred or relinquished unaccompanied by possession.

(4) 4 N L R 120.

As between an excluded or dispossessed tenant and the trespasser the former has the tenant-right which means an interest in the holding. The surrender, like transfer, operates on this right or interest irrespective of possession. The tenant-right, viz., the right to cultivate reverts to the landlord who thereby becomes entitled to eject the trespasser. There is nothing in law to preclude the tenant from relinquishing his tenant-right because he is out of possession. So long as he has the tenant-right, the holding is his and the relinquishment of the tenant-right must mean relinquishment of the holding. The land may be in possession of a trespasser but the "holding" remains with the rightful tenant.

Reference is made to s. 26 of the Ben. Ten. Act and to s. 35 of the Agra Ten. Act. It is unnecessary to discuss those enactments as they are not helpful in the construction of the Tenancy Law in force in this Province.

The appeal is dismissed with costs.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

Second Appeal No. 752 of 1936

January 4, 1939

IQBAL AHMAD AND BAJPAI, JJ.

BANGALI MAL—PLAINTIFF—APPELLANT

versus

BANSIDHAR AND ANOTHER—DEFENDANTS—RESPONDENTS

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 2, Proviso, ss. 3, 30—Joint Hindu family—Each member, if can apply for relief under s. 30—Father and son executing mortgage—Father alone entered in revenue papers as proprietor—Suit on mortgage—Father if entitled to relief under ss. 30 and 3—Benefit, if can be extended to son.

Explanation 2, sub-s. 2, s. 2 of the U. P. Agri. Relief Act, makes it clear that each member of a joint Hindu family cannot claim the benefits conferred by s. 5 of the Act, or by s. 30 which is one of the sections in Chap. IV. For the purposes of applications under s. 30 the person recorded as owner or the person paying revenue, etc. is the only person who can apply. Normally such a person in a joint-Hindu family would be the *karta*. 172 Ind. Cas. 951 (1), relied on.

Father and son who were members of a joint-Hindu family executed a mortgage. The family possessed ancestral property, the revenue of which did not exceed Rs. 1,000. In the revenue papers the father alone was recorded as proprietor. It was contended by both the father and the son, in a suit against them on the mortgage that they were entitled to instalments and reduction of interest:

Held, that the Proviso applied only to those cases where an agriculturist joins a non-agriculturist in any transaction of loan. The son could not be regard-

ed as non-agriculturist so as to invite the application of the proviso. Consequently the father in joining the son in executing the mortgage could not be said to have forfeited his right to claim relief under ss. 3 and 30.

Held, also that the benefits under ss. 3 and 30 could also be extended to the son.

S. A. from the decision of the Additional Sub-Judge, Agra, dated January 14, 1936.

Messrs. Baleshwari Prasad and Gopal Behari, for the Appellant.

Mr. S. Munir Ahmad, for the Respondents.

Iqbal Ahmad, J.—This is a plaintiff's appeal and arises out of a suit for sale on a mortgage dated August 23, 1929. The mortgage was executed by Bansidhar and his son Cheddi Lal who are members of a joint Hindu family. Bansidhar and Cheddi Lal contested the suit *inter alia* on the allegation that both of them were agriculturists and were entitled to the benefit of the provisions of ss. 3 and 30, U. P. Agri. Relief Act (Act XXVII of 1934). They prayed that the rate of interest be reduced and the decretal amount be made payable by instalments. This prayer of the defendants was accepted by the trial Court and that Court reduced the interest and also granted certain instalments. On appeal by the plaintiff, the lower Appellate Court affirmed the decision of the trial Court. The plaintiff has come up in appeal to this Court and it is argued on his behalf that in view of the provisions of Expl. 2 to sub-s. (2), s. 2 of the Act the Courts below were wrong in granting instalments and in reducing the rate of interest. In support of this contention reliance is further placed on one of the provisions to s. 2 which runs as follows:

"Provided further that if a non-agriculturist joins with an agriculturist in any transaction of loan, save for the purpose of adding his name as security, the agriculturist shall not be considered as such for the purpose of that transaction."

Explanation 2 provides that

"in the case of members of a joint Hindu family . . . each member . . . shall be considered to be an agriculturist for the purposes of Chaps. II (except ss. 3, 4, 5 and 8), 3 and 6, whose share or interest in revenue, local rate or rent . . . as the case may be, does not respectively exceed the aforesaid limits."

In the present case it has been found by both the Courts below that the joint family of the defendants is possessed of ancestral *zamindari* property, the revenue of which does not exceed Rs. 1,000. But the name of Bansidhar alone, who is the *karta* of the family, is recorded in the revenue papers and Cheddi Lal's name is not recorded as a proprietor in those papers. In view of the

provisions of Expl. 2, it is contended that Oheddi Lal could not be considered to be an agriculturist for the purposes of ss. 3 and 30 of the Act, and it is therefore urged that he must be deemed to be a non-agriculturist and as Bansidhar joined with Oheddi Lal in the execution of the mortgage the Proviso quoted above applied to this case. In our judgment, there is no force in this contention. The Proviso applies only to those cases where an agriculturist joins a non-agriculturist in any transaction of loan. Oheddi Lal could not, in view of Expl. 2, be regarded as a non-agriculturist for all purposes. He could not therefore be held to be a non-agriculturist so as to invite the application of the proviso referred to above. That being so, Bansidhar by joining Oheddi Lal in the execution of the mortgage did not forfeit the right to the relief to which he was entitled by the provisions of the Act. The learned Counsel for the appellant relied on the decision in *Allahabad Bank, Ltd., Meerut v. Prakash Nath* (1), in support of the contention referred to above. In that case it was held that if a person is recorded as holding certain property or if the revenue papers show that a certain person actually pays land revenue, etc., then he is the person who is *prima facie* an "agriculturist" within the meaning of sub-s. (2) of s. 2 of the Act. It was further held in that case that Expl. 2, sub-s. 2, s. 2 of the Act makes it clear that each member of a joint Hindu family cannot claim the benefits conferred by s. 5 of the Act, or by s. 30 which is one of the sections in Chap. IV, because s. 5 and Chap. IV, are expressly excluded in this Explanation. The learned Judges after making these observations ruled that

"for the purposes of applications under s. 5 or applications under Chap. IV, the person recorded as owner or the person paying revenue, etc., is the only person who can apply. Normally such a person in a joint Hindu family would be the *karta*."

It is clear from the observations just quoted that a *karta* of a joint Hindu family is entitled to apply for the benefit conferred by s. 3 and s. 30 of the Act. In the case before us, Bansidhar had applied for relief under those sections in his written statement. The Courts below were therefore right in granting instalments and in reducing the rate of interest. It was argued that as Oheddi Lal could not be deemed to be an agriculturist for the purposes of ss. 3 and 30, the decree for the full amount claimed

should have been passed against him. We are unable to agree with this contention. On an application being made by Bansidhar the Court was competent to extend the benefit of ss. 3 and 30 to both the defendants who are members of a joint Hindu family. In our judgment, there is no force in this appeal. It is accordingly dismissed with costs.

D.

Appeal dismissed.

BOMBAY HIGH COURT

Suit No. 1915 of 1938

July 20, 1939

KANIA, J.

WESTERN ELECTRIC CO., LTD.—
PLAINTIFFS

versus

KAILAS CHAND—DEFENDANT No. 1.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—"Lawful agreement", scope—Agreement void on face of it, if excluded—Enquiry, whether necessary.

The term "lawful agreement" as used in O. XXIII, r. 3, Civil P. O., excludes not only unlawful agreements *i. e.*, the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which on the face of them are void and therefore will not be enforced by the Court. For this purpose, no inquiry is necessary because the terms of the agreement themselves will show the defect. The Court therefore has to consider whether on the face of the agreement it is lawful or not. Word "lawful" is not wide enough to include an inquiry whether the agreement is voidable at the instance of one party. 110 Ind. Cas. 573 (1) and 154 Ind. Cas. 746 (2), commented upon.

Mr. C. K. Daphtary, for the Plaintiffs.

Mr. M. C. Setalvad, Advocate-General for Defendant No. 1.

Judgment.—This is a motion for recording a compromise. The terms of the compromise, which are reduced to writing, are not disputed. They are found in two letters which are annexed to the affidavit filed in support of the motion. On behalf of the plaintiffs, who oppose this application, it is urged that their consent was obtained on a representation that the Northern India Development Corporation Ltd., who were to pass a writing under the agreed terms promising to pay Rs. 6,500 to the plaintiffs by monthly instalments of Rs. 200 and Rs. 300, was in a sound financial condition. It is alleged that representation was false to the knowledge of the agent of the defendants who came to effect the compromise. It is alleged that the Corporation held a meeting in the middle of April 1939 and passed a resolution

(1) (1937) A L J 970; 172 Ind. Cas. 951; A I R 1938 All. 19; I L R (1938) All. 19; 1937 R D 534; 10 R A 444; 1938 A L R 52.

to go into voluntary liquidation. The company later on has been ordered to be wound up subject to the supervision of the Court. Having regard to the short period within which the company went into liquidation it is contended that the representation was false to the knowledge of the agent and therefore the compromise is voidable at the instance of the plaintiffs. The alleged representation is denied. The dispute is whether on this application the plaintiffs should be allowed to go into that question at all.

The notice of motion to record the compromise is taken out under O. XXIII, r. 3, Civil P. C., which (omitting the words which are inapplicable) states that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit. The words of that rule show that the Court has to be satisfied on two points; first, that there was an agreement between the parties, and, secondly, that it was lawful. The document put forward in the present case is not disputed and the agreement is thus proved. The other question is whether it is lawful. On behalf of the defendants it is urged that "lawful" means "according to law." The learned Advocate-General for the defendants in the course of the argument drew my attention to *Qadri Jahan Begam v. Fazal Ahmad* (1) and *Husain Yar Beg v. Radha Kishan* (2). In those cases proceedings were adopted under O. XXIII, r. 3 and the contention of the opponents was that the agreements were voidable by reason of facts extraneous to the terms of the agreements themselves. The observations of the learned Judges in those cases show that an inquiry showing that the agreements were voidable is not within the purview of O. XXIII, r. 3. In the former case it was observed as follows (pp 751-52*):

"... the words 'lawful' in O. XXIII, r. 3, does not merely mean binding or enforceable.....the word 'lawful'...refers to agreements which in their very terms or nature are not 'unlawful,' and may therefore include agreements which are voidable at the option of one of the parties thereto because they have been brought about by undue influence, coercion or fraud."

With respect I am unable to accept the full meaning of the words used there. If an

(1) 50 A 748; 110 Ind. Cas. 573; A I R 1928 All. 494; 26 A L J 691.

(2) 57 A 426; 154 Ind. Cas. 746; A I R 1935 All. 137; (1934) A L J 1183; 7 R A 786.

*Pages of 50 A.—[Ed].

agreement put before the Court as a compromise on the face of it was a wagering agreement and therefore void under s. 30, Contract Act, in my opinion, it will not be a lawful agreement because on the face of it it is an agreement which the Court will not enforce. The provisions of O. XXIII, r. 3, require the Court to record a lawful agreement and it has no option but to pass a decree in accordance with it. A compromise which is so put forward stands on the same footing as a contract between the parties. If at the *ex parte* hearing of a suit filed to enforce an agreement which on the face of it appeared to the Court to be void, I think the Court would refuse to pass a decree, to enforce that contract (*sic*). In the same way, if a wagering agreement was put forward as a compromise to the suit, I see no reason why the Court should not hold that it is not a lawful agreement and thus refrain from recording it or passing a decree in accordance with it. Therefore the term "lawful agreement" as used in O. XXIII, r. 3, excludes not only unlawful agreements, i.e. the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which on the face of them are void and therefore will not be enforced by the Court. For this purpose, no inquiry is necessary because the terms of the agreement themselves will show the defect. The Court therefore has to consider whether on the face of the agreement it is lawful or not as stated above. With that reservation I respectfully agree with the two Allahabad decisions mentioned above.

An application under O. XXIII, r. 3, is in the nature of an interlocutory proceeding, and normally, it will certainly be inconvenient to treat it as if it were a suit where all evidence which will make the agreement voidable by reason of the provisions of the Contract Act will be led. But that will not be a sufficient answer to refuse to take into consideration the plea whether an agreement is voidable or not. That contention must stand or fall by reason of the wording of O. XXIII, r. 3. I am unable to construe the word "lawful" as wide enough to include an inquiry whether the agreement is voidable at the instance of one party. In my opinion, it includes only two classes of agreements: those which are unlawful and those which on their face are void and therefore not capable of being enforced. Under the circumstances the opposition fails. If the plaintiffs have any grievance in respect of the agreement their remedy is to file a suit to set aside the

agreement and the decree. They are not prevented from doing so by this judgment. The agreement which is contained in the letters of March 10 and 12, 1939, which are put in and marked No. 1 is recorded, and a decree is passed in accordance therewith. Plaintiffs to pay the costs of this motion and decree.

s.

Order accordingly.

CALCUTTA HIGH COURT
Matrimonial Suit No. 21 of 1938
May 22, 1939

SEN, J.

A. W. LOBO—PETITIONER

versus

J. A. LOBO—RESPONDENT

Divorce Act (IV of 1869), s. 36—"Net income"; meaning of— Calcutta High Court (Original Side) Rules, Chap XXVI—Registrar in making report regarding payment of alimony making suggestion as to amount of maintenance payable for children—No reference to him on this point—Such part cannot be confirmed.

Net income merely means income after allowing for the cost of collection, income-tax and similar deductions. It does not mean any sum which is left over after the husband has spent all that he considers necessary for his maintenance.

Where the Registrar has, in making his report regarding the payment of alimony *pendente lite*, made certain suggestions regarding the amount of maintenance which should be paid for the children, the latter part of his report cannot be confirmed when there was no reference to him upon that point.

Mr. R. C. Bonnerjee, for the Petitioner.

Mr. Sekhar Bose, for the Respondent.

Judgment.—There are two reports by the Registrar in the matrimonial suit instituted by the wife against her husband. One report deals with the amount payable as alimony *pendente lite* and the other deals with the amount payable as costs. Both these enquiries were referred to the Registrar and he made his report on February 22, 1939. Both the reports were filed on March 8, 1939. When the reports came up for further directions the husband appeared in person and objected to the reports. This was on April 18, 1939. Before this date the husband took no steps. The objections of the husband are twofold. As regards the amount fixed for alimony *pendente lite* the husband says that the Registrar took into account his gross income, not his net income. By net income the husband means income left after meeting all what he terms his necessary expenses. The next objection is that the wife is not entitled either to alimony *pendente lite* or to her costs because she

has private means of her own. As the husband appeared in person and as I wanted to be advised on the matter I asked Mr. Sekhar Bose to appear for the husband, and he has very kindly done so. I express my thanks to Mr. Bose for the assistance he has given to me.

Learned Counsel appearing on behalf of the wife points out that these objections of the husband cannot be entertained inasmuch as the report has become confirmed by efflux of time. He draws my attention to r. 89 of Chap. XXVI, of the Rules of the Original Side of this Court. Rule 89 lays down that "an application to discharge or vary a report shall be made by motion upon notice to be given within 14 days of the filing thereof." In the present case there has been no motion filed against the report and the objections were taken over a month after the report had been filed. Learned Counsel on behalf of the husband seeks to invoke the aid of rr. 91 and 92 of Chap. XXVI. He says that the fact that the Registrar has not taken into account the expenses of the husband is an error of law and that therefore the provisions of r. 91 come into operation. He also says that r. 92 comes into operation because the failure of the Registrar to take this element into consideration amounts to a mistake within the meaning of r. 92. I am of opinion that the husband cannot avail himself of the provision of r. 92 as there is a procedure laid down under the Rule which has not been followed by the husband. The Rule says that

"a report after it has become binding will not be re-opened except on the ground of fraud, surprise or mistake or such other ground as may be allowed by the Court on an application to the Court by motion which may be granted on such terms and conditions as to costs and otherwise as to the Court shall seem fit."

Now there is no motion before me at all to vary the report. As regards the application of r. 91 I am of opinion that there has been no error of law on the part of the Registrar. It is true that alimony *pendente lite* should be calculated on the net income of the husband. This is provided in s. 36, Divorce Act. The interpretation put upon the word "net" by the learned Counsel for the husband is, in my opinion, incorrect. Net income merely means income after allowing for the cost of collection, income-tax and similar deductions. Net income does not mean any sum which is left over after the husband has spent all that he considers necessary for his maintenance. In my opinion the contention for

the learned Counsel for the wife is correct. The reports cannot be challenged at this stage. I accordingly confirm both the reports. The learned Registrar has, in making his report regarding the payment of alimony *pendente lite*, made certain suggestions regarding the amount of maintenance which should be paid for the children. As there was no reference to the learned Registrar upon this point that part of the report cannot be confirmed. The result is that the husband is directed to pay alimony *pendente lite* of Rs. 17 to the petitioner, his wife. He will also pay into Court the sum of Rs. 1,800 as costs or furnish security for that sum to the satisfaction of the Registrar within a month. The alimony *pendente lite* will be paid from the date of the application for such alimony. The petitioner will get the costs of this application. Certified for Counsel. These orders are made without prejudice to the right, if any, of the husband to apply to sue or defend *in forma pauperis*.

S.

Order accordingly.

NAGPUR HIGH COURT

Letters Patent Appeal No. 11 of 1937

February 3, 1939

GRILLE ADD NIYOGI, J.J.

MANIKALAL—APPELLANT

versus

BHIKAMCHAND—RESPONDENT

Letters Patent (Nagpur), cl. 10, 27—Judge refusing leave to appeal under cl. 10—If can subsequently re-call his own order and declare case fit for appeal.

Rule 10 of the rules made by the Nagpur High Court under the powers conferred by cl. 27 of the Letters Patent read with sub-s. (1) of s. 106 of the Govt. of India Act, precludes any possibility of an applicant approaching a Judge a second time when his application for a declaration under cl. 10, Letters Patent that the case is a fit one for appeal has been refused. Hence when once a Judge has refused to declare that a case is fit one for appeal under cl. 10, Letters Patent he cannot subsequently revise or review his own order and re-call it and declare that the case is fit one for appeal under cl. 10.

L. P. A. from the appellate decree of Mr. Justice V. Bose, dated November 24, 1936.

Mr. J. R. Mudholkar, for the Appellant.
Messrs. R. N. Padhye, A. R. Kulkarni and
Rai Bahadur M. B. Kinkhede, for the Respondent.

Judgment.—On November 17, 1936, a Judge of this Court heard an appeal out of which this Letters Patent Appeal arises. He delivered judgment on November 24,

1936, and the appellant whose appeal was dismissed asked on the following day for leave to appeal under the Letters Patent. He was heard on November 26, 1936 and in a considered order, which appears on p. 45 of the Paper Book, the Judge refused leave to appeal. On February 20, 1937, the appellant put in a petition of review of the judgment and on the same day put in a petition filed on a two-rupee stamp to the effect that the Court had possibly followed a rule not in a consonance with the practice of the other High Courts in refusing leave to appeal, and praying that if his application for review of the judgment was rejected, at least leave to appeal should be granted. Subsequently on August 3, a further application was put in, asking that the review application on the original judgment should be heard by a Bench or that leave should be granted to the plaintiff to file a Letters Patent Appeal. The application concluded with the prayer that the order refusing leave be reviewed and reconsidered and that the leave should be granted. This was treated as a review application of the order rejecting the application for Letters Patent Appeal (*vide* the Court's order of April 7, 1937). In that order the Judge considered that, as after the passing of his previous order rejecting the application a convention had been arrived at among the Judges of the Court with respect to such applications, he felt justified in granting leave to appeal. But our learned brother had some doubt whether he had power to review his own order. He stated that as at present advised he considered that he had power under the inherent powers of the Court, and in the circumstances granted leave, but with this proviso; that the question whether he had the power to review his own order was to be decided by the Divisional Bench which was to hear the Letters Patent Appeal. The appeal which was *prima facie* considerably beyond time was admitted by a Divisional Bench of this Court as within time subject to objection by the other side.

A preliminary point is raised in objection on behalf of the respondent that no appeal can lie, and it is urged that when once a Judge has refused permission, he is *functus officio* and cannot revise or review his own order, and that as such an order is not one passed under the provisions of the Civil P. O., no provision of that Code, even including s. 151, can be held applicable. The appellant contends that all that the Court was concerned with was under cl. 10 of

the Letters Patent to declare that the case was a fit one for appeal, and that it was immaterial whether it had previously refused to make such a declaration.

In our opinion, the contention of the respondent that no appeal lies must succeed on the very short point that the case is governed by the rules made by this Court under the powers conferred by cl. 27 of the Letters Patent read with sub-s. (1) of s. 106 of the Govt. of India Act. Rule 10 of those rules published in Notification No. 2022-II-21-8-34, dated March 9, 1936, runs as follows:—

"An application for leave to appeal under cl. 10 of the Letters Patent against an appellate judgment of a single Judge of the High Court shall be made in writing or orally to the Judge deciding the appeal immediately after the judgment is delivered. No other application for such leave to appeal shall be entertained."

That rule precludes any possibility of an applicant approaching a Judge a second time when his application for a declaration that the case is a fit one for appeal has been refused. One application had been entertained and refused in a fully considered order which was set out in the ordersheet. No subsequent application under the rules was entertainable. The respondent, when the appellant's petition to have the case declared as one fit for a Letters Patent Appeal was rejected, was in the position that the litigation had concluded in his favour (subject always to the right of review that he had under the Civil P. C. in respect of the judgment itself) and he would be deprived of a valuable right were there any provision, which in our opinion, there is not, for an approach being made to the Court a second time asking that the decision should be reversed. The learned Counsel for the appellant concedes that it would not be possible for a Judge, having declared that the case was one fit for appeal, to re-call that decision and declare that it was not one so fit. We are unable to see that the converse proposition holds and that a Judge having once declared a case not to be a fit one for appeal should be able to re-call that decision. The detriment to the party in whose favour the original decision was given is as great in the one case as it is in the other.

The question of limitation which would naturally arise if the question of the admissibility of the appeal had terminated in the appellant's favour, need not now be considered. The preliminary objection, then, succeeds and the appeal must be dismissed as untenable. Counsel's fee Rs. 30.

S.

*Appeal dismissed.***RANGOON HIGH COURT**

Second Appeal No. 173 of 1939

August 17, 1939

WRIGHT, J.

R. M. S. V. CHETTYAR FIRM—

APPELLANT

versus

MA OHN MYAING—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 47—Decree against person in representative capacity—His objection in his own capacity regarding property against which decree is being executed, if can be raised by separate suit—Second appeal—New point.

Where a decree is passed against a person in his representative capacity and proceedings are taken under it to obtain execution in his representative character, he is a party to the suit in respect to any question which may arise between him and the other parties relating to the execution of the decree. Hence when a decree has been passed against a person in his representative capacity, he should, in execution proceedings, in his own capacity, raise any objection with regard to the property against which the decree is being executed. Where he has failed to do so, he is debarred by s. 47, Civil P. C., from bringing, subsequently a suit for declaration that his share in the property is not affected by the decree.

[Case-law discussed.]

A point of law which depends entirely upon admitted facts can be raised for the first time in second appeal.

S. A. against the decree of the District Court, Pyapon, in Civil Appeal No. 4 of 1939.

Mr. Hay, for the Appellant.

Mr. U Ba Maung, for the Respondent.

Judgment.—In 1928 Daw Mon and her son Maung Sein purchased the property in connection with which the suit arises. Maung Sein's wife was Ma Ohn Myaing. In 1931 this property was mortgaged by Daw Mon, Maung Sein, Ma E Khaing and Ma Shin to R. M. S. V. Chettyar Firm. In 1936 the Chettyar Firm brought a suit on the mortgage (Civil Regular Suit No. 10 of 1936 of the Assistant District Court of Pyapon) against Daw Mon in her personal capacity and as the legal representative of the deceased Ma Shin, against Ma E Khaing in her personal capacity, and against Ma Ohn Myaing as the legal representative of Maung Sein, deceased. A decree was obtained and in September 1938 the property was brought to sale and was purchased by the decree-holder Chettyar. At no time, either during the suit, or during the execution proceedings, did Ma Ohn Myaing put forward any claim in respect of this property. In October 1938 Ma Ohn Myaing filed the suit out of which this appeal arises, against R. M. S. V. Chettyar Firm and

others, seeking a declaration that she was entitled to a quarter share in this property and that her share was not affected by the mortgage decree. The defence was taken that the suit was barred by *res judicata* by reason of Civil Regular No. 10 of 1936, but the learned Judge of the Sub-Divisional Court held that the suit was not so barred and the learned District Judge on first appeal came to the same decision.

The sole point taken before me on behalf of the appellant is that this suit is barred by reason of s. 47, Civil P. C. It is suggested that this is a new point which was not taken in the Courts below. I am not certain that this is so in view of the terms of para. 10 of the written statement; but, even if it is a new point, it is a point of law which depends entirely upon admitted facts and there is no objection to it being raised for the first time, if indeed it is being raised for the first time, in this Court. The relevant portion of s. 47, Civil P. C., reads as follows:

"All questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit".

Their Lordships of the Privy Council in *Chowdry Wahed Ali v. Jumae* (1) have held that where a decree is against a person in a representative capacity and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. In *Kali Charan v. Jewat Dube* (2) it was held that when a judgment-debtor dies after the passing of the decree and his legal representatives are brought on the record, any questions which they may raise as to the property, which they say does not belong to the assets in their hands, and as such is not being capable of being taken in execution, are questions which must be decided under s. 244, Civil P. C., (now s. 47) and must be determined in the execution case, and not in a separate suit. It is clear therefore that Ma Ohn Myaing, although she was only joined to the suit as the legal representative of Maung Sein, was a party to the suit within the meaning of s. 47, Civil P. C.

It has been suggested on behalf of the respondent that entirely different considera-

tions arise in a mortgage suit. It is argued that it would not have been open to Ma Ohn Myaing to put forward her own title to contest a decree being passed on the mortgage because it was a title paramount to that of the mortgagor, and my attention has been directed to the case in *Viswathan Chettyar v. Ma Aye* (3). It was held in that case that in a suit to enforce a mortgage, persons claiming under a title adverse to that of both the mortgagor and mortgagee are not proper parties and the claims of such persons cannot be adjudicated upon in the mortgage suit. This ruling is therefore an authority for U Ba Maung's contention that it was not open to Ma Ohn Myaing to raise this point in the suit; but it does not lend any support to the second part of his contention, that such a claim could not have been raised after the decree had been passed and in execution proceedings under s. 47, Civil P. C. In *Kurivali v. Mayan* (4), which was a mortgage suit, it was held:

"The question whether the property mentioned in the decree was available for execution is such a question, and it arose between the decree-holders and this plaintiff, who had been made a party to the decree as the judgment-debtor's representative".

On such grounds it was held that a separate suit was not maintainable in view of s. 244, Civil P. C., which is now equivalent to s. 47. The case which I have just referred to was approved of by their Lordships of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (5). In that case it was held that a question of this kind must be determined in the execution proceedings and not by a separate suit. Learned Counsel on behalf of the respondent has drawn my attention to various authorities, which he says, lend support to his contention that s. 47, Civil P. C., has no application in this case and that what his client is really seeking to attack is the decree, and that the matter is not one relating to the discharge and execution of the mortgage decree which has been passed. The first case is *Muthappa Chetty v. Pallathappa Chetty* (6). In that case it was held that it was not necessary for the holder of a mortgage decree to apply for the attachment and sale of the mortgaged property and if he unnecessarily applied for attachment, which was granted, a claim to the property could not be brought under s. 278,

(3) 4 R 214; 98 Ind. Cas. 11; A I R 1926 Rang. 208.

(4) 7 M 255.

(5) 19 O 683; 19 I A 166; 6 Sar. 209 (P O).

(6) (1900-02) 2 L B R 188.

(1) 11 Beng. L R 149; 19 W R 87.

(2) 28 A 51; A W N 1905, 180.

Civil P. O. It is suggested that this ruling tends to show that the ordinary rules of execution, including s. 47, do not apply where a mortgage decree is being executed, but I do not think that this particular ruling is authority for anything beyond the single point that it is unnecessary, and in fact improper, to attach property which is being sold in pursuance of a preliminary mortgage decree. *Tripathi Prakash Nandy v. Biseswar Lal* (7), is another case cited on behalf of the respondent. In that case, which was a mortgage case, it was held that while the decree stood the judgment-debtors, who were parties to the decree, could not challenge its validity in execution proceedings, either on the question as to the security that was to be sold or on the question of the saleability of that security. The decision in this case appears to have turned on the principle that the person, against whom a decree has been passed, is not entitled to question the correctness of that decree in execution proceedings. That is an entirely different point from the one which arises before me. The point with which I am concerned is whether, when a decree has been passed against a person in his representative capacity, he should, in execution proceedings, in his own capacity, raise any objection with regard to the property against which the decree is being executed.

Various other cases were cited before me with regard to removal of attachment, but I think that all these cases can be easily distinguished from the case with which I am now dealing where no question of attachment arises at all. For the reasons which I have given, I am of the opinion that Ma Ohn Myaing, the plaintiff, was bound to raise her claim with regard to this property in the execution proceedings in view of s. 47, Civil P. O., and that, as she has failed to do so, she is debarred by that section from bringing the present case. I therefore allow this appeal, set aside the judgments and decrees of both the lower Courts, and in place thereof direct that the plaintiff's suit be dismissed with costs throughout. Advocate's fee four gold mohurs in this Court.

D.

Appeal allowed.

(7) 55 O.L.J. 114; 138 Ind. Cas. 380; 4 A.I.R. 1932 Cal. 517; Ind. Rul. (1932) Cal. 451.

PATNA HIGH COURT

Criminal Revision No. 568 of 1939

January 17, 1940

DHAVLE, J.

BAIJ NATH BHAGAT—PETITIONER

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 471—Date of decree in certified copy of decree altered with erroneous belief that decree being time-barred would thus be executable—Execution of such decree sought—Original decree not in fact time-barred—Offence of forgery, if committed—"Fraudulently or dishonestly", meaning of.

It is necessary for the prosecution, when the charge is under s. 471, I. P. O., to show that the accused knew or had reason to believe the document to be forged and used it fraudulently or dishonestly. [p. 257, col. 2]

Meaning of the expression "fraudulently or dishonestly" discussed.

Where the execution is sought on the basis of a copy of the decree in which the dates were altered under the impression that the decree was time-barred, a sufficient intent to defraud is involved in the advantage directly aimed at by the petitioner on the basis of the altered dates, and it is immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred. A fraud, it is clear, is attempted upon the Court and in such a case it is not necessary for the prosecution to go further and establish an intent to cause loss or risk of loss. But even if the contrary were to be held, the definition of injury in s. 44 of I. P. O., is very wide, and the threat of a decree that could not be executed by any competent authority is a threat of harm or injury within the meaning of the Code. [p. 259, col. 2; p. 262, col. 1.]

[English and Indian case-law discussed.]

Or. R. against the order of the Sub-Divisional Magistrate of Araria, dated July 12, 1939.

Mr. P. C. Manuk and Mrs. Dharmashilla Lall, for the Petitioner.

The Assistant Govt. Advocate, for the Crown.

Order.—The petitioner has been convicted of the offence of fraudulently or dishonestly using as genuine a certified copy of a decree which he knew or had reason to believe to be a forged document. In 1935 he brought a money suit on a hand-note for Rs. 250. The suit was decreed on July 4, 1935, and the decree was signed on the 8th of that month. On July 21, 1938, a petition for execution of the decree was filed in the Court of the Munsif by Babu Satnarain Bhagat, Pleader and brother of the petitioner. This petition was accompanied by a certified copy of the decree in which the date of the judgment was palpably altered in two places from July 4 to 24, 1935, and the date of the decree was similarly altered from the 8th to the 28th of that month. On the following day Shamsuddin

Ahmad, the Civil Court *mohurrir* who had received the execution petition, compared the copy of the decree, with the money suit register and discovered that the dates looked suspicious both in the copy and in the money suit register. After consulting his colleagues he brought the matter to the notice of the Munsif, who also examined the entries, and pending the receipt of the original record of the suit from the district headquarters, held an enquiry. It was thus that on July 26, 1938, he questioned the petitioner and was told by him that he had obtained the certified copy of the decree, that in the certified copy the date of disposal of the money suit was copied as July 24, 1935, and that "it was all along as it is now". The Munsif also examined his *mohurrirs*, the Pleader, the Pleader's clerk Ajab Lal and the writer of the execution petition, Baleshwar Prasad, who happened to be the clerk of another brother of the petitioner, who had also been a member of the Bar but was then a paralytic. As a result of the Munsif's enquiry the petitioner was placed on his trial.

There is no dispute now that the execution petition with the dates as we find them was filed by the petitioner's Pleader on July 21, 1938. There is also no dispute that the dates in the original decree were July 4 and 8, 1935. The copyist who prepared the certified copy filed on behalf of the petitioner was examined as a Court witness and swore that he had copied the dates correctly, and denied that the figure "2" in three places in the dates given in the certified copy (twice before the 4th and once before July 8), was his writing. The evidence of the copyist was supported by the circumstances, for the copy was prepared in August, 1935, when there was no reason whatsoever to tamper with the dates, and towards the end of the month the copy was amended by order of the Court in respect of two items (besides the total) in the statement of costs given, as usual, at the end of the decree.

It seems to have been suggested in the trial Court that Shamsuddin, the Court *mohurrir*, may have altered the dates. The suggestion was repelled by the Magistrate and was, quite rightly, not repeated before the Sessions Judge.

The principal defence was that long before the filing of the execution petition the petitioner had made over the copy of the decree to Ajab Lal in order to put the decree into execution, and that Ajab Lal had allowed the decree to become barred by limitation and

then tried to save it by altering the dates. This was put by way of suggestion only to Ajab Lal in cross-examination, and denied by him. The lower Courts have both accepted Ajab Lal's denial, rejecting the evidence of Baleshwar, who happens to be a cousin of the petitioner and who wrote the execution petition although he was not the *mohurrir* of the Pleader working for the petitioner in the execution proceedings, that he had written the petition at the instance of Ajab Lal. No evidence was produced on behalf of the petitioner, nor anything of importance elicited from such friendly prosecution witnesses as the petitioners' brother and cousin in support of the suggestion put to Ajab Lal.

It was also urged that the petitioner could not possibly have had any motive for altering the dates in the certified copy as the three years' limitation for execution ran from the date of amendment and had therefore not yet expired. But the dates were in fact altered, and altered so palpably that, as the learned Sessions Judge had remarked, "no man with any common sense can fail to realise that there is suspicion in the dates." It is also obvious that whoever brought about the alterations did not realise how limitation was saved by the amendments of August 30, 1935.

Learned Counsel for the petitioner has contended that the fraudulent user of the forged copy of the decree has not been conclusively brought home to the petitioner, that the lower Appellate Court has acted on inadmissible evidence, and that the decree not being really time-barred, the alterations were immaterial and did not constitute forgery as they did not make the document "more efficacious".

Now, it is necessary for the prosecution when the charge is under s. 471 to show that the accused knew or had reason to believe the document to be forged and used it fraudulently or dishonestly. The execution petition of July 21, 1938, was signed by the petitioner himself in the three usual places. It gave July 24, 1935 as the date of the decree, and the Courts below had before them the palpably altered dates in the copy of the decree filed with it besides the statement, Ex. 12 made by the petitioner to the Munsif on July 26, 1938. The petitioner did not on that occasion suggest anything about Ajab Lal having received the copy of the decree long before and having allowed the decree to become time-barred; but said, on the contrary, that the date "July 24, 1935" in the copy "was

all along as it is now." Learned Counsel has endeavoured to meet the comment of the lower Appellate Court on this failure of the petitioner to state such an important fact on the earliest occasion by urging that the petitioner was not then on his defence. I am not impressed by this, because if the story about Ajab Lal had been true, there was no reason why the petitioner should not only have kept it back at the time—unlike Baleshwar, Ajab Lal is not even related to the petitioner—but should also have stated that he himself had obtained the certified copy and that the date of disposal of the money suit shown in it had all along been July 24, 1935. Mr. Manuk has also referred to a suggestion made by the prosecution in the cross-examination of Baleshwar after the witness had gone the length of saying that he did not recognise the handwriting of the petitioner's signatures on the execution petition. This suggestion was that the petitioner had given the decree to Baleshwar, that Baleshwar found that it was time-barred after showing it to the Pleader Satnarain Bhagat, that Baleshwar then asked Ajab Lal to write the execution petition, that Ajab Lal refused and that Baleshwar then wrote the petition, asking Ajab Lal only to sign as scribe. The contention is that this completely exonerate the petitioner. But it is nobody's case that that is what actually took place, and the prosecution seems merely to have thrown out a not very fully thought out suggestion to make out that the witness was telling very much less than he knew about the affair. Baleshwar himself denied the suggestion. It has also been suggested by learned Counsel that the petitioner may not have noticed the alterations in the dates in the certified copy, but this suggestion is entirely irreconcilable with the petitioner's statement to the Munsif, the whole of which is in evidence.

As to inadmissible evidence, the contention on behalf of the petitioner is that what Satnarain Bhagat told Shamsuddin on the evening of July 23, in the absence of the petitioner is no evidence against the petitioner. According to Shamsuddin, Satnarain told him that the decree (that is to say, the certified copy) had been shown to him by the petitioner, that Satnarain had pointed out that it was time-barred, and that Baleshwar had taken it away. The trial Court, as a matter of fact, was not inclined to believe this incident as

given by Shamsuddin. The lower Appellate Court, on the other hand, found nothing improbable in it and preferred to believe the *mohurrir* rather than the Pleader. The matter was reported to the Munsif on the next working day, namely, July 25, and if the *mohurrir* did not go up to the Munsif at once, the learned Sessions Judge thinks it not unnatural for Shamsuddin to have displayed a slight amount of sympathy to the Pleader who had been at school with him. The learned Sessions Judge certainly considers the incident as an important piece of evidence, but it is by no means clear that he uses it as evidence against the petitioner. It was certainly evidence against the Pleader who, when cross-examined by the prosecution with the leave of the Court, went so far as to say that he did not remember if he filed the execution petition on the instructions of the petitioner, adding that he had authorised him to file it. The Pleader, who occupied a dual position in the matter because he was the petitioner's brother as well, has made himself thoroughly unreliable as a witness, and the conclusion that the petitioner knew the certified copy to be forged was arrived at by the trial Court irrespective of this incident between Shamsuddin and the Pleader. Indeed, in my opinion, the petitioner's statement to the Munsif on the earliest occasion makes it impossible not only to entertain seriously his later suggestion in cross-examination that Ajab Lal had allowed the decree to be time-barred and may, therefore, have made the alterations, but also to doubt that the petitioner was aware of the alterations in the dates.

Coming now to the last argument on behalf of the petitioner, learned Counsel has cited *Apari Charan Ray v. Emperor*, 126 Ind. Cas. 862 (1) and contended that as by reason of the amendment the decree was not in fact time-barred, this was not a case of forgery since the offence requires a possibility of some person being defrauded by it, that is to say, being not only deceived but injured by the forgery. The case cited was one in which a plaint was filed on behalf of a lady by her husband, and what he described as the thumb-impression of his wife was shown not to be her thumb-impression at all. It was a suit for rent, and the defendant was liable for it and no damage was caused to him. As to the lady, she had given a

(1) 126 Ind. Cas. 862; A.I.R 1930 Pat. 271; 31 Cr. L.J. 1126; Ind. Rul. (1930) Pat. 654; (1930) Cr. Cas. 458.

general permission to her husband to file papers in Court on her behalf, and had given him authority to sign on her behalf and file papers in Court. The plaint being filed in her interest, and as she said, under her authority, there was no fraud on her. It is true that the plaint was not really signed by her, but this was found to be only a defect in procedure which was curable. *Ross, J.* who decided *Aparti's case* (1) referred to the similar cases of *Ramsarup v. Emperor*, 43 Ind. Cas. 828 (2) and *Reg. v. Bhavani Shankar* (3); in the latter of which reference was made to the view of *Oresswell, J.* in *Reg. v. Marcus* (4) about the possibility of some person being defrauded—that is to say, not only deceived but injured—by the forgery being essential in point of law to constitute an intent to defraud. But, as *Oresswell, J.* himself pointed out in *Reg. v. Nash* (5) the case of *Reg. v. Marcus* (4) was decided before 14 and 15 Vict. C 100, which made it unnecessary to allege the intent of the defendant to defraud any particular person, while the three counts in the indictment of *Marcus* mentioned the intent to defraud the London and Croydon Railway Company and two specific individuals. *Maule, J.* in *Nash's case* (5) pointed out that in order to convict a person of an intent to defraud, it is not necessary that any person should be in a situation to be defrauded. As the learned Judge had observed during the arguments, a man may have an intent to defraud and yet there may not be any person who could be defrauded by his act;

"Where a person has no account at his Banker's but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case although no person could be defrauded."

It would thus seem somewhat doubtful whether in England it is still regarded as essential indictments for forgery that there should be a possibility of some person being injured in consequence of the forgery (see foot-note (o) at p. 587 of *Halsbury's Laws of England*, Volume 9; Second Edition). One well-known writer deduces the English Law from *Marcus's* and other cases to be that

"if the person whose signature has been forged as the drawer of a cheque has ceased to have any account at the particular bank, this will not deprive the forgery of its full criminality. But the fraudulent intent necessary will not exist unless

(2) 43 Ind. Cas. 828; 19 Cr. L. J. 236; A.I.R. 1918 Pat. 640.

(3) 11 B.H.O.R. 3.

(4) (1846) 2 Car. & K. 356.

(5) (1852) 2 Den. C.C. 493; 21 L.J.M.C. 147; 16 Jur. 553.

the offender had reasonable grounds for supposing (however wrongly) that someone or other might possibly be defrauded."

(*Kenny's Outlines of Criminal*, 11th Edition, p. 262). Be that as it may, it would seem to be clear under the English Law that a forgery is nonetheless so because it was committed in order to support a title which was good without it, for it is settled that a man may be fully guilty of forgery although the money which he aimed at getting by the forgery was only a sum that was legally due to him. Coming to Indian Law, *Aparti Charan Ray's* was a case in which a claim was made which only suffered from an informality curable under our Civil P. O., while in the present case execution was sought on the basis of a copy of the decree in which the dates were altered under the impression that the decree was time-barred. Section 471, I. P. O. contains the expressions "fraudulently or dishonestly" terms which are defined in ss. 24 and 25, the latter being equivalent to "with intent to defraud"—and "a forged document". Our definition of forgery is to be gathered from ss. 463 and 464, and may, for present purposes, be taken to be that a person commits forgery who, with intent to support any claim or title, alters a document in any material part without lawful authority, dishonestly or fraudulently. In construing the expression "dishonestly or fraudulently," which thus occurs in the definition, it is important to bear in mind one of the illustrations under s. 464 which has a bearing on the question how far loss or risk of loss is an element in fraud as contemplated in the Code. This illustration is

"(k) A without B's authority writes a letter and signs it in B's name certifying to A's character, intending thereby to obtain employment under Z. A has committed forgery inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an express or implied contract for service."

Reference was made to this illustration in *Queen-Empress v. Vithal Narayan* (6) where *Le Blanc, J.'s* description of fraud in *Haycraft v. Creasy* (7), was adopted:

"By fraud I understand an intention to deceive; whether it be from any expectation of advantage to the party himself, or from ill-will towards the other is immaterial."

The meaning of the word 'fraudulently' in our Code has been the subject of many decisions, which are not all easy to reconcile, especially in connection with the cognate offence of falsification of accounts under s. 477-A, created in 1895 and em-

(6) 13 B.515n.

(7) (1801) 2 East 92; 6 R.R. 380; 102 E.R. 303.

bodying as an essential ingredient "willfully and with intent to defraud". In *Queen-Empress v. Abbas Ali* (8) a Full Bench of the Calcutta High Court held that deprivation, actual or intended, is not a necessary ingredient of the intent to defraud referentially imported into s. 464 and s. 471. Maclean, O. J. who delivered the judgment of the Full Bench added "though we are in no way bound by the decisions of the English Courts, still we are fortified in the view we take of the expression" 'intent to defraud' by the decision in *Reg. v. Toshack* (9), the forgery in the case before the Full Bench relating to a certificate qualifying for admission to a certain professional examination. In *Koimiraaju Venkatarayadu v. Emperor* (10) a Full Bench of the Madras High Court followed the decision in *Abbas Ali's* case; (8) and White, C. J. after referring to Sir James Fitz-James Stephen's well-known observations about 'fraud' or 'intent to defraud' or 'fraudulently' in his history of the Criminal Law of England (Vol. 2, p. 121), pointed out that under s. 24 of the Code it is not necessary for a thing to be done 'dishonestly' that there should be an intention to cause both wrongful gain and wrongful loss. The learned Chief Justice was apparently inclined to the view, on the analogy of that section, that :

"either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit is an intent to defraud."

though he did not consider it necessary to decide whether an intention to secure a benefit or advantage by means of the deceit by itself constitutes an intention to defraud, because the accused who had submitted to the University a certificate qualifying for admission to an examination with the intention that the University should admit him to the examination, was taken to have done so with the intention of causing loss or detriment to the University. This was in fact the point on which two of the learned Judges differed from the majority of the Full Bench, and Subrahmaniam Ayyar, J. distinguished *Reg. v. Toshack* (9) and illustration (K) to s. 464. In *Robinson v. Emperor*, 63 Ind. Cas. 617 (11) a chemist had been induced to supply twelve tubes of morphia on the basis of three prescriptions which were for one tube each, but in which the words

'one tube' had been altered to 'four tubes'. Shadi Lal, O. J. and Moti Sagar, J. held that the alterations were fraudulent. They referred to Sir James Fitz-James Stephen's observation :

"A practically conclusive test as to the fraudulent character of a deception for criminal purpose is this:— Did the author of the deceit derive any advantage from it which he could not have had, if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to someone else, and if so there was fraud."

The deception practised upon the chemist was taken by the learned Judges to have deprived him of his right to refuse to sell morphia in quantities exceeding those specified in the genuine prescriptions and thus to have supplied the element of loss or the risk of loss essential to a forgery. The loss to the chemist is comparable to the loss to Z in illustration (K) or to the loss to the Munsif in having to deal with the execution petition of July 21, 1938 in this case. It was also urged in *Robinson's* case (11) that fraud was unnecessary. The learned Judges overruled this contention and referred to Norris, J.'s observation in *Empress v. Dhunum Kazez* (12):

"Let a person's title to property be ever so good, yet if in the course of an action brought against him to gain possession of the property he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document..... I am clearly of opinion that he uses it fraudulently."

In our own Court the meaning of "intent to defraud" was considered in *Sukhamoy Maitra v. Emperor* (13) a case under s. 477-A where Rowland, J. said that he did not find that any of the later cases had gone so far as Norris, J. in *Dhunum Kazez's* case (12). The attention of the learned Judge does not seem to have been drawn to *Robinson's* case (11) nor to the decision in *In re Shivananda Mudali*, 96 Ind. Cas. 850 (14), in which the question arose whether the alteration of a plot number in a partition deed could amount to forgery if the accused had an independent title to the new plot. Devadoss, J. said

"If a person in order to resist a false claim for money makes a false receipt, does he or does he not commit forgery? Even if the Court holds that the claim is false, that would not make the false receipt any the less a forgery. Whether a document is a false document or not does not depend upon the adjudication of the Court on the claim or title

(6) 25 C 512; 1 O W N 255 (F B).

(9) (1849) 4 Cox O O 33.

(10) 28 M 90; 1 Weir 538 (F B).

(11) 63 Ind. Cas. 617; 22 Cr. L J 681.

(12) 9 O 53; 11 O L R 169; 7 Ind. Jur. 196.

(13) 16 Pat. 688; A I R 1938 Pat. 165; 10 R P 445; 4 B R 337; 39 Cr. L J 374; 19 P L T 297.

(14) 96 Ind. Cas. 850; 27 Cr. L J 994; A I R 1926 Mad. 1072.

which is intended to be propped up by the false document."

Norris, J.'s observation was quoted. The alteration was held to be a forgery on the ground (to quote Waller, J.) that "if a man intends to gain an unfair advantage by deceitful means and uses a false document for that purpose, his conduct is fraudulent", the intention being taken to be as Devadoss, J. put it—to defraud the Court or the party against whom the document is used. In the Bombay High Court the point was considered in *Emperor v. Balkrishna Waman* (15) where Batchelor, J. considered *Haycraft v. Creasy* (7) and the observations of Sir James Fitz-James Stephen as applied in India, and came to the conclusion that the word 'fraud' is used in our Penal Code in its ordinary and popular acceptance. In a recent Allahabad decision, *Emperor v. Raghu Ram* (16) a case under s. 477-A, much the same view was taken, the learned Judges observing that where there is an intention to obtain an advantage by deceit, there is fraud, and if a document is fabricated with such intent, it is forgery. Page, J. in *Emperor v. Mohit Kumar Mukherjee* (17) reviewed previous decisions on the questions of fraud under the I. P. C. and referred not only to *Haycraft v. Creasy* (7) and other old English cases but also to *Rex v. Newton and Bannet* (18) in which the Court of Criminal Appeal followed Buckley, J.'s definition in *In re London and Globe Finance Corporation Ltd.* (19):

"To defraud is to deprive by deceit; it is, by deceit to induce a man to act to his injury. (More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action)."

The learned Judge's conclusion was:

"That an offence is committed under s. 471 whenever a document known or believed by the accused to have been forged is used as genuine with the intention that some person thereby should be deceived, and by means of such deception that either an advantage should accrue to the person so using the document, or injury should befall some other person or persons."

The indictments for common law forgery in the case of Toshack, who had fabricated a certificate qualifying for examination

(15) 37 B.666; 20 Ind. Cas. 998; 15 Bom. L. R. 708; 14 Cr. L. J. 518.

(16) 55 A. 783; 145 Ind. Cas. 749; A. I. R. 1933 All. 525; L. R. 14 A. 241 Cr.; (1933) Cr. Cas. 830; 34 Cr. L. J. 1056; 6 R. A. 158; (1933) A. L. J. 1372.

(17) 52 C. 881; 91 Ind. Cas. 993; 27 Cr. L. J. 177; A. I. R. 1926 Cal. 89.

(18) (1914) 23 Cox 609; 109 L. T. 747.

(19) (1903) 1 Ch. 728; 72 L. J. Ch. 368; 51 W. R. 651; 88 L. T. 194; 19 T. L. R. 314, (375); 10 Manson 198.

as a master mariner, alleged an intent "to deceive, injure, prejudice and defraud" the four examiners and the Corporation of Trinity House which used to issue certificates to act as masters upon such examination; and when the point was referred to the Court of Criminal Appeal, the counts in question were held to be good and the conviction right. In such cases as those from *Queen-Empress v. Abbas Ali* (8) and *Katamaraju Venkatarayadu v. Emperor* (10) (already referred to), where the question was whether an intent to defraud within our Penal Code was brought home to the accused who had submitted a false certificate in order to obtain admission to an examination, there was a clear primary intention of deceiving and by deceit of inducing a course of action on the part of the person deceived and obtaining an advantage from him. Except so far as loss or detriment is almost necessarily involved when an advantage is thus obtained, any intention of causing loss was a matter of remote inference. Illustration (K) to s. 164 seems to contemplate not the loss that may possibly result to Z from the contract of service which he may be induced by the forgery and deceit to offer to A but rather the advantage of employment primarily aimed at by A. In *Robinson's case* (11) the chemist must have been paid whatever he would have charged any ordinary customer for the morphia supplied on the forged prescriptions. He had of course a right to refuse to sell except on a genuine prescription, but he was perhaps not bound to sell even on such prescriptions. The loss or risk of loss from the violation of his right to refuse to sell is far less clear and much more indirect than the advantage that Robinson obtained by the forgery and deceit. The petitioner before me had the forged copy of the decree filed in order to obtain execution as upon a decree of July 24, 1935. There was no such decree in existence, and the fact that he sought to gain this advantage is not in the least affected by the circumstance that if he had been correctly advised, he would have known that the decree of July 4, 1935, was saved from the time bar by the amendment of August 1935. In my opinion a sufficient intent to defraud is involved in the advantage directly aimed at by the petitioner on the basis of the altered dates; and it is immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred.

A fraud, it is clear, was attempted upon the Court. I am not prepared to hold that in such a case it is necessary for the prosecution to go further and establish an intent to cause loss or risk of loss. But even if the contrary were to be held, the definition of injury in s. 44 of our Penal Code is very wide, and *Priyanath Gupta v. Lal Jhi Chowkidar* (20) shows how the threat of a decree that could not be executed by any competent authority in this case, the decree of July 24, 1935—is a threat of harm or injury within the meaning of the Code. Mr. Manuk also referred to the observation of Bramwell, B. in *Reg. v. John Smith* (21):

"Forgery supposes the possibility of a genuine document, and that the false document is not as good as the genuine document and that the one is not as efficacious for all purposes as the other".

That observation referred to some printed wrappers which were found to be as good for describing the powers for which they were to be used as other wrappers which they imitated were for describing their own contents. The mere printing of the wrappers was held not to constitute forgery, but this seems to have no application at all to the facts of the present case. A genuine copy of the decree would, it is true, have entitled the petitioner to execution of a decree passed on July 4, 1935, and amended on August 30, 1935, but the copy filed by the petitioner sought execution of a decree passed on July 24, 1935. The unauthorized alterations in the dates actually made the copy of the decree "more efficacious" than the genuine decree in the sense that the petitioner took the real decree to be time-barred and attempted to bring into existence a decree of a later date, not that this is essential to a forgery. In my opinion, the fact that the petitioner held a decree which was capable of execution on July 21, 1935, does not prevent the alterations in the certified copy filed on behalf of the petitioner from being forgeries, or the petitioner's user of it from being fraudulent.

The petitioner has been rightly convicted. The application in revision is dismissed.

D.

Application dismissed.

(20) 27 O W N 479; 72 Ind. Cas. 508; 37 O L J 526; 24 Cr. L J 396; A I R 1923 Cal. 550.

(21) (1858) 8 Cox O L O 32.

SIND JUDICIAL COMMISSIONER'S COURT

Judicial Miscellaneous No. 289 of 1939

November 6, 1939

WESTON, J.

LOUIS DREYFUS & Co.—RESPONDENT

No. 1

versus

HEMANDAS HOTOHAND—RESPONDENT

No. 2

Arbitration—Term in agreement that after certain period one party may nominate arbitrator on behalf of other party—Such period, when commences—Letter of appointment written before expiry of such period to be sent afterwards—Whether amounts to appointment—Appointment of arbitrator by one party on behalf of other party according to agreement—Communication to arbitrator but not to other party—Appointment, if incomplete—No disagreement between arbitrators—Omission to appoint umpire, whether legal misconduct vitiating award—Umpire, meaning of.

The period of days after which one party in accordance with the terms of the agreement may nominate an arbitrator on behalf of the other must be so many clear days commencing from the midnight after the receipt of the letter or notice requiring the other party to nominate his arbitrator. 6 Ind. Cas. 886 (1), relied on. [p. 263, col. 1.]

Where in anticipation of nomination of such an arbitrator a party has written letter of appointment before the expiry of the period stated in the agreement, to be sent when the necessity arose, the appointment cannot be said to be complete when the letter was written provided the formal communication to the arbitrator or to other party is not made before the expiry of the period. [p. 264, col. 1.]

Where a clause in the agreement states that if any party shall refuse or neglect to appoint an arbitrator within seven days after the one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then, upon such failure, the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment, and where such appointment is made and communicated to the arbitrator, it cannot be said to be inoperative or incomplete until other party has received notice of it. [p. 264, col. 2.]

In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, no disagreement between the arbitrators occurred, the omission of the arbitrators to provide for a contingency, does not vitiate their proceedings. The omission to make the appointment is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made. 1 Ind. Cas. 391 (4), not followed. 16 Ind. Cas. 153 (5), relied on. *Bright v. Durnell* (2), referred to. *Bates v. Townley* (3), distinguished [p. 265, col. 2.]

The ordinary meaning of the word "umpire" is a person who is to decide upon disagreement. [p. 264, col. 2.]

Mr. Hakumatrai M. Eidnani, for Respondent—No. 1.

Mr. *Kewalram Jethanand*, for Respondent No. 2.

Order.—These are objections to an award. The objector, respondent No. 2, was the guarantee broker of Messrs. Louis Dreyfus & Co., and had entered into a guarantee agreement with that firm on February 4, 1939. The agreement covered contracts by buyers of sugar in Karachi from Messrs. Louis Dreyfus & Co. and one of these buyers was a firm, Messrs. Dwarkadas Assandas of Karachi who entered into a number of contracts bearing Nos. 3, 7, 9, 23 and 29 between the dates February 4 and May 19, 1939. Respondent No. 2 had signed all these contracts as guarantor and there is no dispute that these contracts were within the terms of the guarantee bond executed by him on the date of the first of these five contracts. Some time before August 14, 1939, Messrs. Dwarkadas Assandas were adjudicated insolvents and although in the objections filed it was stated that Messrs. Dwarkadas Assandas have applied to set aside the order of adjudication, it is now admitted by the learned Advocate for respondent No. 2 that they have withdrawn any such application. On August 14, 1939, Messrs. Louis Dreyfus & Co., sent a letter to respondent No. 2 stating that as Messrs. Dwarkadas Assandas have been adjudicated insolvents they have, as respondent No. 2 is aware, cancelled their contracts outstanding with him for July, August and September shipments and that in respect of those contracts a sum of Rs. 10,750 has become due. In addition, they state that a sum of Rs. 10,000 odd is due in respect of 275 tons of sugar stored on behalf of Messrs. Dwarkadas Assandas under an agreement dated July 25, 1939 and also a sum of Rs. 1,160 on a demand promissory note. They therefore call upon respondent No. 2 under cl. 5 of the guarantee brokerage agreement of February 4, to pay the sum of Rs. 21,991-8-3 being loss sustained by them in accordance with the bill enclosed. The letter goes on to state that should respondent No. 2 dispute the right of Messrs. Louis Dreyfus & Co. to claim the sum stated from respondent No. 2 he should note that they will refer the matter to arbitration and they state that they hereby appoint as their arbitrator Mr. J. Humphrey and they call upon respondent No. 2 to nominate his arbitrator within seven days in accordance with the arbitration clause in the guarantee brokerage agreement. The postal acknowledgment

of this letter which has been produced shews that it was received by respondent No. 2 on August 16, 1939 and this fact has not been disputed. It is also not disputed that respondent No. 2 gave no reply to this letter and did not nominate an arbitrator on his behalf, as called upon by the letter to do and in accordance with the arbitration clause, cl. 12 of the guarantee agreement.

On August 23, the manager of Messrs. Louis Dreyfus & Co. signed a letter addressed to respondent No. 2 stating that as he has neither paid the sum demanded nor appointed his arbitrator they, in accordance with cl. 12 of the agreement, nominate Mr. Fairclough as arbitrator on behalf of respondent No. 2. On August 24, according to the evidence of the manager of Messrs. Louis Dreyfus & Co. this letter was despatched and on the same day the reference was communicated to the two arbitrators Messrs. Humphrey and Fairclough. The arbitrators on August 24, issued notices to both respondents and the postal acknowledgment shews that the notice to respondent No. 2 was received by him on August 25. The date fixed in the notice for hearing was August 31, and on that day the arbitrators made their award. Respondent 2 did not appear before them. By the award the arbitrators awarded a sum of Rs. 21,991-8-3 to be paid by respondent No. 2 to Messrs. Louis Dreyfus & Co., and this sum is identical with that claimed by Messrs. Louis Dreyfus & Co. in their letter of August 14.

Respondent No. 2 has raised a number of objections. The first is that the appointment by Messrs. Louis Dreyfus & Co. of Mr. Fairclough as arbitrator on behalf of respondent No. 2 was bad as it was made before the expiry of seven days from the receipt of the notice in the letter of August 14, demanding arbitration. Reliance is placed upon *Louis Dreyfus & Co. v. Meharchand Patehchand* (1) where it was held that the period of days after which one party in accordance with the terms of the agreement may nominate an arbitrator on behalf of the other must be so many clear days commencing from the midnight after the receipt of the letter or notice requiring the other party to nominate his arbitrator. The letter of August 14, as has already been stated was received by respondent No. 2 on August 16, and, following the ruling above quoted, the nomination by Messrs. Louis

Dreyfus & Co. of an arbitrator on behalf of respondent No. 2 could not be made until August 24, as the period in cl. 12 of the guarantee agreement is seven days. But we have the sworn statement of the manager of Messrs. Louis Dreyfus & Co. that the letter to respondent No. 2 informing him of the appointment of Mr. Fairclough although written on the 23rd was not despatched until the 24th and also that the appointment of Mr. Fairclough was not communicated to him until the 24th. Although the learned Advocate for respondent No. 2 has admitted that he is in possession of the covers under which communications to his client were sent, respondent No. 2 has not gone into the witness-box to produce the cover of the letter said to have been despatched on August 24. I can see no reason why the statements of Mr. Winther, Manager of Messrs. Louis Dreyfus & Co., should not be accepted.

It is suggested that the appointment was complete on the writing of the letter and therefore should be taken to have been made on August 23. I do not think that this is the correct view. It was open to Messrs. Louis Dreyfus & Co., in anticipation of the failure by respondent No. 2 to appoint an arbitrator, to consider what steps they should take in this contingency and to prepare for this contingency. And provided the former appointment by communication to Mr. Fairclough or to respondent No. 2 was not made before August 24, I can see no reason to hold that the appointment must be deemed to come into effect when Messrs. Louis Dreyfus & Co., anticipating the necessity of such an appointment wrote letters to be sent when the necessity actually arose. I hold that the appointment was made not on the 23rd but on August 24, and the objection that it was made within the period of seven days from receipt of the letter of August 14, therefore is without substance.

The next objection is that the two arbitrators assumed jurisdiction before the completion of the appointment of Mr. Fairclough and in support of this objection the learned Advocate for respondent No. 2 adopts the position that the appointment of Mr. Fairclough did not come into effect until August 25, when his client received the letter informing him of this appointment. Reliance is placed upon almost identical passages in Russel on Arbitration and Redman on Arbitration in which referring to the case of two arbitrators,

one appointed by each party, it is said that the appointment by a party of his own arbitrator does not become effective until it is communicated to the other party. I do not think these remarks have any bearing upon the position where the party has already appointed his own arbitrator and is making the appointment of an arbitrator on behalf of the other side in accordance with the terms in the submission. Paragraph 12 of the guarantee agreement states that if any party shall refuse or neglect to appoint an arbitrator within seven days after the one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then, upon such failure, the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment. In view of these terms I can see no reason why the appointment of Mr. Fairclough should be deemed to be incomplete or incomplete until respondent No. 2 received notice of it. If once it is conceded that Messrs. Louis Dreyfus & Co. had the right under cl. 12 to appoint Mr. Fairclough then their communication to Mr. Fairclough of his appointment made the appointment effective from the time the communication was made. This objection also is without substance. The next objection relates to the omission by the two arbitrators to appoint an umpire. The portion of cl. 12 of the guarantee agreement dealing with appointment of umpire is as follows:

"The arbitrators shall within three days after their appointment and before entering upon the business of the said reference appoint an umpire in writing to whom the matters in dispute shall be referred. If the arbitrators disagree and if they fail to appoint an umpire within the said period then the Chairman or the acting Chairman for the time being of the Karachi Chamber of Commerce shall appoint the said umpire. The arbitrators and umpire acting under these presents shall have all the powers conferred by the Indian Arbitration Act of 1899 or any statutory modification thereof for the time being in force and these presents shall be deemed to be a submission to arbitration within the provisions of the said Act."

It is plain that the functions of the arbitrators were not solely to appoint an umpire or third arbitrator to whose sole arbitration the matters in dispute should then be referred without the arbitrators having considered them. The words "to whom the matter should then be referred" only mean that the umpire is to be an umpire in the matters which have been referred to the

arbitrators. The ordinary meaning of the word "umpire" is a person who is to decide upon disagreement. There is nothing whatever to support the further suggestion made that the umpire was to be a third arbitrator sitting with and having the same powers as the other arbitrators. It is true that the arbitrators omitted to make an appointment of an umpire as they were required to do within three days by the terms of cl. 12 and in fact they made no appointment at all. It is not very easy to understand what is meant by the words "if the arbitrators disagree and if they fail to appoint an umpire within the said period." For respondent No. 2 it is urged that the disagreement contemplated is disagreement as to the person to be appointed as umpire. For Messrs. Louis Dreyfus & Co, it is urged that the disagreement must be a disagreement on the matters referred for arbitration. The use of the word "and" between the portion dealing with disagreement and that dealing with failure to appoint an umpire does suggest that the two matters are to be considered distinct. If it was only intended to provide for failure to appoint an umpire either by disagreement or by neglect of the arbitrators, then, it would be sufficient to say: "If they fail to appoint an umpire within the said period then, &c," and to omit altogether the words "If the arbitrators disagree, &c."

But even if the contention of respondent No. 2 set out in the above paragraph is accepted, the question remains whether the failure by the arbitrators to appoint an umpire amounts to legal misconduct such as to vitiate the whole award. Reliance has been placed upon two English cases, *Bright v. Durnell* (2) and *Bates v. Townley* (3). The second of these cases does not appear to be in point. It was a case where the reference was to three arbitrators, one chosen by each party, and the third to be chosen by the two so appointed. It was held that as the third arbitrator had not been duly appointed the award was bad. In the first case, *Bright v. Durnell* (2), the two arbitrators did not appoint an umpire as they were required to do by the terms of the submission and the Court held that it had no jurisdiction to compel the arbitrators to make an appointment of an umpire. In a Calcutta case, *Chooni Lal v. Madhoram* (4), it was held relying upon the both *Bright v. Durnell* (2) and *Bates v. Townley* (3) that

where the terms of the reference provided for the appointment of an umpire before the arbitrators entered upon the reference then until the umpire is appointed the reference could not proceed. In this case the reference was made under rules relating to arbitration made by the Bengal Chamber of Commerce, and in a later case, *The Bombay Co., Ltd. v. National Jute Mills Co. Ltd.* (5) it was held that under the same rules of the Bengal Chamber of Commerce although they required an umpire to be nominated before the arbitrators entered upon the reference yet the omission to so nominate an umpire would not be a ground for setting aside the award having regard to a rule which provided that no award should be set aside by reason or on account of any informality, omission or delay or error in the proceedings or any misconduct short of collusion or fraud on the part of the arbitrators. In view of this later case the authority in *Chooni Lal v. Madhoram* (4) must be regarded as considerably weakened.

It is true that the Amending Act of 1934 to the English Arbitration Act lays down that in an arbitration agreement, unless the contrary intention is expressed therein, if reference is to two arbitrators, the two arbitrators shall appoint an umpire immediately after they are themselves appointed. And no doubt a rule requiring the umpire to be appointed before the arbitrators enter upon the reference is a sound rule tending to minimize the possibility of later disagreement as to the person to be appointed as umpire. In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, as in the present case, no disagreement between the arbitrators occurred, it is difficult to see why the omission of the arbitrators to provide for a contingency, which in fact did not arise, should vitiate their proceedings. Even on the interpretation urged by respondent No. 2, I think the direction to appoint an umpire should be regarded as directory and not as mandatory. I hold that in the present case the omission to make the appointment is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made.

(5) 39 O 669; 16 Ind. Cas. 153.

(2) (1836) 4 Dowl. Rep. 756.

(3) (1847) 1 Ex. 572, 19 L J Ex. 396; 74 R R 772.

(4) 36 C 388; 1 Ind. Cas. 391; 13 O W N 297.

The next objection raised is that matters referred to arbitration include certain contracts between Messrs. Louis Dreyfus & Co. and Dwarkadas Assandas which were not within the scope of the guarantee agreement. I am referred to the agreement marked by the arbitrators as document No. 7 dated July 25, 1939, referred to in the letter of August 14, by which Messrs. Louis Dreyfus & Co. agreed to store on behalf of Dwarkadas Assandas under certain conditions a part of the sugar of contract No. 3 which had arrived at Karachi. Although this agreement bears the signature of respondent No. 2 as guaranteeing this agreement it is claimed that as the agreement itself contains no submission clause it was outside the scope of the arbitration. But the original contract made on February 4, 1939 (marked 3), to which the agreement marked 7 refers, expressly provides for warehousing the goods by Messrs. Louis Dreyfus & Co. on the buyer's account and risk. The agreement No. 7 therefore is merely an amplification of the terms of the contract No. 3 to which respondent No. 2 is also guarantor and which admittedly is within the scope of the guarantee agreement. Any dispute or claim under agreement No. 7 is really a dispute or claim under the contract No. 3 and is a matter which under the guarantee agreement was to be referred to arbitration.

Lastly, it is urged that after Dwarkadas Assandas were adjudicated insolvents Messrs. Louis Dreyfus & Co. were bound to call upon respondent No. 2 to fulfil all the contracts of Dwarkadas Assandas and that arbitration could not be held until respondent No. 2 failed to take up those contracts. It has not been suggested that respondent No. 2 upon the claim being made from him by Messrs. Louis Dreyfus & Co. took up this position. On the contrary, it is not disputed that he did nothing at all. If respondent No. 2 wished to claim that he was entitled to take up the contracts, goods of which had not yet arrived, on the due dates, and that the matter could not yet be adjudicated upon by the arbitrators, it was open to him to have claimed this before the arbitrators. Respondent No. 1 in their letter to respondent No. 2 of August 14, stated definitely that they had cancelled the contracts with Dwarkadas Assandas by reason of his insolvency. Any question as to the propriety of this course and the liability of respondent No. 2 under the guarantee were questions for the arbitrators to decide. If respondent No. 2

did not choose to put forward his contentions before the arbitrators he cannot now plead that the award is bad because the arbitrators have not accepted a position which was not placed before them.

All the objections raised in my opinion are without substance and I order the objections to be dismissed. Respondent No. 2 must bear costs of respondents No. 1 in these proceedings.

s.

Objections dismissed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 745
of 1938

January 24, 1940

AGARWALA AND ROWLAND, JJ.

MAKSUDAN LAL SAHU—PLAINTIFF—
APPELLANT

versus

NIRANJAN NATH DAS AND OTHERS—
DEFENDANTS—RESPONDENTS

Chota Nagpur Tenancy Act (VI of 1908), ss 46, 47—Mortgage in violation of s. 46—Validity—Limitation Act (IX of 1908), s. 20 (2)—Receipt of usufruct during possession as trespasser—Whether gives fresh start of limitation—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Plaint—Amendment of at second appeal—Amendment altering nature of suit, cannot be allowed

Where a mortgage has been entered into in violation of s. 46, Chota Nag. Ten. Act it cannot under that section or s. 47 form the basis of a valid decree for sale and the fact that the land subsequent to the mortgage ceases to be *raiya* will not validate a transaction regarding the land which was previously invalid.

The enjoyment of the usufruct of the property by the plaintiff year by year does not give him a fresh start for limitation for a suit to recover the money. 144 Ind. Cas. 439 (1), distinguished, 57 Ind. Cas. 76 (7), *Pichandi v. Kandesami* (8) and *Venkaji Babaji Naik v. Shidremapa Balapa Desai* (9), relied on.

[Case-law referred to.]

The plaintiff cannot be allowed in second appeal to amend his plaint by asking to be treated as a person who has by prescription acquired an absolute title as owner instead of as mortgagee, as originally alleged, with a prayer to be restored to possession of the house, since such an amendment would alter the character of the suit.

A. from a decision of the Additional Judicial Commissioner of Chota Nagpur, dated June 1, 1938.

Mr. K. K. Banarji, for the Appellant.

Messrs. A. C. Sinha and S. C. Chakravarty, for the Respondents.

Rowland, J.—This is an appeal by the plaintiff who brought on April 25, 1936, a suit to recover principal Rs. 250 and

interest Rs. 225 due on a mortgage bond secured on a house situated in cadastral survey plot No. 1055, in Khata No. 32 in village Lohardaga, district Ranchi. The mortgage bond was executed on December 22, 1911, by Sheotahal Ram, ancestor of the defendants Nos. 1 to 9 in favour of Banshi Sahu, the father of defendants Nos. 10 and 11. The mortgagee was put in possession of the property hypothecated of which he was under the document to remain in possession for three years after which the mortgagor was to be entitled to redeem. It was further stipulated that the mortgagee would continue in possession until redemption and in case of dispossession there was a covenant to repay the money with interest at 15 per cent. per annum. The mortgagee assigned his interest by sale-deed dated February 10, 1916 to Mohan Lal, the father of the plaintiff. Thereafter the plaintiff remained in possession of the house until 1930 when the defendants 1st party dispossessed him. The sons of Banshi Sahu have not contested the suit but the other defendants raised various objections to the claim, one was that by oral agreement the plaintiff was allowed to remain in possession and the usufruct of the property was to be set off against both principal and interest as a result of which the debt has been extinguished. This defence was negatived by the Courts. Another defence taken was that the plaintiff was dispossessed in 1917 or 1918 and that the suit was barred by time whether regarded as a mortgage suit or as a suit for recovery of money on the personal covenant to repay. The Courts have found the facts otherwise holding that dispossession of the plaintiff by the defendants took place in 1930 that is just within the period of six years before the institution of the suit. A third objection was that the mortgage was a transaction contrary to s. 46 of the Chota Nag. Ten. Act and as such was void either at the outset or, at any rate, after five years. Therefore it was said that limitation to recover the money ran from either 1914, the date on which the mortgage money was made repayable by the bond or from 1916 if it be assumed that the possession of the plaintiff as mortgagee was valid for five years. Sections 46 and 47 are a bar to the plaintiff obtaining a mortgage decree for sale of the property and the period of six years' limitation calculated either from 1914 or 1916 bars the relief of the money-decree on the basis

of the personal covenant. This defence was accepted by the Courts below who have dismissed the suit, the view taken being that the suit should have been brought within six years from December 22, 1916 and that the plaintiff could not take advantage of his subsequent possession of the property because it was that of a trespasser. The Additional Judicial Commissioner thought that s. 20 (2) of the Lim. Act could not avail the appellant because the receipt by him of the usufruct of the property was not as mortgagee in possession but as a trespasser. It is this finding of the Courts below which is assailed on appeal.

Assuming, it is said, that the plaintiff was a trespasser in possession it is contended that by holding possession for 12 years adversely to the true owner he acquired a title as claimed by him, namely, the status of a lawful mortgagee. In support of the contention reliance is placed on some observations of Macpherson, J. in *Abdul Jabbar Khan v. Gulab Khan* (1). It was there said that the mortgagee begins to prescribe from the date of the mortgage and if he holds adverse possession as such for the statutory period, the *raiyat* can only recover possession by redeeming him. That observation was in the nature of an *obiter dictum*, for in the case before him which was resisted by the defendant on the ground that he had been in possession not as a mortgagee but as a *raiyat* it was held that in fact the defendant had been in adverse possession of an interest as *raiyat*. There are decisions of other High Courts in which a person in possession as a mortgagee under a mortgage inviolate by statute has been held to have prescribed and obtained by lapse of time the limited right of a mortgagee. It was so held in *Sontayana Gopala Dasu v. Inapatalupula Rami* (2) and in *Ramchandra Venkaji Naik v. Kallu Deoji Despande* (3), in a suit to redeem where the defendant held under an invalid mortgage for over 12 years and set up an absolute title it was held that he could prescribe only for the limited interest of a mortgagee in possession. On the other hand, doubt has been expressed in this Court whether such a limited interest as the

(1) 14 P L T 294; 144 Ind. Cas. 439; A I R 1933 Pat. 288; Ind. Rul. (1933) Pat. 236.

(2) 44 M 946; 64 Ind. Cas. 323; (1921) M W N 385; 41 M L J 194; 13 L W 685; A I R 1921 Mad. 410 (2).

(3) 39 B 587; 30 Ind. Cas. 396; 17 Bom. L R 630; A I R 1915 Bom. 131.

relation of mortgagor and mortgagee can be created by prescription. In *Sheikh Bhukhan Mian v. Srimati Radhika Kumari Debi* (4) the question was not expressly decided but both Wort, A. O. J. and Manohar Lal J. inclined to the opinion that this limited interest could not accrue by adverse possession. In *Madhavrao Waman Saundalgekar v. Raghunath Venka'esh Despande* (5) the question arose whether tenants claiming a permanent tenancy in service *watan* lands on the strength of a lease contrary to the prohibition in Bombay Act III of 1874 against alienation by a *watandar* had, by adverse possession established a right to a permanent tenancy. Sir John Edge in delivering the judgment of their Lordships said, without expressly deciding the point, that

"They are constrained to say that it is somewhat difficult to see how a stranger to a *watan* can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the state, prohibited."

Again in *Srinathi Dairasikhamani Ponnambala Desikar v. Periyann Chetti* (6) the question was raised but not decided. But the decided cases mainly deal with the position in which the true owner seeks to redeem or to eject a person in possession under an invalid mortgage. In the present case the position is changed because the defendants who are the true owners have succeeded in recovering possession of the mortgaged property. Hence it is not necessary for us to decide what would have been the position had the present plaintiff been in possession and in the situation of a defendant to a suit of that nature. The point which we have to decide is whether limitation for the suit instituted by him which is to recover his mortgage money is to run from 1916 at latest or from 1930, the date on which he lost possession. The position seems analogous to that in *Krishnaji Sakharam Despande v. Kashim* (7). Here a mortgage of *watan* lands was by statute permissible so far as it affected the life interest of the grantor but beyond that it was not valid so as to affect the in-

terest of his successor. A suit was brought by the successor to recover possession of the property and he succeeded on the finding that the mortgagee was, since the death of his mortgagor, a trespasser. The latter then sued to recover his money and he sought to date limitation for the suit from the date when he was dispossessed of the land treating the receipt of the rent or produce of the land as a payment within the meaning of s. 20 (2) of the Indian Lim. Act giving a fresh start to limitation. It was held that time ran against him from the date of the death of his mortgagor on which date the mortgage as such came to an end. His possession thereafter "was the possession of a trespasser claiming a limited interest in the property as a mortgagee, but not the possession of a mortgagee". A similar view was taken in *Pichandi v. Kandasami* (8) and in *Venkaji Babaji Naik v. Shidramapa Balapa Desai* (9). That being so we are unable to hold that the enjoyment of the usufruct of the property by the plaintiff year by year gave him a fresh start for limitation for a suit to recover the money. On that finding the claim to a money decree fails:

As to the alternative claim for a mortgage decree Mr. K. K. Banarji for the appellant did not feel himself in a position to press it and said he would be content if his client got a money decree but it may be pointed out that the mortgage having been entered into in violation of s. 46 of the Oota Nag. Ten. Act could not, under that section or s. 47, form the basis of a valid decree for sale. It is true that the land (and house) now in suit has ceased to be *raiya* land and its status is *chhaparbandi*. But the change took place apparently about 1926 and will not validate a transaction regarding the land which was previously invalid. It was faintly contended that if relief under the bond could not be given to the plaintiff he might be permitted to amend his pleading and asked to be treated as a person who has by prescription acquired an absolute title as owner. For this purpose he might be permitted to amend his plaint by adding a prayer to be restored to possession of the house. I do not think that at this late stage the plaintiff can be allowed to make such an amendment which would alter the character of the suit

(4) 19 P L T 469; 176 Ind. Cas. 35; 4 B R 667; 11 R P 37; A I R 1938 Pat. 479.

(5) 47 B 798; 74 Ind. Cas. 362; 25 Bom. L R 1005; (1923) M W N 689; A I R 1923 P O 205; 33 M L T 389; 28 O W N 857; 20 L W 248; 30 I A 255; 47 M L J 248 (P O).

(6) 59 M 809; 162 Ind. Cas. 465; 1936 O L R 326; 1936 A L R 505; A I R 1936 P O 123; 8 R P O 295; 2 B R 567; 40 O W N 901; 44 L W 1; 38 Bom. L R 702; 17 P L T 480; (1936) O W N 566; (1936) M W N 733; 71 M L J 105; 38 P L R 793; 63 O L J 491; (1936) A L J 977; 63 I A 261 (P O).

(7) 44 B 500; 57 Ind. Cas. 76; 22 Bom. L R 385.

(8) 7 M 539.

(9) 19 B 663.

to a degree which does not seem to be permissible.

In the result I would dismiss the appeal with costs.

Agarwala, J.—I agree.

D. *Appeal dismissed.*

RANGOON HIGH COURT
Second Appeal No. 72 of 1939
July 5, 1939

WRIGHT, J.

KO PA TU—APPELLANT
versus

AZIMULLA AND OTHERS—RESPONDENTS
Contract Act (IX of 1872), s. 23—Contract to transfer property to another in consideration of latter's giving false evidence on behalf of former—Legality—Contract illegal—Illegality not pleaded—If should be enforced.

Courts should not enforce illegal contracts even if the illegality has not been pleaded by the defendant. *Alice Mary Hill v. William Clarke* (1), *Scott v. Brown, Doering, McNab & Co.* (2) and *Gedge v. Royal-Exchange Assurance Corporation* (3), relied on.

Where one person enters into agreement with another person to transfer certain property to him on the latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for the agreement is illegal and opposed to public policy.

S. A. from the decree of the District Court, Pegu, dated December 7, 1938.

Mr. P. K. Basu, for the Appellant.

Dr. Ba Han, for the Respondents.

Judgment.—Towards the end of 1934, an Indian called Kalu died leaving a considerable amount of property. After his death, litigation arose over his estate between his Burmese wife, Ma Sein Khin, and his Indian heirs. The Indian heirs sought the assistance of the plaintiff, Ko Pa Tu, as they were not well acquainted with the way in which to conduct suits, and they entered into an agreement with him (Ex. A), which is the basis of the suit out of which this appeal arises. In this document the heirs undertook to transfer out right to Ko Pa Tu certain immovable property provided he conducted properly for them everything concerned with the litigation in connection with the inheritance case. Ko Pa Tu brought a suit based on this document for specific performance of the contract or in default for compensation, Rs. 1,500. Various defences were taken, but the Sub-Divisional Judge came to the conclusion that the agreement had been entered into with the object of getting Ko Pa Tu to give evidence on

behalf of the heirs, which was opposed to public policy and therefore he held the agreement to be void. The Sub-Divisional Judge considered that the plaintiff was entitled to some compensation in respect of what he had done for Kalu's Indian heirs and so he awarded him Rs. 500 and costs, against them. Ko Pa Tu appealed against the decree dismissing the greater part of his suit and the defendants filed a cross-objection with regard to the decree for Rs. 500. The learned District Judge agreed with the Sub-Divisional Court that the agreement was void as opposed to public policy, but he set aside the decree for Rs. 500 on the ground that no specific claim had been made in the plaint for remuneration for general services rendered.

The plaintiff, Ko Pa Tu, comes to this Court in second appeal. The main ground urged by Mr. P. K. Basu on behalf of the appellant is that the Judges of the lower Courts ought not to have made out a new case for the respondents which was not taken in the written statements. The important paragraph of the written statement of defendants Nos. 1 to 10 is No. 3, which I reproduce:

"That as regards para. 4 of the plaint these defendants admit execution of the agreement, but submit that as the plaintiff, who was a witness in the suit by Daw Nyein May against these defendants in the District Court of Pegu unduly influenced them to execute the said agreement they had to sign it against their will and consent in order to protect their interest in the said suit. Thus as they were unduly influenced to execute the agreement it is not enforceable against them."

Other defences were also taken but they are not material to this point. When evidence was led, the defendants did not strictly conform to this portion of their written statement. The case they put forward was that Ko Pa Tu intimated to them that Ma Nyein May had promised to give him Rs. 1,000 if he gave evidence in her favour, but that if the Indian heirs would give him the land which he worked he would give evidence favourable to them and so they executed the agreement (Ex. A).

It will be noticed that para. 3 of the written statement already referred to is rather vague, but that it does make reference to the fact that they executed it because the plaintiff was a witness in the suit and they wanted to protect their interest in their suit. The plaintiff did not ask for further particulars with reference to this defence. If he had done so, the defendants would have put their defence more clearly. It will be seen that when the plaintiff was cross-

examined he was asked whether it was true that Ex. A had been executed by the Indian heirs as a reward to him for giving evidence against Ma Nyein May. From this it is clear that the defendants did put forward this defence before the plaintiff's witnesses were examined and before they themselves gave evidence. I can find nothing in the record tending to show that the plaintiff ever raised any objection to the reception of this evidence which was tendered by the defendants to establish this portion of their defence. In such circumstances, it seems very doubtful whether the plaintiff should not be permitted to say that this defence should be disallowed because it was not originally mentioned with sufficient clarity in the pleadings.

There is another aspect of this matter. It is a general principle that Courts should not enforce illegal contracts even if the illegality has not been pleaded by the defendant. In *Alice Mary Hill v. William Clarke* (1), it was held that where an agreement was on the face of it a perfectly legal agreement, and although no plea had been raised by the defendant as to the illegality of the consideration, yet no decree should be passed on it when it was established that the consideration of the agreement was illegal. In *Scott v. Brown, Doering, McNab & Co.* (2), Lindiey, L. J. said:

"Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him."

In *Gedge v. Royal Exchange Assurance Corporation* (3), Kennedy, J. followed the case which I have just referred to and refused to enforce an agreement which was illegal, although the illegality of it had not been pleaded. In the present case it appears from the plaintiff's own evidence in the former case (Ex. 1), which he admitted, and from the circumstances which he admitted, that the agreement (Ex. A) was entered into with the object of obtaining Ko Pa Tu's evidence in the case which had been brought

against the Indian heirs by Ma Nyein May. In the particular circumstances a strong inference arises that the evidence which was to be given would be false evidence. When these facts, were brought to the notice of the Courts, it seems to me that they were amply justified in disallowing plaintiff's claim on the ground that the agreement was void, although this particular plea had not been taken in the written statements. On these two grounds I am not prepared to uphold Mr. Basu's contention that the decisions of the lower Courts should be upset because they did not proceed directly from the pleadings.

It remains to consider whether on the evidence the Courts were justified in coming to the conclusion that the agreement was void owing to the nature of the consideration. (After considering evidence his Lordship concluded.) In view of the evidence and the circumstances, I cannot see any good grounds for coming to the conclusion that both the lower Courts were wrong in holding that the real consideration for the agreement (Ex. A) was the undertaking of Ko Pa Tu to come over to the side of the Indian heirs to give evidence, apparently false evidence, on their behalf. It seems to me that the consideration for the agreement was certainly opposed to public policy and that it was moreover illegal, and I agree that no decree should be passed on the basis of the suit agreement. For the reasons which I have given I dismiss this appeal with costs.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

Civil Revision No. 383 of 1936

December 19, 1938

BENNET AND VERMA, JJ.

DISTRICT BOARD, DEHRA DUN—

PLAINTIFF—APPLICANT

versus

CAPTAIN H. TROTTER—DEFENDANT—

OPPOSITE PARTY

U. P. District Boards Act (X of 1922), ss. 114 (a), 128, 131—Suit for recovery of tax on circumstances and property—Judge considering tax unjust in case of Government servants—Suit, if can be dismissed—Such tax, if amounts to second assessment on persons paying income-tax—Fact that Forest Research Institute is administered by Government of India, whether excludes land covered by Institute from territories administered by Local Government.

The mere fact that in the opinion of the Judge the tax is unjust and would operate harshly, so far, at any rate, as Govt. servants residing only for certain periods within the jurisdiction of the

(1) 27 A 266; 1 A L J 632.

(2) (1892) 2 Q B 724; 61 L J Q B 733; 4 R 42; 67 L T 782; 41 W R 116; 57 J P 213.

(3) (1900) 2 Q B 214; 69 L J Q B 506; 82 L T 463; 9 Asp. M O 57; 5 Com. Cas. 229; 16 T L R 344.

District Board in question are concerned does not justify the dismissal of the suit for the recovery of a certain sum alleged to be due from the defendant as "tax on circumstances and property" for a certain number of years. The provisions laid down in ss. 128 and 131 of the U. P. District Boards Act make it perfectly clear that the Judge is not right in adverting to these considerations and in basing his judgment upon them.

The tax on "circumstances and property" which the District Board imposes is not income-tax. The residence within the rural area is by itself sufficient to bring a person within the purview of this tax. The imposition of such tax upon a person who pays income-tax, does not therefore amount to second assessment.

The mere fact that the Forest Research Institute is a department administered by the Govt. of India does not exclude the land covered by the Forest Research Institute from the territories for the time being administered by the Local Govt. of the United Provinces.

C. R. against the decree of the Small Cause Court, Dehra Dun, dated June 5, 1936.

Mr. Benod Behari Lal, for the Applicant.
Mr. P. L. Banerji, for the Opposite Party.

Verma, J.—This is a petition in revision by the plaintiff against a decree of the learned Judge of the Court of Small Causes at Dehra Dun. The suit was for the recovery of a total sum of Rs. 547-6-0, alleged to be due from the defendant as "tax on circumstances and property" for a certain number of years. The defendant raised various pleas in defence, but we are concerned with only two of them, namely, (1) that the defendant "did not come within the purview of s. 114, cl. (a), District Boards Amendment Act," and (2) that, at any rate, a portion of the claim was barred by time. The learned Judge has dismissed the entire suit.

The learned Judge has held in favour of the plaintiff that the defendant assessee, residing as he does within the "rural areas" in question, is not entitled to say that he is outside the purview of s. 114 (a), U. P. District Boards Act (X of 1922). He has however, dismissed the suit because, to put it briefly, in his opinion the tax is unjust and would operate harshly, so far, at any rate, as Govt. servants residing only for certain periods within the jurisdiction of the District Board in question are concerned. We are unable to agree with the learned Judge that such consideration can justify the dismissal of the suit. The provisions laid down in ss. 128 and 131 of the Act make it perfectly clear that the learned Judge was not right in adverting to these considerations and in basing his judgment upon them. Another reason given by the learned Judge for holding in favour of the

defendant and dismissing the suit is that the defendant pays income-tax and is "therefore free from a second assessment." This view is clearly erroneous. The learned Judge is not right in thinking that the tax on "circumstances and property" which the District Board imposes is income-tax. No question of a second assessment arises.

The previous sanction of the Governor-General, as required by sub-s. 3 of s. 80-A, Govt. of India Act, then in force, was obtained to the passing of the U. P. District Boards Act (X of 1922). That being so, the Local Govt. was entitled to enact the sections which authorize the imposition of taxes by the District Boards. Section 108, U. P. District Boards Act, runs as follows:

"With the previous sanction of the Local Govt. a Board may, by notification, impose and may in like manner abolish or alter the rate of either or both of the following taxes: (a) a local rate under s. 3, U. P. Local Rates Act, 1914, as modified by this Act; (b) a tax on persons assessed according to their circumstances and property (hereinafter referred to as the 'tax on circumstances and property') in accordance with s. 114:

Provided that a Board shall not effect an increase in the amount of the local rate in force at the commencement of this Act unless a tax on circumstances and property has been imposed under cl. (b)."

The relevant portion of s. 114 may also be quoted:

"The power of a Board to impose a tax on circumstances and property shall be subject to the following conditions and restrictions, namely, (a) the tax may be imposed on any person residing or carrying on business in the rural area, provided that such person has so resided or carried on business for a total period of at least six months in the year under assessment."

It is perfectly clear therefore that the District Board was authorized in law to impose a tax on persons residing in the rural area assessed according to their circumstances and property. The argument of Mr. Banerji who appears for the defendant-respondent, is that the area covered by the Forest Research Institute at Dehra Dun, within which area the defendant resides, is not within the rural area and is therefore outside the jurisdiction of the District Board. He refers to s. 1 (2) of the Act which lays down that the Act extends to the territories for the time being administered by the Local Govt. of the United Provinces and urges that the Forest Research Institute is outside such territories. He is unable however to place any materials whatsoever before us which would justify such a conclusion. All that he is in a position to say in support of his argument is that the Forest Research Institute is a department administered by the Govt. of India. That may be so, but it does not

follow from that circumstance that the land covered by the Forest Research Institute is excluded from the territories for the time being administered by the Local Govt. of the United Provinces. The areas which are excluded from the operation of the U. P. District Boards Act are mentioned in the Act itself in the definition of the expression "rural" area which is given in s. 3 (10) and is as follows:

"Rural area means the area of a district excluding every Municipality as defined in the U. P. Municipalities Act, 1916 and every cantonment as defined in the Cantonments Act, 1910."

This argument of the learned Counsel therefore is without force. The second contention raised by the learned Counsel for the defendant-respondent is that mere residence in the rural area is not sufficient to make a person liable to pay the tax. This contention also is clearly not well-founded as the very words of cl. (a) of s. 114 of the Act clearly show. It may also be pointed out that in the year 1932 Govt. acting under the powers conferred on them by s. 124 (3) of the Act, had issued G. O. No. 2341/X-409 dated November 10, 1932, by which they had exempted from the payment of the tax on circumstances and property all Govt. servants who had resided in their official capacity in the rural area within the jurisdiction of any District Board for a period of less than six months of the year of assessment. That also indicates that residence within the rural area is by itself sufficient to bring a person within the purview of the powers conferred on District Boards to impose the tax. We have therefore come to the conclusion that the decision of the Court below holding that the defendant is not liable to pay the tax is erroneous. The learned Counsel appearing for the plaintiff-applicant has however not been able to show that the decision of the Court below that the claim for all tax due before March 30, 1933 is time-barred, is incorrect. The learned Judge is clearly right in arriving at that conclusion.

For the reasons given above, we allow this application in revision, set aside the decree of the Court of Small Causes and remand the case to that Court for the determination of the amount due to the plaintiff in accordance with the observations made above. In view of the fact that the District Board included in its claim tax for a period which was clearly beyond limitation, we direct that the parties shall bear their own costs.

D.

Application allowed.

LAHORE HIGH COURT Special Bench

Matrimonial Reference No. 5 and
Civil Miscellaneous No. 419 of 1939

October 16, 1939

TEK CHAND, SKEMP AND ABDUL RASHID, JJ.

PHILIP WILLIAM RAVANSHAW

HARDLESS—PETITIONER

versus

GLADYS ISABEL HARDLESS

AND OTHERS—RESPONDENTS

Divorce Act (IV of 1869), s. 14—Decree dissolving marriage passed by District Judge and confirmed by High Court—Application for custody of child—Forum—Practice—Expunging remarks from judgment—Duty of Judge when commenting on conduct of party.

Judges, when commenting on the conduct of parties and others, should be very careful to use sober, restrained language. A passage in the judgment which is not necessary to the conclusion of the Judge, nor necessary to his argument, which militates seriously against party's earning a living in his profession should be expunged.

Where a decree for dissolution of marriage is passed by a District Judge and confirmed by the High Court, the High Court has no jurisdiction to hear an application for the custody of the child or arrears of maintenance. The jurisdiction to entertain such application lies in the District Judge. 31 Ind. Cas. 331 (1), relied on.

Matri. Ref. and C. Misc. for confirmation of decree *nisi* granted by the District Judge, Delhi, dated May 25, 1938.

Mr. Kartar Singh, for the Petitioner.

Mr. M. F. Rahman, for Respondent No. 1.

Order.—On May 25, 1939, the District Judge of Delhi granted a decree dissolving the marriage between Philip and Gladys Hardless. This decree was confirmed by a Full Bench of this Court on July 7, 1939. Mr. Hardless, the petitioner, alleged that his wife had committed adultery with an unknown European and also with Mohammad Habib, a cook. Mrs. Hardless confessed to the adultery with the European and the learned District Judge based his decree on this admission. He found that adultery with Mohammad Habib was not proved. Mr. Hardless has appealed seeking that the High Court should declare that it is proved that his wife committed adultery with Mohammad Habib. He also seeks that sentences in the judgment reflecting on his character should be expunged. He also prays for custody of the child of the marriage, Raymond. Mrs. Hardless has put in a petition for arrears of maintenance for the child.

The parties were married in 1932 and Raymond was born in 1933. In 1934 Mrs. Hardless went to England. Shortly

before her return at the beginning of the cold weather, Mohammad Habib was engaged by Mr. Hardless as cook. The parties lived together in Delhi till April 1935, when they went to Waltair in Southern India, Mohammad Habib being dismissed at the time they left Delhi. At the end of the hot weather in 1935, the Hardlesses returned to Delhi, travelling via Calcutta where they stayed with Mrs. Gregory, aunt of Mrs. Hardless. The original intention had been to stay only for a day or so and this is what Mr. Hardless did; but Mrs. Hardless saying that Raymond was tired and peevish did not accompany her husband and stayed on in Calcutta for about three weeks. Mohammad Habib was then employed as cook by Mrs. Gregory. Shortly after Mrs. Hardless left for Delhi, he also came to Delhi and after some time obtained employment with Mr. Davidson, Manager of Messrs. Cooke and Kelvey.

In April 1936 Mrs. Hardless became seriously ill and was admitted to the Hindu Rao Hospital at Delhi. While there she confessed to her husband that she had committed adultery with an European from Rawalpindi, whose name she refused to disclose. On June 26, 1936, Mr. Hardless dined with Mr. Cannham, Manager of Manton & Co., whose premises were next door to those of Cooke and Kelvey. Mr. Davidson had meanwhile been succeeded at Cooke and Kelvey by Mr. Binns who had kept Mohammad Habib as cook. The premises had a common staircase and Mr. Hardless saw Mohammad Habib stumbling down the stairs. Next morning he went to Cooke and Kelvey's godown where he found Mohammad Habib and took from him a bundle of letters. This was resented by Mr. Binns, there was some sort of a scuffle; and the papers were thrown to the ground. Mr. Hardless went outside to explain to Mr. Binns and on his return most of the papers had been burnt. This is the statement of Mr. Hardless supported more or less by Mr. Cannham, Mr. Binns and one Shimbhu Lal. The same morning, according to the petitioner, Mohammad Habib left Delhi for Calcutta, sending a telegram to Mrs. Hardless on the way.

A little later, early in July, Mr. Hardless, at his wife's request, took from the hospital a suit-case which his wife had borrowed from and wished to return to a Mrs. Barrow. In the pocket of the suit-case Mr. Hardless found some other documents which will be noticed later. (After examining evidence regarding alleged adultery with Mohammad Habib, their Lordships proceeded further.)

Obviously, taking all this evidence at its best, it falls very far short of establishing the charge made by the petitioner. We entirely agree with the learned District Judge that the petitioner's charge that his wife had committed adultery with Mohammad Habib is not proved. In his judgment the learned District Judge said:

"Are we then to accept the statement of Mr. Hardless as gospel truth and to condemn his wife forever? The evidence on the record and the behaviour of Mr. Hardless in Court lead me to the irresistible conclusion that he is a person of unbalanced mind; quarrelsome disposition and highly suspicious nature. He magnifies trifling incidents into serious affronts, and it is extremely unwise to accept anything from his lips unless it is fully corroborated by independent evidence."

Mr. Hardless seeks that this passage be expunged. This course is not opposed on behalf of Mrs. Hardless. The passage is not necessary to the conclusion of the learned District Judge; it is not even necessary to his argument. Mr. Hardless is a hand-writing expert and this passage might be cited against him every time he appeared to give evidence in Court. The expression "unbalanced mind" would militate seriously against his earning a living in his profession. For these reasons we direct that the passage be expunged, remarking that Judges, when commenting on the conduct of parties and others, should be very careful to use sober, restrained language. Mr. Hardless also sought custody of his child. A preliminary objection was taken by Mrs. Hardless's Counsel, Mr. Fazal Rahman, that we had no jurisdiction to entertain this petition. After some discussion it was practically admitted that this objection was well-founded. Section 44, Divorce Act, lays down:

"The High Court after a decree absolute for dissolution of marriage or a decree of nullity of marriage, and the District Court after a decree for dissolution of marriage or of nullity of marriage has been confirmed, may upon application by petition for the purpose, make from time to time all such orders and provisions, with respect to the custody, maintenance and education of the minor children"

Section 16 of the Act lays down that every decree for a dissolution of marriage made by a High Court shall in the first instance be a decree nisi to be made absolute after a certain period. This refers to suits tried in the High Court where the decree nisi is generally made absolute after six months by the same Judge who heard the suit. On the other hand, s. 17 of the Act lays down that every decree for a dissolution of marriage made by a District Judge shall be subject to confirmation by the High Court, such confirmation being by a Bench

of three Judges. Thus, the distinction is laid down; a decree by a District Judge being confirmed in the High Court; a decree nisi made by a High Court Judge being made absolute. Hence, according to the language of s. 44 we have no jurisdiction to hear this petition, the jurisdiction lying in the present case with the District Judge. This view is supported by authority: see *M. Wallace v. A. Wallace* (1), which dealt with an application for alimony. In similar circumstances the Bombay High Court held that the Court which had heard the original suit should hear the application. The learned Chief Justice said:

"The decree for dissolution was not a decree absolute under s. 16 of the Act upon a decree nisi which could only be passed by the High Court, but it was a decree confirming the Divisional Judge's decree for dissolution under s. 17. It is therefore clear we think that the Court which is empowered to make the order either for alimony or for the maintenance and education of the children is in this case the Court of the Divisional Judge and not the High Court."

For the same reasons, Mrs. Hardless's application for arrears of maintenance lies in the first instance to the District Judge. We assess the costs of these two days' hearing in the High Court at Rs. 150 to be paid into Court by Mr. Hardless within one month.

S.

Order accordingly.

(I) 40 B 109; 31 Ind. Cas. 331; A I R 1915 Bom. 261; 17 Bom. L R 948.

ALLAHABAD HIGH COURT

First Appeal No. 559 of 1935

September 8, 1939

BENNET AND VERMA, JJ.

MANGAL SEN—DEFENDANT—

APPELLANT

versus

KEWAL RAM—PLAINTIFF—

RESPONDENT

Transfer of Property Act (IV of 1882), s. 92, Para. 4—Subrogation—Person allowed by mortgagee to redeem mortgage in part—If can claim right of subrogation—S. 92, whether retrospective.

Paragraph 4 of s. 92, T. P. Act, does not make any exception in favour of a person who has been allowed by the mortgagee to redeem the mortgage in part. Such a person cannot, therefore, claim the right of subrogation. 1 Ind. Cas. 913 (2), relied on, 35 Ind. Cas. 732 (1), held no longer good law.

Section 92, T. P. Act has retrospective effect. 171 Ind. Cas. 153 (3), followed.

F. A. from the decision of the Sub-Judge, Muzaffarnagar, dated August 30, 1935.

Mr. Panna Lal, for the Appellant.

Mr. P. L. Banerji, for the Respondent.

Verma, J.—The appellant, Mangal Sen, was defendant No. 17 in the suit, which was for the enforcement of a mortgage of August 30, 1922 executed by three brothers, Chandu Lal, Nandan Lal and Bansil Lal in favour of the plaintiff-respondent. The appellant was impleaded as a defendant on the allegation that he was a subsequent purchaser of a portion of the mortgaged property. The appellant's contention was that he had, after purchasing on April 20, 1933 a portion of the mortgaged property paid off a sum of Rs. 4,180 to Joti Prasad who held a prior mortgage of August 25, 1921 executed by Bansil Lal alone. The appellant asserted in his written statement in para. 1 of the "further pleas" that the plaintiff could not get the property purchased by the appellant sold in enforcement of his mortgage. In para. 2 he alleged that he was not a subsequent purchaser, nor was the property purchased by him liable to be sold for the satisfaction of the amount due to the plaintiff. In para. 3 he stated that, even if the plaintiff had a right to get the property sold, he could not be allowed to do so without payment of a sum of Rs. 4,180 and interest thereon to the appellant. In para. 5 it was averred that the property purchased by the appellant was not liable to be sold at the instance of the plaintiff and that the appellant had been improperly impleaded as a defendant. The plaintiff filed a replication and asserted that Mangal Sen and Joti Prasad were brothers and that Mangal Sen had not paid any money to Joti Prasad.

It was also pleaded that Mangal Sen could not acquire any right of subrogation by reason of the partial redemption set up by him. The Court below held that Mangal Sen had proved that he had paid the sum of Rs. 4,180 to Joti Prasad in discharge of a portion of the amount due to Joti Prasad, but that such partial redemption could not entitle Mangal Sen to the right of subrogation in view of the provision contained in para. 4 of s. 92, T. P. Act. It accordingly rejected the claim put forward by Mangal Sen. In this appeal the relief sought by the appellant is that this Court may declare that in respect of the property purchased by him the appellant was a prior mortgagee to the extent of Rs. 4,180. It is clear from the written statement and from the judgment of the learned Civil Judge that no pleading precisely similar to the relief now sought in appeal was really put forward in the

Court below and, strictly speaking the appellant cannot complain against the Court below for not having considered a plea which he never put forward. But, apart from that, it seems to me that the decision of the Court below is right. The facts bearing on this question are these. One of the items of property mortgaged to Joti Prasad under the deed of August 25, 1921 executed in his favour by Bansi Lal, was "one share out of six shares" situated in a village called Pairi. In the mortgage of August 30, 1922, made by Bansi Lal, Naudan Lal and Chandu Lal in favour of the plaintiff-respondent, one of the items mortgaged was "three out of six shares" in that village Pairi. In execution of a simple money decree held by certain persons against the sons of Bansi Lal, who had died by this time, a portion of the property mortgaged to Joti Prasad was put up to sale and was purchased by the appellant on April 20, 1933.

The appellant alleges that on August 20, 1933 he paid a sum of Rs. 4,180 to his brother Joti Prasad, and obtained from him a receipt which he has produced. His contention is that Joti Prasad released the property purchased by the appellant from his security and that the appellant took possession of that property free of the encumbrance of Joti Prasad. He claims that as the result of this alleged payment to Joti Prasad he is entitled to be subrogated to the rights of Joti Prasad and to be treated as a prior mortgagee to the extent of Rs. 4,180. It is common ground that this payment of Rs. 4,180 even if it was made by Mangal Sen to Joti Prasad, did not redeem the mortgage of August 25, 1921, in full. Mr. Panna Lal has relied on the case in *Udit Narain Misir v. Ashrafi Lal* (1). That case was decided long before the T. P. Act was amended and s. 92 was inserted in the Act. The learned Judges who decided that case did not agree with the view taken by the Calcutta High Court in *Gurdeo Singh v. Chandrika Singh* (2). It seems to me that the Legislature, when amending the T. P. Act in 1929, deliberately accepted the view of the Calcutta High Court in *Gurdeo Singh v. Chandrika Singh* (2) and did not accept the view expressed by this Court in *Udit Narain Misir v. Ashrafi Lal* (1). The appellant's purchase and his alleged payment to Joti Prasad are of the year 1933, i. e., at a time when the

T. P. Act had been amended. Mr. Panna Lal argues however that the law as it stood on August 25, 1921, when the mortgage-deed in favour of Joti Prasad was executed, would govern the rights of his client. This contention is not, in my opinion, correct. It has been held in the Full Bench case in *Hira Singh v. Jai Singh* (3), that s. 92, T. P. Act, has retrospective effect.

Now, s. 92 of the Act is as follows :

"Any of the persons referred to in s. 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagees.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagees whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full."

It seems to me that the language of the statute is perfectly plain and that on that language the appellant is not entitled to claim the right of subrogation, even if he made the alleged payment to his brother, Joti Prasad, which, in my opinion, is very doubtful. Mr. Panna Lal's argument is that when the appellant paid the sum of Rs. 4,180 to Joti Prasad and persuaded him to release the property purchased by the appellant, the integrity of Joti Prasad's mortgage was broken up and that, instead of one mortgage in favour of Joti Prasad, several mortgages came into existence, each existing over different items of the property originally mortgaged. He contends that in this view the alleged payment by the appellant to Joti Prasad of the amount which was agreed upon between him and Joti Prasad to be the proportionate amount due from the property purchased by him amounted to a redemption in full of the mortgage over the property purchased by the appellant which according to Mr. Panna Lal, came into existence at the time of the alleged payment by the appellant to Joti Prasad. In the first place, as I have already indicated, I am not satisfied that his story that he

(1) 38 A 502; 35 Ind. Cas. 732; A I R 1916 All 81; 14 A L J 662.

(2) 36 C 193; 1 Ind. Cas. 913; 5 O L J 611.

(3) (1937) A I J 659; 171 Ind. Cas. 153; A I R 1937 All. 586; I L R (1937) All. 880; 10 R A 228; 1937 A L R 800 (F B).

paid any money to his brother, Joti Prasad is true. But even if he did make the payment as alleged, in my judgment the contention of Mr. Panna Lal is not sound. If his argument is accepted, any purchaser of a portion of the mortgaged property or any co-mortgagor can, by colluding with the mortgagee, frustrate the object of the Legislature in enacting para. 4 of s. 92. It is noteworthy that that paragraph does not make any exception in favour of a person who has been allowed by the mortgagee to redeem the mortgage in part. It seems to me that if it had been the intention of the Legislature to make any such exception it would have said so. For the reasons given above, I have come to the conclusion that the decision of the Court below is correct.

Bennet, J.—I agree with what my learned brother has stated and I would like to add a few words. The claim of the appellant is based on the receipt printed on p. 47, Ex. F-3. This receipt is dated August 20, 1933 and is a receipt by Joti Prasad, son of Ude Ram to Mangal Sen, the son, of the same Ude Ram as the particulars which are given are similar in each case. It is admitted therefore that the receipt is by one brother to another. Mangal Sen gave evidence on p. 19 but he did not state that he had ever separated from his brother Joti Prasad. Five days after the date which this receipt bears, that is, on August 25, 1933, Joti Prasad brought a suit of which the plaint is on p. 48. This suit was for the enforcement of the simple mortgage dated August 25, 1921. The principal amount advanced on that mortgage was Rs. 1,852. Paragraph 10 set out that Mangal Sen had paid the rateable amount for Khewat No. 1 in *Mohalla Bansi Lal in Mauza Pairi* which he has purchased in auction sale. Paragraph 11 set out that the total due of principal and interest was Rs. 13,480 but the claim was only brought for Rs. 5,250. The plaintiff deducted not only the amount of Rs. 4,180 alleged to have been received from his brother Mangal Sen but he also remitted a further amount of Rs. 4,050. As the plaintiff evidently considered that it was not possible to realize more than Rs. 5,250 from the remaining property it is clear that he was not giving up anything by this transaction with his brother. It was a case in which the family could not realize much from the remaining property. Therefore it was obviously no loss to the plaintiff Joti Prasad to ex-

ecute a nominal receipt in favour of his brother.

Now, when the appellant Mangal Sen filed his written statement on p. 12 he evidently had no books of account or memorandum to show that he had paid any amount to his brother Joti Prasad. He therefore put down the amount of Rs. 5,000 as the amount which he paid. This written statement was dated October 3, 1934. Subsequently when the record of the suit by Joti Prasad, Suit No. 51 of 1933 was examined it was found that para. 11 of the plaint stated that Rs. 4,180 had been received from Mangal Sen by Joti Prasad. The receipt Ex. F-3 was then produced in Court on November 22, 1934, and the written statement was amended by an order of November 14, 1934, by which the amount of Rs. 5,000 was corrected to Rs. 4,180 to make it agree with the plaint of Joti Prasad and the receipt then produced. It is also to be noted that the plaint of Joti Prasad did not allege that any receipt had been given. Such a receipt as Ex. F-3 could be manufactured at any time. Joti Prasad has not been produced as a witness to support the statement of Mangal Sen, nor have any books of account been produced to show that there was any such payment. In these circumstances it appears to me that the mere statement of Mangal Sen and the receipt signed by Joti Prasad are not sufficient to prove that there was any payment of Rs. 4,000. I may further note that what Mangal Sen said in evidence was that Rs. 4,000 was paid whereas the receipt says Rs. 4,180. The plaintiff had pleaded in replication that this transaction was an entirely fictitious transaction. For these reasons I think that no ground for a claim for subrogation does arise as there was in my opinion no payment by Mangal Sen, appellant, to his brother.

s.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 1283 of 1937

July 14, 1939

B. K. MUKHERJEE AND ROXBURGH, JJ.
BHARAT BANDHU CHATTOPADHYA—
DEFENDANT—APPELLANT

*versus***RANENDRA KUMAR DUTTA****AND OTHERS—RESPONDENTS**

Bengal Public Demands Recovery Act (III
1913, ss. 3 (1), 20—Order directing certain person

to be added as parties—Their names not specified in order nor added in certificate—Whether makes them certificate-debtors.

An order merely directing the addition as parties of certain persons, whose names were not specified in the order, nor added in the certificate, cannot make these persons certificate-debtors within the meaning of s. 3 (1), Ben. Public Demands Recovery Act and their right does not, therefore, pass by the sale.

A. from appellate decree of the District Judge, Faridpur, dated April 27, 1937.

Messrs. *Hiralal Chakravarti* and *Nirmal Ch. Chakravarti*, for the Appellant.

Mr. *Apurbadhan Mookerjee*, Dr. *S. C. Basak* and Mr. *Rama P. Mookerjee*, for Respondents Nos. 1, 2 and 16 respectively.

B. K. Mukherjea, J.—This appeal is on behalf of defendant No. 1, and the suit was one for setting aside a sale of residuary Taluk No. 4335 standing in the name of Ram Narayan Chatterjee in the Faridpur Collectorate, held on November 30, 1934 for non-payment of arrears of cesses, under the Public Demands Recovery Act. There were prayers also for confirmation of plaintiffs' possession to the said taluk, and in the alternative for recovery of possession if defendant No. 1 be found to have taken possession. The trial Court dismissed the suit, on appeal the judgment was reversed and the plaintiff's suit decreed. It is against this decision that the present second appeal has been preferred. On hearing the learned Advocates on both sides it seems to me that this appeal cannot succeed. It appears from the records that the certificate that was filed on July 22, 1933 originally contained the names of four persons, to wit (1) Kula Chandra Chatterji, (2) Ashutosh Chatterji, (3) Mohima Charan Chatterji and (4) Kazi Abdul Aziz; of these only Ashutosh was alive, and the rest were dead at the time when the certificate was filed. Ashutosh paid up his dues in proper time, and this is clear from the order dated January 17, 1934. After that it appears that the record-keeper supplied the names of some other persons, who were interested in the taluk, including that of Provat Chandra Dutt, the father of the present plaintiffs, and an order was passed that the names of these persons should be added as certificate-debtors. As a matter of fact the names were not added in the certificate, which remained unaltered as before. The peon reported that Provat was dead, and on August 11, 1934 another order was passed that the names of the heirs of

Provati as supplied by the petition would be added and notice under s. 7 issued.

Apart from the irregularities in the service of notice, which have been pointed by the Court of Appeal below, it seems clear, that the names of the plaintiffs were not added as certificate-debtors, although a notice was issued in their names. In my opinion, under s. 20, Public Demands Recovery Act, all that vests in the purchaser is the right, title and interest of the certificate-debtor at the time of the sale. The names of the present plaintiffs never appeared as certificate-debtors in the certificate that was filed, and consequently their rights did not pass by the sale. Mr. Chakravarty has drawn our attention to the definition of a certificate-debtor as given in s. (3), cl. (1) of the Act. There it is stated that certificate-debtor means the person named as debtor in a certificate filed under the Act, and includes any person whose name is substituted or added as debtor by the certificate officer. Here the names of the plaintiffs were not in the certificate originally, nor were they subsequently added. In my opinion an order merely directing the addition as parties of certain persons, whose names were not specified in the order, nor added in the certificate, cannot make these persons certificate-debtors within the meaning of the section. The result is that the appeal fails. The cross-objection filed by defendant No. 15 is allowed and the order for costs passed against them by the Court of Appeal below is set aside. We direct the parties to bear their costs throughout.

Roxburgh, J.—I agree.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

First Appeals Nos. 455 and 530 of 1933

October 2, 1939

BENNET AND VERMA, JJ.

TOTA RAM—DEFENDANT—

APPELLANT

versus

Kunwar ZALIM SINGH—

PLAINTIFF—RESPONDENT

Principal and agent—Interest—Agent, when liable to pay, on sums due from him to principal—Handwriting—Inference—Document appearing to be in handwriting of certain person—Such person must explain it—No explanation but evasive answers—Court can infer that document was in his handwriting.

No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract express or implied, or

where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of default. The agent must also pay interest in all cases of fraud, and on all bribes and secret profits received by him during his agency. 173 Ind. Cas. 15 (1) and 49 Ind. Cas. 696 (2), distinguished.

Where a writing on the face of it appears to be that of a certain person it is for that person to explain the document and the entries to be found in it. If such person instead of offering any explanation chooses to take shelter behind the evasive reply that he did not know whether the document was in his handwriting, the Court is right in inferring that the document was in that person's handwriting and in holding that it was for that person to explain it.

F. As. from the decision of the Sub-Judge, Aligarh, dated January 19, 1933.

Messrs. S. K. Dar and S. B. L. Gaur, for the Appellant.

Messrs. Gopi Nath Kunzru and B. S. Darbari, for the Respondent.

Verma, J.—The suit which has given rise to these appeals by the defendant was one for accounts by a principal against his agent and for the recovery of the amount found due on the accounts being rendered. The preliminary decree was passed on January 19, 1933 and the appellant was ordered to render accounts to the plaintiff-respondent from September 11, 1915, to August 14, 1930. A Commissioner was appointed and, after going through the accounts and hearing the parties at length, he reported to the Court that a certain sum of money was recoverable by the plaintiff from the defendant. He further expressed the view that the defendant was liable to pay interest at the rate of 12 per cent. per annum. Both parties took objections to this report. The learned Civil Judge has accepted some of the objections of the plaintiff and has rejected all the objections of the defendant except in certain minor matters. The result has been that the decree passed by the learned Civil Judge is for an amount larger than the amount found by the Commissioner. The defendant has filed two appeals, F. A. No. 45 of 1933 being against the preliminary decree and F. A. No. 530 of 1933 being against the final decree.

Learned Counsel appearing for the defendant-appellant has confined himself to the appeal against the final decree and has raised four points, three being with regard to specific items allowed by the Court below against the recommendation of the Commissioner and the fourth being with regard to

the interest allowed. The first item challenged by learned Counsel is an item described in the Commissioner's report, as well as in the judgment of the Court below, as item No. 18 "about miscellaneous deposit of tenants, Rs. 2,265-8 0." The Commissioner had reported against the plaintiff's claim under this head, but the Court below accepting the objection of the plaintiff, has allowed a portion of this amount, namely Rs. 2,056-8-0. The claim was based on a document described as Ex. 274. The appellant has not had this paper translated and printed, but the contents of this document are to be found in the Commissioner's report at p. 45 of the paper book. We have also examined the original. When the defendant was confronted with this document he made this statement: "I do not know whether Ex.....274..... is in my handwriting." The writing on the face of it appears to be that of the defendant and it was for the defendant to explain this document and the entries to be found in it. Instead of offering any explanation, the defendant chose to take shelter behind the evasive reply that he did not know whether the document was in his handwriting. In our opinion, the Court below was right in inferring that the document was in the defendant's handwriting and in holding that it was for the defendant to explain it. There being no explanation forthcoming on behalf of the defendant, the decision of the Court below on this point is clearly right.

The next item questioned is what is described as item No. 8 in the Commissioner's report as well as in the judgment of the Court below. The item is one of Rs. 3,385-14-0 and is said to consist of certain sums which were payable by the defendant to the plaintiff on account of certain transactions of leases and sub-leases. Learned Counsel has questioned two of the sub-items which go to make up the total of Rs. 3,385-14-0. The first one that he has questioned is in connexion with a tenant called Tika Motia and amounts to Rs. 397-8-0. The Commissioner had reduced the claim under this head to Rs. 277-8-0 on the ground that the defendant was dismissed in 1337-Fasli and the rent of Rabi 1337 must therefore be deducted "because it may or may not have been realized." The Court below has pointed out that the Commissioner was wrong in thinking that the defendant was dismissed in 1337. It is common ground that the dismissal took place on August 14, 1930. The Fasli year

1337 came to an end on June 30, 1930. The position thus was that either the defendant had realized the rent as it fell due and became payable during the currency of the agricultural year, or by his neglect allowed it to fall into arrear. As soon as the *Fasli* year 1338 began on July 1, 1930, the rent of *Rabi* 1337 became an arrear. In either case the defendant was liable to pay the amount to the plaintiff. The decision of the Court below is thus clearly right. The second sub-item with regard to which the learned Counsel for the appellant has addressed us is the one which is dealt with by the Commissioner under the heading "No. 3 Bada C. Rs. 876-2-3" (p. 35 of our paper book). The point raised by learned Counsel is that the Commissioner as well as the learned Civil Judge have erred in not deducting the occupancy rent from what has been described as 'sub-tenancy rent.' But the Commissioner has pointed out that "the occupancy rent of this *khata* has been regularly credited up to the end of the lease," and the learned Judge has agreed with that finding of the Commissioner. We see no reason to differ from the finding of the Court below on this point.

The third item that has been dealt with by the learned Counsel for the defendant-appellant is item No. 9 in the Commissioner's report as well as in the judgment of the learned Judge. It is stated to be 'one of Rs. 2,232 as rent of non-occupancy tenants.' It appears that the appellant in his account books had two columns showing the rents of the tenants, viz. col. 6 and col. 7. The case of the plaintiff was that the rent entered in col. 6 was the real rent and that receipts were issued, suits were filed and *siyahas* were entered in accordance with the entries in this column, and that the amounts entered by the defendant in col. 7 were fictitious which the defendant had been fraudulently entering in the books to defraud the plaintiff. The defendant, on the other hand, contended that the amounts entered in col. 7 represented the real rent and that those entered in col. 6 were fictitious. The explanation given by the defendant as to why he had a column containing fictitious entries at all was that the plaintiff wanted to exchange his villages with another *zamindar* and with that end in view he got fictitious and exaggerated rents entered and *kabuliyats* executed in order to show that his property was of larger value than it really was. This explanation was not accepted by the Commissioner. But the Commissioner adverted to

certain circumstances and stated that he was inclined "to the contention of the defendant." The learned Judge dealt with the point involved in this item when discussing item No. 7 and also in his judgment under item No. 9. Having considered the matter carefully, we have come to the conclusion that the decision of the learned Judge on this point is correct and that the Commissioner had erred.

The last point urged is as to interest. The first argument is that no interest should have been allowed and reliance has been placed on the decision of their Lordships of the Privy Council in *Bengal Nagpur Ry. Co. Ltd. v. Ruttanji Ramji* (1), and on the decision of this Court in *Lalman v. Chintamani* (2). It seems to us however that the contention of the learned Counsel is not well-founded. The case before their Lordships of the Privy Council was one in which there was a contract between the parties to the effect that the plaintiffs would execute certain work for the defendants and the defendants would pay for that work. Certain rates for calculating the price of the work had originally been mentioned, but subsequently by consent of parties those rates had been abandoned. No fresh rates were fixed, but the plaintiffs were allowed to carry on the work and to complete it. In these circumstances, their Lordships held in agreement with the Courts below that the amount should be determined on the basis of fair and reasonable rates, and the amount arrived at by the High Court not having been challenged, was accepted by their Lordships. The Courts in India had allowed interest to the plaintiffs on the amount thus arrived at. Their Lordships held that no interest should have been allowed. On the facts found, it was clear that there had been no wrongful detention by the defendant of the amount payable to the plaintiffs. The defendant company had not been guilty of any tortuous act and the case rested entirely on contract. Similarly, in *Lalman v. Chintamani* (2), it was found that the defendant had not been guilty of any improper detention and had actually been acquitted in the criminal proceedings launched by the plaintiff against him. In these circumstances it was held that the

(1) (1938) A L J 169; 173 Ind. Cas. 15; 1938 O L R 119; 19 P L T 125; A I R 1938 P O 67; 10 R P O 216; 47 L W 281; 1938 O W N 261; 1938 A L R 167; 4 B R 374; (1938) I M L J 640; 32 S L R 374; 67 O L J 153; 42 O W N 985; (1938) M W N 646; I L R (1938) 2 Cal. 72; 40 Bom. L R 746; 65 I A 66 (P O).
(2) 41 A 254; 49 Ind. Cas. 696; A I R 1919 All. 214; 17 A L J 169.

plaintiff was not entitled to interest either under s. 73, Contract Act, or under the Interest Act (No. XXXII of 1839). The case before us however is entirely different. The defendant has not only been guilty of improper and dishonest detention of the plaintiff's money but has also been guilty of fraud. The law applicable to cases of this character is, in our opinion, correctly summarized in para. 423 of Vol. I of Edn. 2 of Halsbury's Laws of England. It is as follows:

"No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract express or implied, or where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of default. The agent must also pay interest in all cases of fraud, and on all bribes and secret profits received by him during his agency".

In the case before us, several of the circumstances mentioned in this paragraph are present. The Court below was therefore right in allowing interest to the plaintiff. The second point raised by learned Counsel for the appellant with regard to interest is that the rate, namely, 12 per cent. per annum, is excessive. The majority of the items involved in the claim however were on account of realizations made from the tenants of the plaintiff's *zamindari*. If these sums had not been paid by the tenants and had fallen into arrears, the plaintiff would under the revenue law have been entitled to interest at the rate of 12 per cent. per annum. We are therefore not prepared to accept the argument of the learned Counsel with regard to the rate of interest in respect of such items. But there are two items, namely Items Nos. 1 and 2, which are on account of bricks and lime and the construction of some building. We have come to the conclusion that the interest on the two sums of money found due under these two heads should be reduced to 6 per cent. per annum. The total interest allowed by the Court below on these two items is Rs. 3,916-5-0. Calculating the interest at the rate of 6 per cent. per annum, the interest allowable to the plaintiff will come to Rs. 1,973-2-6 only. Thus the amount decreed by the Court below on account of interest should be reduced by Rs. 1,973-2-6.

The result is that we allow First Appeal No. 530 of 1933 in part and in modification of the decree of the Court below grant to the plaintiff a decree for Rs. 22,489-14-9. Future interest on this amount from the date of the decree of the Court below,

namely August 31, 1933, shall, as directed by the Court below, be allowed to the plaintiff at the rate of 6 per cent. per annum. Parties shall pay and receive costs throughout in proportion to success and failure. First Appeal No. 455 of 1933 is dismissed with costs.

s.

Order accordingly.

MADRAS HIGH COURT

Full Bench

Referred Trial No. 119 and Criminal

Appeal No. 508 of 1939

December 4, 1939

LEACH, C. J., LAKSHMANA RAU AND

KRISHNASWAMI AYYANGAR, JJ.

In re GURUSWAMI TEVAR AND OTHERS—
ACCUSED.

Evidence Act (I of 1872), s. 32—Conviction, when can be based on uncorroborated dying declaration.

There may not be corroboration of the nature contemplated by s. 157, Evi. Act, or matters provable under s. 158, and the only direct evidence may be a statement by the deceased made admissible by s. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and s. 114, Evi. Act, (illus. b) says that the Court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance. [p. 284, cols. 1 & 2.]

It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility. R. T. No. 112 of 1937, approved, Cr. Appeal No. 653 of 1935, not followed, 146 Ind. Cas. 548 (2), explained and approved partly, *In re Debbukota* (5), criticised and not approved, *Gulla Ella Reddi v. Emperor* (1), distinguished. [p. 285, col. 1.]

Ref. T. and Cr. A. referred by the Sessions Court, Tinnevely Division, in Case No. 60 of 1939.

Order of Reference to a Full Bench

Burn and Mockett, JJ.—The appellants have been convicted of murder by the learned Sessions Judge of Tinnevely and appellants Nos. 1, 2 and 4 have been sentenced to death. Appellants Nos. 3 and 5 have been sentenced to transportation for life. The case is one of a simple nature

but there is an important question of law involved. There is no doubt about the fact that, on the early morning of March 31, 1939, Nammalwar Naicker, a resident of the village of Kalugachalapuram, was attacked while he was on his way to the village of Mannagopalanaickenpatti. He was stabbed in 38 places and he died soon after midnight. The Sub-Assistant Surgeon (P. W. No. 1) who was in charge of the hospital at Ettiyapuram saw him at 1 p. m. and found 32 injuries on him, of which seven were penetrating wounds into the abdomen and one was a penetrating wound in the chest. This Sub-Assistant Surgeon was not able to do anything for the man beyond rendering first aid and then he sent him on to the Headquarters Hospital at Palamcottah. Another Sub-Assistant Surgeon (P. W. No. 2) made a *post mortem* examination on April 1, and then he found that there were in all 38 injuries. P. W. No. 1 expressed an opinion that the abdominal injuries inflicted upon Nammalwar Naicker would only prove fatal in the absence of medical or surgical treatment but that, if treated properly, there was "every chance" of the injured man escaping death. This is a very remarkable opinion and, in our opinion, it is worthless. The *post mortem* certificate shows that two of the stabs not only penetrated the abdomen but punctured the intestines, so that faeces escaped into the peritoneal cavity. It is quite clear that Nammalwar Naicker was fatally wounded by persons who meant to kill him, and that he never had any chance of recovery.

There are no eye-witnesses in the case, the assassins having been careful to choose a time when there was nobody in sight. The case against the appellants rests almost entirely on statements said to have been made by Nammalwar Naicker himself before he died. Three witnesses P. Ws. Nos. 6, 7 and 8, say that they were in the vicinity and that they were attracted to the spot by the cries of Nammalwar Naicker but they do not corroborate him any further than by saying that the number of persons whom they saw running away was five. As the learned Sessions Judge had said, there are four statements of Nammalwar Naicker to be considered. In the first place, P. Ws. Nos. 6, 7 and 8 say that as soon as they reached him, he told them the names and fathers' names of the five persons who had attacked him. Those are the names of the present five accused persons. P. W. No. 6 ran to the village

and informed P. W. No. 12, the brother-in-law of the deceased. P. Ws. Nos. 12, 13 and others went to the place where Nammalwar Naicker was lying stabbed. Nammalwar Naicker is said to have told those witnesses also the names and fathers' names of these five appellants. P. W. No. 12 went and fetched the Village Munsif, P. W. No. 21. He reached the scene of the murder at about 8 o'clock in the morning and he took down a statement from Nammalwar Naicker which is Ex. K. In that also the names and the fathers' names of the five appellants are found. Finally at about 2-30 p. m. on the same day in the hospital at Ettiyapuram a dying declaration (Ex. A) was recorded by a Special Magistrate (P. W. No. 4). In that again the deceased has stated that these five persons attacked him and stabbed him.

Learned Counsel for the appellants has attempted to show that the statement (Ex. K) recorded by the Village Munsif was a concoction but he has not adduced any convincing arguments in support of that proposition. It was proved that there was enmity between Nammalwar Naicker and the accused, but the accused were not the only members of the Marava caste with whom the deceased was at enmity. P. Ws. Nos. 6, 7 and 8 belong to a different village, Mannagopalanaickenpatti, and no enmity whatever was even suggested between them and any of the accused. There is therefore no reason why these witnesses should say falsely that Nammalwar Naicker named these five persons as his assailants. We can see no reason to believe that Ex. K was concocted.

The next contention of learned Counsel for the appellants is that Ex. K and Ex. A are widely discrepant. This contention is based upon the fact that in Ex. K, Nammalwar Naicker is recorded as having said that, when the five appellants approached him, appellant No. 1 came and gave him a stab was a *soori* (dagger) in the abdomen and afterwards the four persons joined together and stabbed him in the body. In Ex. A however he has given a much more detailed account in which he says that Guruswami Tevar (accused No. 1) stabbed him not only in the abdomen but in several other places before any of the other accused stabbed him at all. He also says that accused Nos. 3 and 5 held his legs while the other three accused Nos. 1, 2 and 4 were stabbing him. We are not able to see that there is any discrepancy in these statements. In Ex. K the wounded man has

stated that all the five persons joined together and stabbed him. This cannot be said to be an inaccurate description of the occurrence. If five persons jointly attack a man and two of them hold him, while the others stab him, he cannot be considered to be an untruthful person if he says that they all five stabbed him. The only real inconsistency that is apparent between Ex. K and Ex. A is with regard to a knife. In Ex. K, Nammalwar Naicker, said: "When I warded off the *soori* which Kandiah Thevan had, it fell down." In Ex. A he said: "When they stabbed me, I wrested the *soori* from Krishna Thevan." Now, Krishna Thevan is the name of accused No. 2 and Kandiah Thevan is the name of accused No. 4. In Ex. K, Nammalwar Naicker does not mention that he wrested a knife from accused No. 2 and in Ex. A he does not mention that, while he was warding off a blow aimed at him by accused No. 4, accused No. 4's knife fell down. These however cannot be considered as contradictions. The learned Public Prosecutor points out that at the scene of offence two knives were actually found, one in a sheath and one bare. Apart from this, there is no discrepancy, and both these statements show that Nammalwar Naicker charged these five persons with the attack upon him. We cannot find also, as already stated, any reason to disbelieve P. Ws. Nos. 6, 7 and 8 and P. Ws. Nos. 12 and 13, and their evidence makes it clear that from the very beginning, within a few seconds after he was attacked, Nammalwar Naicker has been alleging that these five appellants are responsible for his death.

We agree with the learned Sessions Judge therefore that the statements of Nammalwar Naicker have been truthfully described by the witnesses and in the documents, Exs. K and A. The next question, as the learned Sessions Judge has pointed out, is whether Nammalwar Naicker's statements are true. As to this, the plea of the accused was that the whole case was a concoction against them by P. W. No. 12 and the Village Munsif, on account of the enmity due to faction between the Thevars (Maravars) and the Naickers. Accused No. 3 alleged that he had been sick for the last eight months and therefore confined to his house. He repeats this statement in his appeal petition from jail. None of the accused offered any explanation beyond this bare denial and allegation that the case was concocted on account of faction and none of them cited any witnesses. As already

observed, there was enmity between the deceased and the Maravars of Kalugalachapuram, but there was no special enmity between the deceased and these five appellants, and, as the learned Sessions Judge has observed, there was not the slightest reason shown why Nammalwar Naicker, within a few seconds of being stabbed, should have made up his mind to exculpate the persons who really attacked him, and to accuse falsely five persons who had nothing whatever to do with the matter. It was sunrise when this attack on Nammalwar Naicker took place. He was stabbed in 38 places, which must have taken some time, so that he had ample opportunity to see who were the persons who were stabbing him. We can find no reason for doubting the truth of the statements made by Nammalwar Naicker. If they are believed, the appellants are clearly guilty of his murder.

The point of law which arises is whether, on the statements of a deceased person such as these, uncorroborated, (except as to the number of the assailants), the appellants can be convicted of murder. The weight of authority appears to be in favour of the view that a conviction based wholly upon the statements of a deceased person is not illegal. This was assumed in the case of Sanjappa (R. T. No. 112 of 1937) in which the judgment was pronounced by one of us, but in that case the judgment in Cr. Apps. Nos. 653 of 1935 and 148 of 1936 was not brought to our notice. Those appeals were heard by Sir Owen Beasley, C. J. and Gentle, J. and the judgment contains passages indicating that a dying declaration uncorroborated by other evidence could not justify a conviction. The learned Judge says:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents, it is clear from the authorities and the text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

In the case in question the learned Judge showed that the dying declaration upon which the prosecution relied was unreliable; but the observations are of a general nature. And in another place the learned Judge has said:

"Apart from the dangerous practice of relying upon the uncorroborated contents of a dying declaration alone"

Referring to these passages, my learned brothers Mockett and Horwill, JJ. have stated in R. T. No. 5 of 1937:

"Even a dying declaration, as has been held by

this High Court, is very dangerous material by itself on which to found a conviction.

These dicta are clearly at variance with the principle on which R. T. No. 112 of 1937 was decided. The learned Public Prosecutor has stated that, so far as he is aware, there has not been any case in which it has been held that a dying declaration, proved to have been made and with no reason shown for distrusting its truth, was insufficient to warrant a conviction. Such a case as *Gula Ella Reddi v. Emperor* (1) is no exception to this rule, for, there the dying declaration was found to be unsatisfactory in itself. On the other hand, there are many cases in which dying declarations alone have been relied upon as justifying conviction. The learned Public Prosecutor brought to our notice the views expressed in *Emperor v. Akbaralli Karimbhai* (2), *Naimuddi Biswas v. Emperor* (3) and *King v. Maung Po Thi* (4). It is clear that by the provisions of s. 32 (1), Evi. Act, the statements made by Nammalwar Naicker in this case are evidence. There are very good reasons for believing them to be true, and none for disbelieving them. With respect, we do not think we should be acting dangerously or imprudently, if relying on these statements we confirmed the convictions of the appellants in this case. As however there is a conflict between the decision in R. T. No. 112 of 1937 and the observations in Or. Apps. Nos. 653 of 1935 and 143 of 1936 with regard to the question whether statements made by a person who is dead, uncorroborated by any other evidence, can support a conviction, we order, under r. 2 of the Appellate Side Rules, that this matter be referred to a Full Bench. The records will be laid before His Lordship the Chief Justice.

Mr. E. R. Balakrishnan, for the Accused.
The Public Prosecutor, for the Crown.

OPINION

Leach, C. J.—In order to appreciate the question which has been referred it is necessary to state certain of the facts. The appellants have been convicted of murder. Appellants Nos. 1, 2 and 4 have been sentenced to death and appellants Nos. 3 and

5 to transportation for life. Between 5 and 6 o'clock on the morning of March 31, 1939, one Nammalwar Naicker was attacked by a band of men and received 38 injuries from which he died shortly after midnight. As the result of his cries three persons who were in the vicinity were attracted to the spot where the deceased was lying. They had not seen the assault, but they said that they had seen five persons running away. When these witnesses reached the deceased, he told them that he had been attacked by five men and gave their names and the names of their fathers. The names given were the names of the five appellants. One of these witnesses went and called the deceased's brother-in-law and another person, both of whom also gave evidence. These two witnesses went to the spot and the deceased informed them that the appellants were his assailants. The Village Munsif was called to the scene of the crime at about 8 A. M. and recorded a statement made by the deceased. In that statement also the deceased implicated the appellants. The deceased was removed to the hospital at Ettiyapuram and at about 2-30 P. M. his dying declaration was recorded by a Magistrate. In that statement the deceased again said that his assailants were the appellants. It was proved that there was enmity between the deceased and the appellants, who are of the Marava caste, but they were not the only members of that caste with whom he was at enmity. The question of law which arises is whether on the statements of a deceased person of the nature of those indicated without other testimony, except as to the number of the assailants, the appellants can be convicted of murder. The question has been referred to a Full Bench because the judgments of two Division Benches of this Court are in conflict. Neither of these judgments has been reported. The first of the two cases which have given rise to this reference is Or. App. No. 653 of 1935 which was decided by Beasley, C. J. and Gentle, J. The judgment was delivered by Gentle, J. who after quoting from Taylor on Evidence and referring to *Emperor v. Akbarathi Karimbhai* (2), *In re Dabbukota* (5) and *Gula Ella Reddi v. Emperor* (1), observed:

"Whilst the contents of a dying declaration can be relied upon as evidence for the prosecution, in the absence of any corroboration of its contents it is clear from the authorities and text books that it is dangerous, imprudent and opposed to practice to do so, even when no justifiable criticisms can be levelled against the declaration."

(5) 2 Weir 753.

(1) (1935) M W N 193 Cr.

(2) 58 B 31; 146 Ind. Cas. 548; A I R 1933 Bom. 479; (1933) Cr. Cas. 1583; 35 Cr. L J 109; 35 Bom. L R 1021; 6 R B 157.

(3) I L R (1937) 1 Cal. 475; 166 Ind. Cas. 625; A I R 1936 Cal. 793; (1936) Cr. Cas. 1129; 38 Cr. L J 243; 40 O W N 1377; 9 R O 561.

(4) A I R 1938 Rang. 282; 176 Ind. Cas. 683; 39 Cr. L J 771; 11 R Rang. 72.

The judgment which is in conflict is the judgment in R. T. No. 112 of 1937, which was delivered by Burn, J. and in which I concurred. In that case, there was no corroboration of a dying declaration, but the facts were such that my learned brother and I had no hesitation in accepting it as reliable evidence and upheld the conviction of the accused. The question at issue has been fully argued before this Full Bench and I am unable to accept the observations which I have just quoted from the judgment of Gentle, J. as correctly stating the position. With great respect I regard the statement as being far too wide. Section 32, Evi. Act, says that statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in certain specified cases. The first case specified is when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, where the cause of death comes into question. The section declares that such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. Therefore, a statement made by a person who is dead as to the cause of his death is evidence notwithstanding that he was not under expectation of death when he made it. There are two other sections of the Evi. Act which may have important bearing in a case of this nature, namely, ss. 157 and 158. Section 157, says:

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

Section 158 is in these words:

"Whenever any statement, relevant under s. 32 of s. 33, is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested."

There may not be corroboration of the nature contemplated by s. 157 or matters provable under s. 158, and the only direct

evidence may be a statement by the deceased made admissible by s. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and s. 114, Evi. Act, (illustration b) says that the Court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance. The reference which Gentle, J. made to Taylor on Evidence consisted of a quotation from s. 722 of 11th Edn. This section deals with dying declarations and the quotation was as follows:

"It should always be recollected that the accused has not the power of cross-examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be and that where a witness has not a deep sense of accountability to his maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction."

This, of course, may be the case, but I should regard a statement by a person who has received a mortal wound, made immediately after the injury was caused, as being of high probative value when it relates to the cause of the injury, unless there is some reason shown to doubt its truth. The probative value of a statement of a person who has been mortally injured, but made after a considerable interval, during which time he has been surrounded by his relatives and friends, is certainly much less, but here again it seems to me it may be accepted if it fits in with earlier statements made when he could not have been influenced and they are otherwise unimpeachable. In *Emperor v. Akbaralli Karimbhai* (2) Beaumont, C. J. observed:

"Generally speaking, and as a rule of prudence, I am of opinion that a declaration, relevant under s. 32, but not made by one in immediate expectation of death, and not made in the presence of the accused, ought not to be acted upon unless there is some reliable corroboration."

The learned Chief Justice however agreed that there is no rule which requires that a dying declaration should not be acted upon unless it is corroborated and he pointed out that the evidential value of a declaration relevant under s. 32 varies very much in accordance with the circumstances in which it is made. Here I respectfully agree, but I am not prepared to go so far as to say that a declaration relevant under s. 32, though not made in immediate ex-

pectation of death, and not made in the presence of the accused, necessarily requires corroboration.

In *In re Dabbukota* (5) it was said :

"It is to be remembered that though dying declarations are in some respects deserving of a degree of consideration and credence to which ordinary statements are not, they are not subject to the test of cross-examination and if not substantially borne out by independent evidence and the probabilities of the case, or admitted facts, are worth little or nothing."

By this I presume is meant there must be corroboration before a dying declaration can be accepted. I have said sufficient to indicate that this statement is far too sweeping and it is open to the further objection that it offends against the law of evidence in India. With regard to the case in *Gula Ella Reddi v. Emperor* (1) all that need be said is that the circumstances showed that it was unsafe to convict the accused on the bare dying declaration put in evidence in that case and naturally it was not accepted as being sufficient to prove the case for the Crown.

In my judgment it is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the other evidence or in the surrounding circumstances to raise suspicion as to its credibility. I would answer the reference in this sense.

Lakshmana Rao, J.—I agree.

Krishnaswami Ayyangar, J.—I agree.
N.E. Reference answered.

ALLAHABAD HIGH COURT Special Bench

Letters Patent Appeal No. 40 of 1938
November 23, 1939

THOM, C. J., ALLSOP AND GANGA NATH, JJ.
Lala SUMER CHAND—DEFENDANT—

APPELLANT
versus

Mst. MUKHTARI AND OTHERS—

PLAINTIFFS AND DEFENDANTS—RESPONDENTS.
U. P. Land Revenue Act (III of 1901), s. 111—

First suit filed within three months of Revenue Court's order but withdrawn with Court's permission—Second suit beyond three months of the order—If barred by time.

Where a previous suit under s. 111, U. P. Land Revenue Act filed within three months of the order of the Revenue Court is withdrawn with the permission of the Court, a second suit, even if filed beyond three months from the order of the Revenue Court is not time-barred. 21 Ind. Cas. 654 (2), 25 Ind. Cas. 188 (3), 132 Ind. Cas. 191 (4) and 98 Ind. Cas. 516 (5), doubted but followed.

L. P. A. against the decision of Allsop, J., in S. A. No. 154 of 1936, dated March 22, 1938.

Mr. G. S. Pathak, for the Appellants.

Messrs. Panna Lal and N. C. Shastri, for the Respondents.

Thom, C. J.—This is a defendant's appeal arising out of a suit for a declaration of proprietary title. The appeal which is under the Letters Patent is against the order of a learned single Judge of this Court. The only question raised for decision in the appeal is as to whether the suit is time-barred. A suit was instituted following an order by the Revenue Court under s. 111, Land Revenue Act. The Revenue Court's order was passed on June 17, 1932. The plaintiffs instituted their suit in the Civil Court as required within three months. This suit however was withdrawn on September 7, 1933 with the permission of the Civil Court and the suit out of which this appeal arises was instituted on September 21, 1933, i. e. more than three months after the order of the Revenue Court. The defendant-appellant pleaded that the suit was time-barred. This plea was rejected and the suit was decreed. Upon this point the decision of the trial Court was upheld by the learned Civil Judge in the lower Appellate Court. An appeal against this decision has been dismissed by this Court. It was contended for the appellant that the suit was clearly barred in view of the provisions of O. XXIII, r. 2, Civil P. C. This Rule is as follows :

"In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."

It was urged for the appellant that s. 111, sub-s. (b), Land Revenue Act, prescribed a period within which a suit in the Civil Court must be instituted following an order by the Collector directing such a suit to be filed and that if the suit was not brought within that period it was barred by limitation. It was contended that the bar operated despite the fact that a suit

had been filed by the plaintiff within three months of the order of the Revenue Court, that suit being subsequently withdrawn. Whether a second suit following the withdrawal of the first suit filed within the period of three months of the order of the Revenue Court under s. 111, Land Revenue Act, and withdrawn with the Court's permission is time-barred is a question which has been considered by this Court in a number of cases. The earliest case is *Banwari Lal v Gopy* (1). In that case a learned single Judge of this Court held that if the second suit was instituted more than three months after the order of the Revenue Court it was barred by limitation. That decision however was overruled by a Bench of this Court in *Randhir Singh v. Bhagwan Das* (2). This latter case was decided in the year 1913. From 1913 onwards, this Court has consistently followed this decision. The decision was followed by a learned single Judge of this Court in *Shaikh Muhammad v. Kadir Bux* (3), and again by a Bench of this Court in *Nageshwar Bharthi v. Ram Narain Bharthi* (4), and in *Darbari Singh v. Ram Murat Singh* (5). The ground upon which the decisions in these cases have proceeded appears to have been that the second suit is not a fresh suit but really a continuation of the first. The first suit having been instituted within time, it was held that the second suit is not time-barred. The effect of the provisions of O. XXIII, r. 2, has not been exhaustively discussed in any of the decisions above referred to. Had we been interpreting for the first time these provisions in relation to suits under s. 111, Land Revenue Act, we should have held that a second suit filed after a first suit has been withdrawn and beyond the three months from the order of the Revenue Court was time-barred. We do not think that the second suit can be regarded in any sense of the term as a continuation of the first. A "fresh" suit in our view is not the continuation of an earlier suit. It is a separate and independent proceeding. If it is not a continuation of the first it is clearly time-barred. Section 111, sub-s. (b) of the Land Revenue Act, prescribes that a suit in the Civil Court for a declaration

of proprietary title must be brought within three months of the order of the Revenue Court. If it is not brought within three months of the order of the Revenue Court this suit must fail. The period of three months referred to in s. 111, in our judgment, is a period of limitation. In this connection we would refer to the decision of a Full Bench of this Court in *Drigpal Singh v. Pancham Singh* (6).

Had it not been for the long and consistent course of decisions covering the period from 1913 to date we should in the view we take of the law have allowed this appeal. We do not consider however that at this stage when the law on the point has been well-settled so far as this Court is concerned and when no doubt litigants have relied upon the interpretation which has been placed upon s. 111 by this Court we would be justified in overruling these earlier decisions. We do not apprehend that any great injustice would result from leaving the law as it stands. On the other hand, the overruling of the earlier decisions without doubt would result in injustice. This would be so, we are satisfied, so far as the respondents in the present appeal are concerned. On the principle of *stare decisis* we would not, in our judgment, be justified in reversing the order of the learned single Judge of this Court. In the result the appeal is dismissed. In all the circumstances we direct the parties to bear their own costs.

D.

Appeal dismissed.

(6) (1939) A L J 522; 183 Ind. Cas. 242; A I R 1939 All. 403; I L R (1939) All. 647; 1939 O L R 472; 12 R A 98 (F B).

CALCUTTA HIGH COURT

Appeal No. 871 of 1938

August 24, 1939

B. K. MUKHERJEE AND ROXBURGH, JJ.

KAMAL KRISHNA MANDAL—PLAINTIFF
—APPELLANT

versus

HEMENDRA KRISHNA SINGHA—

DEFENDANT No. 1 AND OTHERS—RESPONDENTS
Bengal Land Revenue Sales Act (XI of 1859), ss. 33, 14, 34—S. 33, applicability to sale under s. 14—Suit by co-sharer for declaration of his preferential title and that sale should stand entirely in his favour, if falls within s. 33—Question of substantial injury, whether must be made specific ground of appeal before Commissioner—"Sale" in s. 33—Effect of annulment of sale—Entire arrears paid by one co-sharer—Subsequent payment of arrears by other co-sharers within ten days—Latter, if become co-purchasers with former

(1) 4 A L J 713; 30 A 44; A W N 1907, 282.

(2) 11 A L J 746; 21 Ind. Cas. 654; 35 A 541.

(3) 12 A L J 989; 25 Ind. Cas. 188; A I R 1914 All. 400.

(4) (1930) A L J 650; 122 Ind. Cas. 191; Ind. Rul. (1930) All. 223; 11 R D 336.

(5) A I R 1927 All. 98; 98 Ind. Cas. 516; L R 8 A 5 Rev.

—Sale under s. 14, when effected — Ten days' period under s. 14, whether absolute.

Section 33, Beng. Land Rev. Sales Act is not confined to sales by public auction under the Act, but also applies to a sale under s. 14 of the Act. But in order to attract the operation of s. 33 the suit must be one to annul the sale and this presupposes that the party suing is the defaulting co-sharer or any other person who derives his title from him. Where the plaintiff co-sharer impeaches the rights of other co-sharers to become purchasers by reason of the subsequent deposits they made, but wants at the same time that the sale should stand and stand entirely in his favour, it is really a suit by one purchaser against another for a declaration that he has a preferential title and does not fall within s. 33 and would lie in a Civil Court, quite apart from s. 33 for having a declaration that the plaintiff is the sole purchaser, and no title was vested in any of the other co-sharers by reason of the payments they made under s. 14. *Gossain Chatturbhuj v. Ishkrimal* (1), explained. 24 Ind. Cas. 276 (2), dissented from [p. 288, col. 2; p. 289, col. 1.]

It is certainly incumbent upon the plaintiff to establish that he has sustained substantial injury by reason of the irregularity complained of, but it is not necessary, that the question of substantial injury must also be made a specific ground of appeal before the Commissioner. [p. 289, col. 1.]

When one sharer has paid the entire arrears due any other sharer or sharers cannot by subsequently paying the money, even within ten days, could rank as co-purchasers with him. As soon as the full amount of arrears is paid by one sharer, the offer made by the Collector must be deemed to be accepted, and the purchase becomes complete. That the subsequent payments were also made by recorded sharers within ten days cannot affect the position. 24 Ind. Cas 276 (2), relied on. *Debi Prosad v. Aklo Koer* (3), distinguished. [p. 290, col. 1.]

It cannot be said that a sale under s. 14 is really made by the Collector after the period of ten days has expired, and after all the moneys are put in. The sale as is effected by the first payment of the entire arrears. If there are no materials, upon which the Collector can find as to whether one payment is earlier than the other, the obvious course would be to regard these payments as simultaneous, and declare both of them as to be joint purchasers. [p. 290, col. 2.]

Per *Rozburgh, J.*—The effect of an annulment dealt with in s. 34 clearly contemplates restoration of the defaulter, assumed to be decree-holder, on certain terms and conditions. [p. 293, col. 1.]

The word 'sale' is used rather loosely in the Act. 'Sale' must necessarily include the whole procedure from issue of notices under ss. 5 and 6 up till the final completion of the 'sale' in its narrower sense as the corollary to 'purchase'. A 'sale' is conducted contrary to the provisions of the Act within the meaning of s. 33 if there is any defect in any of these proceedings, not merely for defect at the time of actual auction. [*ibid.*]

If the period of ten days in s. 14 expired on a holiday, the period is extended till the re-opening day. [p. 290, col. 2.]

A. from the appellate decree of the Additional Sub-Judge, 2nd Court, 24 Perganas, dated March 12, 1938.

Messrs. A. N. Bose, Panchanan Ghose, Satyendra N. Ghose and Jyotindra N. Das, for the Appellant.

Messrs. Gunada Ch. Sen, Hiralal Chakravarti and Rabindra Nath Bhattacharjee, for the Respondents.

B. K. Mukherjea, J.—The facts giving rise to this appeal may be shortly stated as follows: There is a revenue paying estate bearing *Touzi* No. 395 of the Alipore Collectorate which is owned jointly by several co-sharers. A number of separate accounts were opened in respect of the shares under the provisions of the Revenue Sale Laws, and we are concerned only with one of these separate accounts which is S. A No. 395/3. The owners of this separate account having made default in the payment of revenue, due in respect of the same, this share was put up to sale under s. 13, Act XI of 1859 on September 23, 1935. No bids were received on that date, and the Collector in exercise of his powers under s. 14 of the Act stopped the sale, and made a declaration that the entire estate would be sold, unless the other recorded sharer or sharers of the *touzi* would purchase the separate account, by paying the entire arrears due in respect of the same, within ten days from that date. Several co-sharers now came forward, and each one of them deposited the entire arrears due in respect of the separate account, which amounted to Rs. 482.

The plaintiff paid the money on September 25, 1935. Another co-sharer named Butto Kristo, who is defendant No. 3 paid the said sum on the day following, and lastly on October 14, 1935. Hemendra and Gouribala, who are defendants Nos. 1 and 2, each deposited in the Collectorate the sum of Rs. 482 by separate *chalans*. It may be stated here that the *puja* holidays set in before the expiry of the ten days, within which the arrears were to be paid, and the office re-opened on October 14, 1935, on which day the payments were made by defendants Nos. 1 and 2. The Collector by his order dated October 17, 1935, declared all the four persons to be purchasers of separate account 395/3 in equal shares, and the certificate of purchase was issued accordingly. The balance of the deposits made by all these four persons was directed to be refunded. The matter was then taken before the Commissioner, who affirmed the order of the Collector. The plaintiff whose deposit was earliest in point of time now commenced this suit, and he prayed for a declaration that he was the full 16 annas purchaser of the separate account under s. 14 of the Revenue Sale Law, and that the defendants could not be given any shares in respect of the same. There was also a

prayer for a permanent injunction restraining the defendants from taking possession of the property in accordance with the order of the Collector. Gouribala, defendant No. 2, was alleged to have transferred her interest to one Devendra who was made defendant No. 4 in this suit. The suit was resisted by defendants Nos. 1 and 4. Their contentions were mainly of a twofold character. The first contention was that the order of the Collector was right and the plaintiff by making the deposit earlier could not obtain any preferential title. It was said that all the recorded sharers, who deposited the money within ten days from the date of the declaration, would be entitled to rank as purchasers under s. 14 of Act XI of 1859. The second contention was that the plaintiff's suit was barred under s. 33 of the Revenue Sale Law.

The trial Court was of opinion that the payments made by Hemendra and Gouribala, were ineffectual, inasmuch as they were made after the period of ten days had expired, and it held that the intervening of the *pūja* vacation could not give them an extension of time on the analogy of s. 4, Lim. Act. The only payments that were made within time were those of the plaintiff and Butto Kristo, and as between them, the plaintiff's deposit was earlier, he was entitled to be declared the purchaser of the entire separate account. In this view of the case, the Munsif decreed the plaintiff's suit. There was an appeal taken against this decision, by defendants Nos. 1 to 4 to the Court of Appeal below, and the Additional Subordinate Judge who heard the appeal reversed the judgment of the trial Court and dismissed the plaintiff's suit. The Subordinate Judge concurred in the view taken by the Munsif that as soon as the plaintiff made his payment, the purchase was complete and as there was nothing left for anyone else to buy the Collector was bound to recognize the plaintiff as the sole purchaser of the separate account. But he held nevertheless that the plaintiff could not succeed in the suit, which was one under s. 33 of the Revenue Sale Law as he had not fulfilled the conditions of that section. What the Subordinate Judge said is this: that in order that a Civil Court might annul a sale under s. 33, Revenue Sale Law, it was necessary to establish that the plaintiff had sustained substantial injury by reason of the irregularity complained of, and the question of injury must have been taken specifically before the Commissioner in an appeal. As no such point was raised before

the Commissioner, the suit was not maintainable under s. 33, Revenue Sale Law.

The propriety of this view has been challenged by Mr. Bose who appears on behalf of the appellant. Mr. Sen who appears for the respondent has besides inviting us to uphold the view of the Subordinate Judge attempted to support his decision on the ground that the plaintiff was not entitled to any preferential right by reason of his earlier deposit, and that the co-sharers who deposited the full amount of arrears within ten days were entitled to be recognized as joint purchaser of the separate account. On the question as to whether s. 33, Act XI of 1859 is a bar to the present suit, I am of the opinion, that the view taken by the Subordinate Judge is wrong. First of all it is difficult to say that the present suit at all comes within the purview of s. 33 of the Revenue Sale Law. It may be assumed as was held by the majority of Judges in *Gossain Chatturbhuj v. Ishrimal* (1), that s. 33 of Act XI of 1859 is not confined to sales by public auction under the Act, but also applies to a sale under s. 14 of the Act. But in order to attract the operation of s. 33, the suit must be one to annul the sale, and this pre-supposes that the party suing is the defaulting co-sharer or any other person who derives his title from him. In *Gossain Chatturbhuj v. Ishrimal* (1), the plaintiff was the defaulting co-sharer himself whose application for exemption of his separate account from sale was refused and the share was put up to sale under s. 14 of the Revenue Sale Law. Here the plaintiff does not want the sale to be set aside. He indeed impeaches the rights of the defendants to become purchasers by reason of the subsequent deposits they made, but he wants at the same time that the sale should stand and stand entirely in his favour. It is really a suit by one purchaser against another for a declaration that he has a preferential title. If the plaintiff's contention is right that as soon as he paid the money he became the purchaser, there was nothing left which the defendants could buy, and the order of the Collector declaring them to be joint purchasers would be one without jurisdiction. Under these circumstances a suit would certainly lie in a Civil Court, quite apart from s. 33 of Act XI of 1859, for having a declaration that the plaintiff is the sole purchaser, and no title was vested in any of the other co-sharers by reason of the payments they made, under s. 14 of the Revenue Sale

Law. I am not unmindful of the fact that a contrary view has been taken by Coxe and Imam, JJ. in *Bahuria Sambho Kuar v. Harihar Prasad* (2) and it was held under somewhat similar circumstances that the suit would be governed by s. 33 of Act XI of 1859. With all respect to the learned Judges, I regret that I cannot accept their view as correct. Even if in that case, the claim of the plaintiff amounted to a virtual annulment of the sale in favour of the plaintiff in the suit yet the learned Judges overlooked the fact that the plaintiff in that suit was not the defaulting co-owner and what he demanded was not merely that the sale in favour of the defendant should stand cancelled, but that his own title as purchaser should be declared.

This declaration the Court cannot obviously grant under s. 33 of the Revenue Sale Law. It seems to me that the learned Judges misapplied the decision in *Gossain Chaturbhuj v. Ishrimal* (1), to the case before them, although the facts of the earlier case were quite dissimilar, the suit being instituted there by the defaulting co-sharer himself whose separate account was sold under s. 14 of the Act. Even if the suit is regarded as one coming within s. 33 of the Act XI of 1859, I do not think that the decision of the Court of Appeal below is correct. In this case the plaintiff's complaint is that the sale has been held in contravention of the provisions of s. 14 of the Revenue Sale Law, and this very point was declared and specified in the appeal before the Commissioner. It is certainly incumbent upon the plaintiff to establish that he has sustained substantial injury by reason of the irregularity complained of, but it is not necessary, as the lower Appellate Court thinks, that the question of substantial injury must also be made a specific ground of appeal before the Commissioner. Mr. Gunāda Charan Sen who appears for the respondent has fairly conceded that the Subordinate Judge was wrong on this point. He says however that there is neither any allegation nor any proof adduced by the plaintiff that he has sustained substantial injury. In the plaint there is a definite statement that the plaintiff will suffer irreparable injury if the order of the Collector stands. Section 14, Revenue Sale Law, gives the co-sharer purchaser rights of an exceptional character. He gets a property which may be of considerable value for a trifling

(2) 41 O 1092; 24 Ind. Cas. 276; A I R 1914 Cal. 735; 18 C W N 1071.

amount without any competition whatsoever. In this case the annual revenue payable in respect of S. A. No. 395/3 is said to be over Rs. 1,800 and the purchase was for Rs. 482 only. In these circumstances there would be no question that the plaintiff would suffer loss if the sale in favour of all the four persons is allowed to stand. I am of the opinion therefore that the decision of the Subordinate Judge cannot be supported on the ground that the suit was not maintainable under s. 33 of Act XI of 1859.

There remains now for our consideration the other question raised by Mr. Sen, as to whether the plaintiff can be held to be the sole purchaser of the separate account by reason of his paying the arrears of revenue earlier than the other sharers. The question is not free from difficulty and the section itself is not quite clear on this point. When separate accounts are opened in respect of separate shares of a *touzi* and there is default in payment of Govt. revenue, s. 13 of the Revenue Sale Law provides that the share in respect of which the default has occurred will be put up to sale first. If however the highest offer made at the sale does not equal the amount of arrears due, then the whole estate becomes liable to be exposed to sale. Section 14 here introduces a provision the object of which obviously is to give the other co-sharers a chance of saving the estate by purchasing the share in arrears. The Collector, when he finds that the sale of the separate share did not receive sufficient bids, is to stop the sale and issue a declaration that the entire estate would be put up to sale at a future date unless the recorded sharer or sharers shall within ten days purchase the separate account in arrears by paying to Govt. the whole arrears due from such share. The declaration, it seems to me is in the nature of an offer, inviting the recorded sharers to come and purchase the separate account by paying only the arrears due, and the offer remains open for ten days only, after which the separate accounts are closed and the whole estate is notified for sale. The question arises as to what would happen if more than one recorded co-sharer pays the whole amount of arrears within the specified period. If there is a joint payment by more than one co-sharer, no difficulty arises, and they will certainly rank as joint purchasers. The same thing will also happen if payments are made by several co-sharers each of the whole amount but at one and

the same time. But when one sharer has paid the entire arrears due I do not think that any other sharer or sharers by subsequently paying the money, even within ten days could rank as co-purchasers with him. According to the section the purchase is to be made by paying the arrears due. As soon as the full amount of arrears is paid by one sharer, the offer made by the Collector must be deemed to be accepted, and the purchase becomes complete. That the subsequent payments were also made by recorded sharers within ten days cannot in my opinion affect the position. The period of ten days laid down in the section prescribes the limit of time after which no payments could be received. But as soon as one payment is made within time which wipes out the arrears, the sale is complete, and no subsequent payment of the same amount by any other co-sharer can make him a purchaser of the share. On this point I think that the decision in *Bahuria Sambho Kuar v. Harihar Prasad* (2) referred to above, is perfectly correct. "It seems to me," thus observes Cox, J.,

"that the section was intended merely to give co-sharers a chance of saving the estate and to secure the payment of revenue, and was not at all intended to define the rights of the co-sharers *inter se*... As soon as the payment is made the purchase is complete and there is nothing left for anyone else to buy."

Mr. Sen has referred us to the decision in *Debi Prasad v. Aklo Koer* (3). In that case each of the three co-sharers, had paid the entire amount of arrears separately, and the Collector issued a certificate of sale jointly to them. The only question raised was as to whether the sharers were to get equal shares in the separate account sold, or their interests would be in proportion to their shares in the parent estate. This Court held that the presumption would be that the Collector took from each of the funds an equal share, and consequently they would have equal shares in the property. The particular question which has arisen here was not mooted in that case at all, and we do not know whether the payments were made there by all the co-shares simultaneously, or at different times. I cannot accept the argument of Mr. Sen that a sale under s. 14 is really made by the Collector after the period of ten days has expired, and after all the moneys are put in. The sale as I have said already, is effected by the first payment of the entire arrears. Of

course this fact has to be ascertained by the Collector and he is to issue a certificate of sale after ascertaining who the purchaser is. Mr. Sen has also argued that numerous practical difficulties would arise if this view is taken; for, in many cases, it would be impossible to find out which deposit is earlier. I do not think that there is much substance in this contention. If there are no materials, upon which the Collector can find as to whether one payment is earlier than the other, the obvious course would be to regard these payments as simultaneous, and declare both of them as to be joint purchasers. In the present case however, it is not disputed that the plaintiff's payment was earliest in point of time, and in these circumstances I must hold that he is entitled to a declaration of his title to the 16 annas share of the separate account sold. The result is that this appeal is allowed, the judgment and decree of the lower Appellate Court are set aside and those of the trial Court restored. The plaintiff will be entitled to his costs against the contesting defendants in all the Courts.

Roxburgh, J.—This litigation arises out of a sale under the provisions of s. 14, Land Revenue Sales Act, 1859. Separate account No. 3 of estate No. 395 of the Ali-pore Collectorate was after the usual preliminaries put up for sale by the Collector on September 23, 1935, and there being no bidder, he proceeded under s. 14, stopping the same and declaring that the entire estate would be put up for sale unless (in the words of the section)

"the other recorded sharer or sharers, or one or more of them, shall within ten days purchase the share in arrear by paying to the Prov. Govt. the whole arrear due from such share."

The plaintiff being the proprietor of one separate account of the estate deposited this full amount on September 25; his brother, defendant No. 3, being owner of another such account, deposited the full amount on September 26, and defendant No. 1 and defendant No. 2 also holders of separate accounts each deposited the full amount on October 14, being the opening day after the *pūja* vacation. The vacation lasted from October 1 to 12, the 13th being a Sunday. The Collector gave a certificate, as required by s. 14, in the names of all the four depositors sharers for joint ownership of the purchased share, each having an equal interest. The plaintiff then brought this suit for a declaration that he was the sixteen annas purchaser of the separate

account No. 393/3, for a declaration that the defendants had no right or no right had accrued to them therein, and that, if necessary, orders might be passed setting aside the auction sale in respect of that share made by the Collector in favour of the defendants; there was also a prayer for injunction and recovery of possession, and finally a prayer for a declaration that if it were held that the other defendants had purchased any interest on account of the deposit of money by them, then they were not entitled to more than a share in proportion to their interest in the parent estate. The trial Court held that the plaintiff became purchaser of the separate account by his deposit on September 25, and that the subsequent deposits by the other sharers gave them no interest; and also held that the provisions of s. 33, Land Revenue Sales Act, 1859, had been complied with by the plaintiff. The lower Appellate Court agreed with the former finding, but held that as the plaintiff had not "declared and specified" his case of substantial injury before the Commissioner he had not complied with the provisions of s. 33, and hence his suit must fail. He therefore allowed the appeal and the plaintiff now appeals.

It may be noted at the outset that Mr. Sen appearing for respondents concedes that he cannot support the judgment of the lower Appellate Court on this last operative ground; he contends however that the Collector was right in allotting the separate account in equal shares to all the depositors and also that the plaintiff has failed to prove substantial injury in the present case and hence the suit must fail. The substantial questions for decision in the appeal are first the interpretation to be given to the words of s. 14, cited above, in reference to the declaration made by the Collector under the section, and secondly, whether s. 33 applies to the facts of this case.

Mr. Chakravarti appearing for the appellant supports the interpretation given by the lower Courts and also further contends that s. 33 has no application to the present case, and lastly that, if it applies, then he has complied with its provisions. The section has been considered in three cases, *Debi Prosad v. Aklo Koer* (3), *Gossain Chatturbhuj v. Ishrimal* (1) and *Bahuria Sambhu Kuar v. Harihar Prasad* (2). In the first case three sets of sharers had each deposited the whole arrear due, and the Collector had given them a certificate for joint ownership of the default-

ing share. The plaintiff sued for a declaration that he was entitled to a share in proportion to his share in the parent estate, and lost. There is nothing to show whether the amounts were deposited on the same or on different days, nor was there any contention that any one depositor had priority. Incidentally it may be noted that there was no question of annulment of the sale or of the matter of the applicability of s. 33.

In *Gossain Chatturbhuj v. Ishrimal* (1) the plaintiff was the owner of the defaulting share and clearly prayed for annulment; he made no claim as a purchaser by deposit under s. 14, but sued other sharers who had so purchased. The arrears had been deposited by some of these defendants on October 4, and by others on the 7th and the Collector had given them all a joint certificate under s. 14. The basis of the plaintiff's case was that he had deposited the arrears before the date of auction sale and that the whole proceedings of the Collector were invalid. No question arose there as between the purchasing defendants. It was held by Beverley, J. that s. 6 of the Act applied and that the plaintiff's deposit having been made after the last date of payment was ineffective, he further held that s. 33 applied to the case of such a sale under s. 14; Ameer Ali, J. held that the deposit was effective, but that s. 33 only applied to a case of an auction sale under the Act and not to one under s. 14. Petheram, J. to whom the case was referred agreed on both points with Beverley, J. In *Bahuria Sambhu Kuar v. Harihar Prasad* (2) defendant No. 1 was the first depositor of the entire arrears on the separate account, and the Collector had given him a certificate. It was found as a fact that defendant No. 1 was *benamidar* for defendant No. 2 who was the defaulting co-sharer. The plaintiff had deposited the entire arrear on the day after defendant No. 1 had done so, and he sued for recovery of possession of the whole share or in the alternative for a half-interest in it. The plaintiff succeeded in the trial Court. On appeal Coxe, J. was disposed to hold that although defendant No. 2 was the real purchaser, and although he was a sharer in the defaulting separate account, he was not debarred from taking advantage of the right to purchase given under s. 14, and he considered, but did not definitely decide, that the word 'other' in the phrase 'other recorded sharer or sharers' in s. 14 was

a mere inadvertance. He held however that defendant No. 1 as the first depositor was the purchaser and that the Collector had therefore been right in recognizing him as purchaser, and that

"as soon as the payment is made the purchase is complete and there is nothing left for anyone else to buy. The Collector is bound therefore in my opinion, to recognize the depositor who first pays the whole amount, or, if there are more depositors than one, to recognise as joint purchasers those whose payments first amounted to the total arrears due."

He then went on to refer to *Gossain Chattrbhuj v. Ishrimal* (1) and to approve the view that s. 22 applies to sales under s. 14, and to repudiate an argument that the sale to defendant No. 1 being a sale to a sharer in the defaulting separate account it was a nullity and that it was therefore unnecessary to annul it. Finally he dealt with a contention that the plaintiff did not want the sale annulled but merely that he might be declared the purchaser in these terms (at p. 1107*):

"To accept this contention would, in my opinion, be twisting the plain English of the Statute. The defendant has been formally declared the purchaser and the land has been delivered to his possession. To take it away from him and give it to the plaintiff would, in my opinion, be a manifest annulment of the sale, and a complete annulment if the whole were taken away from him, and an annulment *pro tanto* if a portion were taken."

He held therefore that as the plaintiff had suffered no injury, even if the purchase was bad as being made by a defaulting proprietor, s. 33 was fatal to his suit. In my opinion, though the words of s. 14 are not entirely free from ambiguity, the clear meaning is that, after the separate share has been put up for (auction) sale under s. 13 and a bid sufficient to pay the arrear has failed to materialize, the Collector is to stop the 'sale' and declare that the entire estate will be put up for sale at a future date unless the sharers specified in s. 14 exercise the right of pre-emption given to them, that is to say unless one of them or any group of them 'purchase the share in arrear by paying to the Prov. Govt. the whole arrear due from such share.' I agree therefore on this point with the view expressed by Coxe, J. in so far as there is in fact a 'purchase' by one sharer or a group of sharers jointly, but I would reserve judgment on the view expressed by the learned Judge that apparently sharers may come along independently in driblets within the ten days period and pay in odd amounts and that the Collector is to treat as purchasers all those who have

paid in something contributing to an amount equal to the total arrear. The case under consideration then was one of full deposit by one depositor and it was not strictly necessary therein as it is also unnecessary here to decide this point. There is the same objection to this view of the section as to the view that it means as was apparently assumed in *Debi Prosad v. Aklo Koer* (3). For example, how is the Collector to allot shares to the respective contributors. If the framers had any idea that there was to be anything but one straightforward transaction of purchase by one sharer or several coming jointly and simultaneously it seems to me that they would have made provision for these matters. It seems to me that the condition in the statutory declaration under s. 14 must be interpreted as a statutory offer, as it were, to the privileged parties to come and purchase the property, the purchase to be made by depositing the whole arrear, and being completed by such deposit; independent deposits of smaller sums should be ineffective. However for the purposes of this case it is sufficient to hold that if the first comer is, as here, a depositor of the full arrear, then he becomes the purchaser and all subsequent depositors acquire no interest; the sale is complete by the first deposit, and thereafter there is nothing to sell. Defendants Nos. 2, 3 and 4 in this case acquired nothing by their deposits.

It may be noted that the Board's Manual has at different times contained various instructions on how this point is to be interpreted, the present instruction in force is to follow the decision of Coxe, J., but with the qualification that where the whole amount is not paid by any one depositor, those depositors will be recognized as joint depositors whose payments first amount to not less than the total arrears due, provided that the payments are made on the same day, at whatever hour. I think however that the view expressed by me above will be found to be correct, and if sharers who cannot pay the full amount of the arrear wish to join with other sharers in the purchase they should do so before coming to pay in the amount of the arrear and they should themselves at the time of purchase claim the respective shares so jointly purchased.

We next come to consideration of s. 33 which lays down that no sale for arrears of revenue shall be annulled by a Court of Justice, except on the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plain-

*Page of 41 O.—[Ed].

tiff has sustained substantial injury by reason of the irregularity complained of, and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner. In my opinion this is not a suit for annulment of a sale for arrears of revenue at all, in fact annulment of the sale would give no remedy to the plaintiff; its effect would be merely to restore the property to the defaulting co-sharer provided that the decree could be executed. As the defaulting proprietor is not a party to the suit a decree for annulment would probably remain ineffective. The effect of an annulment is dealt with in s. 34 of the Act which clearly contemplates restoration of the defaulter, assumed to be decree-holder, on certain terms and conditions. Assuming that such restoration were made it could not help any of the present parties. If the property were again put to sale after due notice it might be sold in auction to some outside bidder; and by no other procedure can there be a re-sale after annulment of a sale; the Court has no power to make a sale after annulment.

With all respect to the learned Judges who decide *Bahuria Sambho Kuar v. Harihar Prasad* (2) it must be stated that in referring to and relying on the case in *Gossain Chatterbhui v. Ishrimal* (1), they failed to appreciate the vast distinction between that case where the remedy sought was actual annulment, and the type of case where there is a dispute between rival purchasers. Some of the confusion is due to the fact that the word 'sale' is used rather loosely in the Act. 'Sale' must necessarily include the whole procedure from issue of notices under ss. 5 and 6 up till the final completion of the 'sale' in its narrower sense as the corollary to 'purchase.' A 'sale' is conducted contrary to the provisions of the Act within the meaning of s. 33 if there is any defect in any of these proceedings, not merely for defect at the time of actual auction. In s. 14 'sale' is used to refer to the 'auction sale,' while the verbal difficulty to some extent is surmounted by referring to the pre-emption procedure as 'purchase.' If the 'purchase' is completed the Collector is to give a certificate, and then the purchaser or purchasers shall have the same right as if the share had been purchased at the 'sale'; if the 'purchase' is not made, the entire estate is to be sold after notification and publication as required by s. 6. Now it is clear that s. 33 will apply to a sale made under the pre-emption provisions

of s. 14 if there is any defect in the preliminaries, (though Ameer Ali, J. in *Gossain Chatterbhui v. Ishrimal* (1), held the contrary view). According to the majority view in that case had the plaintiff had a substantial point in respect of his deposit of the arrear after the last day of payment he could have succeeded. It is therefore correct to say in what may be called head-note form that 's. 33 applies to sales held under s. 14,' but that is quite a different matter from saying that it must apply to a case where the dispute is between rival purchasers neither of whom really wishes the sale to be annulled, where the dispute is merely as to the identity of the vendor and not as to the fact of sale. The learned Judge (Coxe, J.) having held that the sale was complete as soon as payment had been made of the full arrear by a qualified person and that the Collector was bound to recognize the depositor who first deposited the whole amount, it seems difficult to follow how he could then hold that it was twisting the plain English of the Statute to say that the plaintiff did not want the sale annulled. The dispute was wholly as to who was the first depositor; the plaintiff contended that defendant No. 1 of that case, being a *benamidar* for defendant No. 2, a sharer of the defaulting separate account, was not a person who in law could purchase the account. If the contention was accepted, then certainly defendant No. 1 was not a depositor at all under the section; the plaintiff was the first depositor, and according to the learned Judge's own view the purchase was complete when the plaintiff deposited the full amount, and he was merely asking in the suit for a declaration that the Collector was bound to recognize him, and give him the certificate.

It is to be noted that there is no provision in s. 14 for any declaration of purchase as there is in s. 22 in the case of a purchase at a public sale. In the latter case some formal declaration by the auctioneer is manifestly required. The declaration completes the sale, subject to the conditions as to payment of deposit, and of the full purchase price. In the case of public sales the certificate of sale is not given until after 60 days from the day of sale, or, where there is an appeal to the Commissioner for annulment of the sale which is not decided within the 60 days, then until after the conclusion of the appeal. It cannot be said then that the granting of the certificate is itself any part of the 'sale' which can be annulled, for the certificate is not given till after the

Commissioner has decided whether to annul the "sale" or not. In cases of the present type where the dispute is between rival purchasers the real dispute is as to the correctness of the Collector's certificate, which is under s. 28 the purchaser's evidence of title. In my opinion, therefore, both because annulment would be no remedy in this type of case, and because of the view that the first deposit by a qualified depositor constitutes the purchase, and because what is in dispute is merely the fact as to deposit and the effect of the law, s. 33 has no application; it will only apply if the sale is attacked for any defect in the procedure leading up to the position that a deposit of the amount of arrear by a qualified co-sharer will be a valid purchase of the defaulting share. Though constrained to differ from the view expressed in *Bahuria Sambho Kuar v. Harihar Prasad* (2) as to the applicability of s. 33 to a case of the present kind, it is not however necessary to refer the case to a Full Bench, since, even if the section applied I hold that it does not affect the plaintiff's claim as he has complied with its requirements both as to proof of substantial injury, and also admittedly as to raising the particular ground of irregularity now complained of in his appeal to the Commissioner.

We proceed then to consider whether the plaintiff has proved that he has sustained substantial injury "by reason of the irregularity complained of." A discussion of the point, on the assumption that s. 33 does apply to such cases, merely provides further reasons for holding that s. 33 cannot in fact apply to them. The irregularity complained of here is that the Collector has certified the four defendants as purchasers of the defaulting share, instead of merely certifying the plaintiff as purchaser. As the share has been sold for default of two *kists* only the purchase must be a lucrative one; the arrears amount to Rs. 480 odd, and the Court has valued the property at Rs. 1,200 which cannot be an over estimate. If the Collector's action amounts to part of the procedure of sale, then certainly the irregularity in his procedure has caused substantial injury to the plaintiff. But then argument is adduced from decisions relating to the true type of cases of annulment under s. 33, for example cases relating to disappointed bidders, to show that the injury alleged here by the purchaser is not the kind of injury contemplated by s. 33. This is really true, but the reason is not that there is no substantial injury but that the

injury is not of the kind contemplated by s. 33 because that section has no application to the case at all; and the reason is closely allied to the fact that the injury is such that the remedy provided by s. 33, *viz.*, annulment, is no cure, and can give no relief. However, it is clear that if it is held that s. 33 applies to this case the plaintiff is not hit by its provisions having complied with its requirements; he proves substantial injury and his ground of irregularity in his complaint to the Commissioner was the same ground as that now relied on, namely, the Collector's error in granting a joint certificate.

In the view taken above it is not necessary to discuss a point which was argued at some length before us in relation to the deposits made on October 14, the re-opening day, namely whether the ten days period in s. 14 was absolute or whether, if it expired on a holiday, the period was extended till the re-opening day. The present instructions in the Board's Manual are to the latter effect and appear to be correct. I agree therefore that the appeal must be allowed and that the decree of the trial Court must be restored.

s.

Appeal allowed.

ALLAHABAD HIGH COURT

Second Appeal No. 995 of 1937

October 17, 1939

THOM, C. J.

BARU AND OTHERS—PLAINTIFFS—APPELLANTS
versus

AMIR SINGH—DEFENDANT—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 47, O. XXI—Sale not challenged by party to execution proceedings under s. 47—Sale confirmed and certificate granted—Suit for possession on ground that sale certificate included more property than was ordered to be sold by decree—Maintainability.

When a sale of immovable property has not been challenged by the judgment-debtors a sale certificate is granted by the Court. At the date of the grant of certificate the sale becomes absolute. The sale certificate granted by the Court to the purchaser is a formal document of title. When a sale has been confirmed by the Court and has become absolute under the terms of O. XXI it cannot be said that the sale is a nullity. The sale must be considered valid until it is set aside. Where a party to the execution proceedings has failed to challenge the sale under s. 47 or O. XXI on the ground that the sale certificate included more property than the decree directed should be sold, a separate suit for possession is not maintainable. 183 Ind. Cas. 415 (2) and 125 Ind. Cas. 765 (3), relied on, 113 Ind. Cas. 725 (4), dissented from.

Mr. Muhammad Jalaluddin Ahmad, for the Appellants.

Mr. Nanak Chand, for the Respondent.

Judgment.— This is a plaintiff's appeal arising out of a suit for possession. The appellants sought to recover the property which had been sold to the defendant at an auction sale held in execution of a decree in his favour. It is averred by the plaintiffs-appellants that more property was sold than had been mortgaged and therefore covered by the decree obtained on the footing of the mortgage and executed by the defendant. The learned Munsif decreed the suit. The learned Judge in the lower Appellate Court reversed the decision of the learned Munsif and dismissed the suit. He has held that the plaintiffs having failed to challenge the sale under the provisions of s. 47, Civil P. C., or O. XXI, they are not now entitled to maintain a suit for possession. The plaintiffs were parties to the execution proceedings. They could have challenged the sale upon the ground that the sale certificate included more property than the decree directed should be sold. When a sale of immovable property has not been challenged by the judgment-debtors a sale certificate is granted by the Court. At the date of the grant of certificate the sale becomes absolute. It was contended for the plaintiffs in appeal that the suit was one for possession and not one to set aside a sale. In substance however, the suit is one to avoid the sale so far as the property not covered by the mortgage is concerned. The sale certificate granted by the Court to the defendant is a formal document of title: see *Venkata Jagannatha Rao Garu v. Venkata Kumara Mahipati Surya Rao* (1). The plaintiffs therefore cannot take possession of the property in suit from the defendant unless this document of title is avoided. It is not open now however to the plaintiffs to maintain a suit to set aside the sale. The plaintiff's right to challenge the sale expired when the sale was confirmed by the Court in favour of the defendant. In this connection reference may be made to the cases in *Rahim Buksh v. Kishen Lal* (2) and *Kishen Lal v. Peare Lal*, 125 Ind. Cas. 165 (3).

Learned Counsel for the appellants relied

(1) 1936 A W R 816; 163 Ind. Cas. 4; A I R 1936 P O 204; 63 I A 304; 59 M 910; 1936 O L R 354; 1936 A L R 589; 9 R P O 14; 2 B R 653; 63 O L J 376; 40 O W N 1130; (1936) M W N 791; 38 Bom. L R 760; 71 M L J 347; (1936) A L J 915; 44 L W 452 (P O).

(2) A I R 1939 All. 368; 183 Ind. Cas. 415; I L R (1939) All. 385; (1939) A L J 211, 12 R A 127.

(3) 125 Ind. Cas. 765; A I R 1930 All. 865; (1931) A L J 49; Ind. Rul. (1930) All. 749.

upon the case in *Bulaki Das v. Kesri* (4). The decision in this latter case certainly supports the contention for the plaintiffs that a suit for possession is maintainable where the property possession of which is claimed, is property which has been sold at an auction sale held in execution of a decree and which has not been covered by the decree. The point in issue was not exhaustively discussed by the Bench which decided that case. It was held that the suit was maintainable upon the ground that so far as the excess property was concerned the auction sale was a nullity. I am unable to agree with this proposition which has been reflected in the decisions already referred to. When a sale has been confirmed by the Court and has become absolute under the terms of O. XXI, it cannot be said that the sale is a nullity. The sale has been effected under orders of the Court and it must be considered valid until it is set aside. Upon the whole matter I am satisfied that the plaintiffs' suit which in substance is a suit to avoid an auction sale held in execution of a mortgage decree is not maintainable. There is no force in the appeal, the appeal is accordingly dismissed with costs. Leave to appeal is refused.

s.

Appeal dismissed.

(4) 26 A L J 716; 113 Ind. Cas. 725; A I R 1928 All. 363; 50 A 686.

NAGPUR HIGH COURT

Miscellaneous Civil Case No. 70 of 1938

April 14, 1939

STONE, C. J. AND BOSE, J.

Seth SUGANMAL AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

Mst. UMRAOBI AND OTHERS—DEFENDANTS

—RESPONDENTS

Registration Act (XVI of 1908), ss. 60, 2 (3), 30 (1), 87—Mere re-registration, if validates deed—Court, whether can go behind certificate of registration—Districts and sub-districts under Act—Sub-Registrar at one place having no jurisdiction wrongly accepting and registering document—District Registrar can re-register it himself—His directing registration of document by Sub-Registrar having jurisdiction is irregularity curable by s. 87.

The mere fact that the deed has been re-registered cannot validate it and the Courts are entitled to go behind the certificate of registration: *Mujib-un-nissa v. Abdur Rahim* (1), *Beni Madhab Mittar v. Khatir Mondul* (2) and *Batj Nath Tiwari v. Sheo Sahay Bhagut* (3), relied on. [p. 296, col. 1.]

Section 2(3), Reg. Act defines a district and sub-district as one formed under the Reg. Act. Therefore, it is clear that the Registering Authorities have their own districts and sub-districts which

need not necessarily conform to those of the Revenue Authorities. [p. 296, col. 2; p. 297, col. 1.]

The discretion conferred by s. 30 (1); Reg. Act is wide and unfettered. It is not controlled, in so far as representation of a document which has been accepted and duly registered in a wrong place by either s. 32 or s. 34 or by any other provision of Part VI, or any other part. These provisions deal with initial presentation and do not refer to representation of a document which has been accepted for registration and duly registered in the wrong place through a mistake of the registering authorities for which the parties were not responsible. These sections no more impose a time-limit or any other restriction upon representation. The discretion should not be lightly exercised. It should not be exercised at all when there is gross negligence, or carelessness or fraud. [p. 298, cols. 1 & 2.]

Where a Sub-Registrar of a sub-district having no jurisdiction to accept for registration a document, has wrongly accepted and duly registered it, the District Registrar having control over such Sub-Registrar and the Sub-Registrar by whom the document ought to have been registered, can remedy the wrong and register the document. If instead of registering it himself he directs the latter Sub-Registrar to register it, it is mere irregularity curable by s. 87. [p. 298, col. 1.]

Misc. C. Case from the decree of the Court of the Subordinate Judge, First Class Balaghat, dated August 26, 1935.

Mr. J. Sen, for the Appellants.

Rai Bahadur D. N. Chaudhari, for the Respondents.

Judgment.—This is an application by R. B. D. N. Chowdhari asking us to reconsider our order of March 7, 1938 in which we afforded the plaintiff an opportunity of obtaining registration of the mortgage-deed upon which he sues.

A preliminary objection is taken by Mr. Sen to the effect that no review lies. R. B. D. N. Chowdhari admits this but says that we have jurisdiction under s. 151 to reconsider an interlocutory order of the kind we have made. We do not propose to decide this point because we have also heard R. B. D. N. Chowdhari on the merits and can see no reason for altering our decision.

The learned Rai Bahadur argues that the mere fact that the deed has now been re-registered cannot validate it and that the Courts are entitled to go behind the certificate of registration. He refers to Rustomji's Registration Act, p. 358, to s. 60 of the Reg. Act, and to *Mujib-un-Nissa v. Abdur Rahim* (1), *Beni Madhab Mitter v. Khatir Mondul* (2) and *Baij Nath*

Tiwari v. Sheo Sahay Bhagut (3) in support of this proposition.

That may readily be conceded and we are prepared to treat this document as if it had been brought before us in its present form without any suggestion from us or any other Court about re-registration.

In those circumstances R. B. Chowdhari argues that only one conclusion is possible. He states that we have already decided that the first registration was invalid because the Sub-Registrar to whom it was presented had no jurisdiction to register it. He says the second is equally invalid because the second presentation was beyond time. He says the provisions of s. 23 of the Reg. Act are mandatory.

As regards *Sah Mukhun Lall Panday v. Sah Koondum Lall* (4) he states that we have misunderstood that ruling. He points out that the re-registration which the Privy Council upheld in that case was by the same Sub-Registrar and that the fact that it was initially presented to the proper registering authority makes all the difference. Section 23-A now embodies the purport of that ruling and it is similarly restricted in its application.

We fully realise that *Sah Mukhun Lall Panday v. Sah Koondum Lall* (4) is not a decision on all fours with the present case. The position we have here is not directly covered by authority, at any rate, not by that of their Lordships; nor is there any decision of this Court on the point. It is consequently a case of first impression and what we have done is to apply the principles laid down in *Sah Mukhun Lall Panday v. Sah Koondum Lall* (4) as far as we can to the present circumstances.

We have already decided that there was no question of fraud in this case. We have already held that all the parties, as well as the Sub-Registrar at Baihar acted in perfect good faith. The situation of the property as given in the deed is "*Mouza Lamta, Tahsil and District Balaghat.*" Both Lamta and Baihar are in the Balaghat District, so that in itself affords no indication as to whether Lamta lies within the registration sub-district of Baihar, or of Balaghat. It is true the document speaks of the Tahsil of Balaghat which is not the same as the Tahsil of Baihar, but it does not follow that the registration sub-districts are co-terminous with the revenue areas. Section 2 (3) defines a district and sub-district

(1) 23 A 233; 28 I A 15; 5 O W N 177; 11 M L J 58; 3 Bom. L R 114; 7 Sar. 820 (P O).

(2) 14 O 449

(3) 18 C 556 (F B).

(4) 24 W R 75.

as one, formed under the Reg. Act. Therefore it is clear that the Registering Authorities have their own districts and sub-districts which need not necessarily conform to those of the Revenue Authorities. In fact, the very names, sub-district and Tahsil, show that they need not be the same.

A glance at the map will show that Lamta, Baihar and Balaghat form three points of a triangle which, as the crow flies is very roughly equilateral. A motor road connects Balaghat with Baihar, and the same road runs on through Baihar to Lamta. The distance between Balaghat and Baihar by road is 41 miles, and that between Baihar and Lamta only 32. Motor buses run between these places.

The third side of the triangle between Lamta and Balaghat consists of a narrow gauge railway line. Lamta is only a small station on this out of the way line and the train connections are probably neither frequent nor convenient. Forest and a wild range of hills separate them all. It is easy to see how in these circumstances Lamta would be much more closely associated with Baihar than with Balaghat, and easy to see how the mistake came to be made. In fact when it is realised that even the Sub-Registrar himself thought that Lamta fell within his sub-district it is easy to see how mere laymen could also be misled.

It has to be remembered that these places lie in a wild part of the country where forests and wild hills abound, and where the line of demarcation between one sub-district and another is to be found only on maps and not on the ground itself. Expert surveyors would often be required to determine whether any given area falls on one side of the boundary or the other. In these circumstances it would be monstrous to mould the law of registration so woodenly and inelastically as to destroy titles taken and given in good faith simply because a Govt. official who is theoretically supposed to know his district does not, and as a matter of practical politics cannot, know every inch of it.

When *Sah Mukhun Lall Panday v. Sah Koondum Lall* (4) was decided the matter was also one of first impression. There was no authority or precedent to guide their Lordships. Section 23-A of the Act was not there. They took the bold and just course and interpreted the law as it ought to be interpreted whenever that is possible, in a broad and common-sense way so as to

further the ends of justice and not to defeat them. We feel we are called upon to do the same here. The same principles which guided their Lordships are here to guide us too. The same considerations which weighed with them weigh with us also. When their Lordships decided their case, the Reg. Act neither prohibited nor allowed re-registration in the peculiar circumstances which then prevailed. It was silent on the point. In the case before us also the Reg. Act neither prohibits nor allows what has now been done. It is silent here as well.

The great principle which their Lordships laid down was that when the Act does not prohibit re-registration or impose a time-limit within which it must be done, then in order to prevent injustice to the parties flowing from the mistaken act of the Registering Authorities themselves, these authorities have inherent power to remedy their own wrongs just as Courts have inherent power to remedy theirs.

In the case before their Lordships, the Sub-Registrar had jurisdiction to accept the document for registration both when it was first presented and when it was represented. Therefore that was the official clothed with the power to remedy the wrong done by his predecessor.

In the case now before us the Sub-Registrar at Baihar had no power either in the beginning or at the end, but the District Registrar had power to determine in which of two sub-districts the property lay and to effect registration accordingly. He had that power in the beginning he had it when the document was represented; and he has it now. He therefore was and is the man empowered to remedy this wrong.

Under s. 30 (1) the Registrar is given a discretion to receive and register any document which might be registered by any Sub-Registrar subordinate to him. The document in this case ought to have been registered before the Sub-Registrar at Balaghat. This Sub-Registrar is subordinate to the District Registrar who directed the re-registration in this case. Therefore this District Registrar had at all material times power and authority to deal with this document because the property comprised in it fell within his jurisdiction.

Had the Sub-Registrar at Baihar refused registration in the first instance, the District Registrar could have exercised the discretion vested in him by this section

and could have effected registration himself. So far as he was concerned, presentation to his subordinate at Baihar was as good as presentation at Balaghat, because both places were within his jurisdiction and both officers were under his authority and control, and also because no procedure is laid down as to the manner in which a document is to be placed before him for his reception; and in any event that would be an irregularity curable by s. 87. No time-limit is fixed within which he is to exercise this discretion and consequently, as their Lordships of the Privy Council have pointed out, he can exercise it at any time, and would certainly be justified in doing so when a Division Bench of this Court considered the case a fit and proper one for the exercise of such discretion.

It will be seen that the discretion conferred by s. 30 (1) is wide and unfettered. It is not controlled, in so far as representation of a document in circumstances similar to the present are concerned, by either s. 32 or s. 34 or by any other provision of Part VI, or any other part. These provisions deal with initial presentation and do not refer to representation of a document which has been accepted for registration and duly registered in the wrong place through a mistake of the Registering Authorities for which the parties were not responsible. The parties here did nothing to mislead, and placed all the facts squarely before the Sub-Registrar in the first instance and left themselves in his hands. These sections no more impose a time-limit or any other restriction upon representation than did the corresponding sections in the Act which was in force when their Lordships decided *Sah Mukhun Lall Panday v. Sah Koondum Lall* (4). The District Registrar had therefore ample power to accept the deed for re-registration.

In point of fact he did not actually register it himself but directed the Sub-Registrar at Balaghat, who is subordinate to him, to do so. But that, if an irregularity at all, is a mere defect in procedure which is curable by s. 87. Even if he had effected registration himself the registration would, under s. 66 (1), have been entered in the books of the Sub-Registrar at Balaghat which, on our findings, is the sub-district within which the property in dispute is situate. Therefore registration by the Sub-Registrar at Balaghat at the direction of the Registrar has made no

practical difference to the essentials with which the law of registration is concerned.

It is to be observed that we did not direct re-registration by the Sub-Registrar at Balaghat. All we said was that the document should be represented to enable the proper Registering Authority to register it. This we think has now been done, and even if there is a slight irregularity in the procedure of the District Registrar in the manner of effecting the registration, it is curable by s. 87.

But we wish to make it plain that the circumstances here are exceptional. We do not for a moment suggest that this discretion should be lightly exercised, or that it should be exercised at all when there is gross negligence, or carelessness or fraud. But in a case like this when even the Registering Authorities themselves were misled and accepted the document and registered it, and were thus instrumental in lulling the parties into a sense of security it is pre-eminently right and proper that resort should be had to the exercise of these exceptional powers.

There is however one small point on which our interlocutory order will require modification. We stated that when re-registration had been effected a formal order decreeing the plaintiff's claim with costs would be made. We omitted to notice that the case had only been decided upon a preliminary point and that there had been no decision on the merits. Of course the matter will have to go back for a continuation of the trial.

The question of fraud was again urged and again reference was made to the passages in the pleadings to which we have already referred in our preliminary judgment. We see no reason to alter our view. If the parties genuinely believed, as we consider they did, that registration could be effected at Baihar, they would have been justified in believing that it could also be effected at Balaghat, for as we have shown the District Registrar at Balaghat could have registered it at Balaghat even if ordinarily the proper place of registration had been with the Sub-Registrar at Baihar. The passage referred to does not therefore contain an admission of fraud, or an admission that the parties knew at the time of registration, that the Sub-Registrar at Baihar had no jurisdiction.

The decree of the lower Court is set aside and the case is remanded under

O. XLI, r. 23, of the Civil P. C. for a continuance of the trial from the point at which it left off. Costs will follow the event. There will be a refund of court-fees under s. 13 of the Court Fees Act.

s.

Case remanded.

ALLAHABAD HIGH COURT

Second Appeal No. 934 of 1936

November 23, 1939

IQBAL AHMAD AND BAJPAI, JJ.

SAT DEO PRASAD—PLAINTIFF—
APPELLANT

versus

DEBI BADAL AND OTHERS—DEFENDANTS
—RESPONDENTS

Compromise—Vakalatnama held gave power to the Pleader to enter into compromise on behalf of minor—Compromise otherwise valid and binding on minor—Question whether it was for benefit of minor held could not be discussed in suit for declaration that compromise is void.

By a *vakalatnama* extensive powers concerning the conduct and prosecution of the suit on behalf of a minor were given to a Pleader and he was *inter alia* authorized to appoint arbitrators, to file compromise (*sulahnama dakhil karen*) and to file documents and it was stated in the *vakalatnama* that all the acts done by the Pleader would be accepted by the minor:

Held, that the *vakalatnama* conferred very wide powers in very general terms on the Pleader, and as such, the *vakalatnama* must by necessary implication be deemed to have authorized him to enter into the compromise. 146 Ind. Cas. 84 (1), relied on.

If the compromise is otherwise valid and binding the question whether or not it was for the benefit of the plaintiff, cannot be debated and discussed in a suit for a declaration that the compromise is not binding on him. That was a question to be determined by the Judge who granted the permission for the compromise.

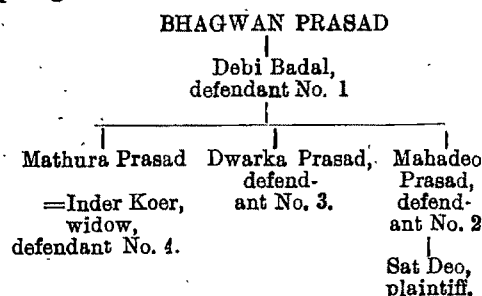
S. A. from the decree of the Additional Civil Judge, Allahabad, dated March 30, 1936.

Messrs. N. P. Asthana and B. N. Sahai, for the Appellant.

Mr. Damodar Das, for the Respondents.

Iqbal Ahmad, J.—This is an appeal by Sat Deo Prasad, minor, an unsuccessful plaintiff, whose suit for a declaration that the compromise decree in suit No. 233 of 1933 of the Court of the Munsif, West Allahabad, was conclusive and void and was not binding on him (the plaintiff) has been dismissed by both the Courts below. The parties to the present suit are descended from one Bhagwan Prasad and their family

pedigree is as follows:



It appears that suit No. 233 of 1933 was filed on behalf of Sat Deo Prasad by his mother, *Mst. Bhagwati Devi*, who acted as his next friend in the suit. The defendants to that suit were amongst others Debi Badal, Dwarka Prasad and Inder Kuer. As *Mst. Bhagwati Devi* was a *pardanashin* lady she appointed one Balgobind as an attorney to look after the prosecution of the case. The powers given to Balgobind were evidenced by a registered power-of-attorney dated May 8, 1933. By this deed Balgobind was *inter alia* authorized to file a compromise. The Urdu words used in the document were *sulahnama dakhil karen*. An Advocate named B. Mahabir Prasad was appointed a Pleader on behalf of the plaintiff by means of *vakalatnama* that was signed by Bhagwati Devi. By the *vakalatnama* extensive powers concerning the conduct and prosecution of the suit were given to B. Mahabir Prasad and he was *inter alia* authorized to appoint arbitrators, to file compromise (*sulahnama dakhil karen*) and to file documents and it was stated in the *vakalatnama* that all the acts done by B. Mahabir Prasad would be accepted by Sat Deo Prasad, plaintiff. In short wide and extensive powers were conferred on B. Mahabir Prasad by the *vakalatnama*.

Suit No. 233 was contested by the defendants and on the date of the recording of evidence the parties entered into a compromise when the trial Judge was actually recording the statement of Balgobind. It has been found by the Courts below that the terms of the compromise were discussed by the parties or their Pleaders in the presence of the presiding Judge and after the terms were settled the Counsel for the parties made a statement concerning those terms and that statement was recorded and signed by Balgobind and the Pleaders of the parties. In short, it is manifest from the findings recorded by the Courts below that the compromise was not a hole and corner affair but was arrived at in open Court after mutual discussion between the

parties. The plaintiff-appellant assailed the validity of the compromise on four grounds. He alleged that his mother, who was his next friend, gave no instructions for the compromise to any person whatsoever. Secondly he alleged that Balgobind was under the influence of Debi Badal who was one of the defendants in suit No. 233. Thirdly he alleged that the compromise was entered into without the permission of the Court and lastly he asserted that the compromise was prejudicial to his interest.

The contention of the plaintiff that the compromise was entered into without the permission of the Court was baseless. It has been found by both the Courts below that the requisite permission to enter into a compromise on behalf of the plaintiff, who was a minor, was given by the presiding officer of the Court. The question whether the compromise was or was not for the benefit of the minor had no material bearing on the decision of the present suit unless the compromise was vitiated on any of the grounds alleged by the plaintiff. If the compromise was otherwise valid and binding the question whether or not it was for the benefit of the plaintiff cannot now be debated and discussed. That was a question to be determined by the Judge who granted the permission for the compromise. It may be assumed for the purposes of argument that the mother of the plaintiff who was his next friend did not give any directions either to Balgobind or to B. Mahabir Prasad to enter into the compromise. Nevertheless, the compromise must be held to be valid and binding if it is found that either Balgobind or B. Mahabir Prasad had the authority to enter into the same and that in exercising that authority they acted honestly and without being in collusion with the defendants to the suit.

So far as B. Mahabir Prasad is concerned he was undoubtedly competent to enter into the compromise. As stated before the *vakalatnama* in his favour conferred very wide powers in very general terms on him, and as such, the *vakalatnama* must by necessary implication be deemed to have authorized him to enter into the compromise. This was the view taken in the Full Bench decision of this Court in *Akbari Begam v. Rahmat Husain* (1). It was contended on behalf of the plaintiff-appellant that the words *sulahnama dakil karen* that find a place in the power-of-attorney and in the *vakalanama* did at best authorize Balgobind

and B. Mahabir Prasad to file a compromise and not to enter into a compromise. We are unable to agree with this contention. The words noted above are words of general import and uncontrolled as they are by any condition to the effect that the compromise must bear the signature of the plaintiff's guardian before the same can be filed in Court the only reasonable interpretation that can be put on those words is that the attorney and the Vakil were given the authority to enter into a compromise on behalf of the minor. That being so the competence of the Vakil and of Balgobind to compromise the suit cannot be questioned. We find that the compromise was signed also by the plaintiff's father. It is not suggested that the plaintiff's father was in collusion with the other defendants to Suit No. 233.

The allegation that Balgobind or the plaintiff's father were either in collusion with or under the influence of Debi Badal was not accepted by either of the Courts below. It follows that the compromise was entered into by authorized persons and was not vitiated by fraud or collusion. The Courts below were, therefore right in holding that the compromise decree was binding on the plaintiff-appellant. This appeal must therefore fail and is dismissed with costs.

D.

Appeal dismissed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 218 of 1939

February 9, 1940

AGARWALA, J.

THE MEMBERS OF THE UNION
COMMITTEE, DALSINGHSARAI

—APPELLANT

versus

SAHAY SAH AND OTHERS—RESPONDENTS.

Bihar and Orissa Local Self-Government Act (III of 1885), s. 118-C (3) (d)—Joint family carrying on business in five different buildings within union—Tax, in respect of each building, if can be levied.

Where the assessee is a joint family and this family carries on business in five different buildings within the boundaries of the Union, the Committee is not entitled to levy tax in respect of each building owned or occupied by it within the Union. Acceptance of the contention that it is so entitled will be to ignore altogether the provisions of cl. (d) of sub-s. 3 of s. 118-C, Bihar and Orissa Local Self-Govt. Act. The assessment in such a case should not exceed Rs. 5, the joint family being a person within the meaning of cl. (d) of sub-s. 3.

In such a case the assessee is entitled to the refund of the whole of the excess tax paid to the Union.

(1) (1933) A L J 1127; 146 Ind. Obs. 84; A I R 1933 All. 861; 56 A 39; 6 R A 232 (F B).

A. from a decision of the Additional Subordinate Judge of Darbhanga, dated December 22, 1938.

Mr. Hareshwar Prasad Sinha, for the Appellant.

Messrs. S. N. Bose, K. N. Lal and K. P. Varma, for the Respondents.

Judgment.—This is a suit by the karta and members of a joint Hindu family for a declaration that an assessment made on them on June 9, 1935, by the Union Committee of Dalsinghsarai under s. 118-C of the Bihar and Orissa Local Self Govt. Act amounting to Rs. 255 was *ultra vires* the Union Committee and for recovery of the tax paid plus Rs. 10 by way of interest. The Courts below have agreed in decreeing the suit. This appeal is by the Union Committee of Dalsinghsarai challenging the decision of the Courts below.

The question that arises is whether an owner or occupier of buildings within the Union is taxable in respect of each of the building which he owns or occupies or whether only one tax is assessable on each individual. Section 118-C of the Act empowers the Union Committee to impose on the owners of buildings, tanks, wells or water-courses, or the occupiers of buildings, within the Union, or in any village therein, such assessment as may be required approximately to meet any deficiency in the financial resources of the Union. Clause (d) of sub-s. 3, however, limits the amount to be assessed on any person to Rs. 5 per mensem. The assessee in this case was a joint family and this family carried on business in five different buildings within the boundaries of the Union. Both before and after 1935 the assessment on the family had been limited to five rupees per mensem. In 1935, however, the Union assessed the family in respect of each of these buildings with the result that the family has had to pay more than five rupees per mensem. It is not disputed, of course, that a joint Hindu family 'is a person' within the meaning of cl. (d) of sub-s. 3. The learned Advocate for the Union Committee in this Court has maintained the argument addressed to the Courts below that the Committee is entitled to levy tax in respect of each building owned or occupied by persons within the Union. Acceptance of that contention will be to ignore altogether the provisions of cl. (d) or sub-s. 3. Had the Legislature intended that any one person within the ambits of the Union Committee

should be liable to pay more than five rupees per mensem, cl. (d) would have read very differently and probably would have been worded as follows: The amount to be assessed in respect of any building, tank, well or water-course shall not exceed five rupees per mensem. Clause (d), however, as it stands, does not refer to buildings, tanks, wells or water-courses but to persons and in unequivocal language limits the assessment on any one person to five rupees per mensem. I, therefore, agree with the Courts, below that the assessment in the present case, in so far as it offends against the provisions of cl. (d), was *ultra vires* the Union Committee, and would, therefore reduce the assessment to five rupees per mensem.

With regard to the claim for recovery of the amount already paid, the learned Advocate for the respondents concedes that the decree of the Court must be modified to this extent that his clients are not entitled to the refund of the whole of Rs. 255 paid but only to so much of it as it is in excess of what was within the power of the Union Committee to levy, namely Rs. 60 per annum. He concedes, therefore, that the appellant is entitled to retain Rs. 60 out of Rs. 255 paid. The result is that the decree of the Court below will be modified to this extent that it will be declared that the assessment on the plaintiffs in excess of five rupees per mensem is *ultra vires* and the plaintiffs are entitled to recover Rs. 195 out of the money which they claimed. With this modification the appeal is dismissed. The parties will bear their own costs in this Court.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 1631 of 1937

May 24, 1939

B. K. MUKHERJEE AND ROXBURGH, JJ.

Smt. BAJROGA KHATUN

AND OTHERS—APPELLANTS

versus

PROVINCE OF BENGAL—PRINCIPAL

DEFENDANT AND OTHERS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), s. 184—S. 184 does not overrule O. VIII, r. 2, Civil Procedure Code—Limitation must be pleaded—Facts in case not clear and undisputed—Plea of limitation not raised in trial Court—Should not be allowed in appeal—Suit for possession as raiyat—Limitation—Bengal Public Demands Recovery Act (III of 1913), s. 20—Representation—Applicability to sale in certificate proceeding—S. 146-A, Bengal Tenancy Act, if applies to such proceedings.

Section 184 (1) Ben. Ten. Act does not overrule the provisions of O. VIII, r. 2, Civil P. C. which require that the defendant must raise by his pleading all matters which raise issues of fact not arising out of the point, as for instance, limitation. Section 184 would require a suit to be dismissed if in fact it has been filed after the period of limitation and would apply even in an *ex parte* case if the facts appear clear and undisputed. Where however, the facts are not clear and undisputed. The question of limitation should not be allowed to be raised as the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial.

Limitation for a suit to recover possession of land claimed by the plaintiff as a *raiyat* is governed by s. 184, Ben. Ten. Act and not by s. 3 or s. 29, Lim. Act.

Section 146-A, Ben. Ten. Act does not in terms apply to certificate proceedings. Certificate proceedings are governed by s. 20, Ben. Public Demands Recovery Act. The words "where the holding is sold in execution of a certificate" in s. 20 (1) mean "where the interests of all the tenants of a holding are bound by the sale and sold in execution of a certificate." The principle of representation recognized in respect of rent decrees would also apply in the case of sales in execution of certificates. When the amendment to Ben. Ten. Act was made by the insertion of s. 146-A, by which in the case of sales by execution of decrees it was provided that in certain circumstances the interests of certain persons not actually parties to the suit might be affected, it does not follow that this applied also to certificate sales in so far as any change was made from the law as it stood at the time when the Ben. Public Demands Recovery Act itself was passed in 1913.

A. from the appellate decree of the District Judge, Noakhali, dated August 17, 1937.

Mr. Jitendra Kumar Sen Gupta, for the Appellants.

Mr. Rama Prosad Mukherjee, for the Respondents.

Ruxburgh, J.—This appeal arises out of a suit by the plaintiffs for declaration of their *raiyati* right in one-third share of the suit land and for recovery of possession. The suit land formerly belonged to one Hakimuddin *patwari* who died in Pous 1331 B. S. leaving six daughters, one son and a widow. Three of the daughters are plaintiffs and the other three daughters and the son and the widow are *pro forma* defendants Nos. 5 to 9. The suit was contested by the Secretary of State, defendant No. 1, who had purchased the holding of Hakimuddin *patwari* in a certificate sale in respect of arrears of rent for 1337-1338 B. S. The plaintiffs claim, as they were not certificate debtors in those proceedings, their interests were not affected by the certificate sale, and they also claim to have been dispossessed of the holding in the latter part of 1340 B. S. by the Secretary of State.

The Secretary of State's case is that the three plaintiffs were represented by *pro forma* defendant No. 6, Selim Mia, son of Hakimuddin *patwari*, and that their interest passed in the sale. In the trial Court the plaintiffs claimed that they had separate possession of the suit land and had themselves paid rent. The trial Court found that in fact they had no separate possession and that the rent had been paid by the son, Selim Mia. The trial Court therefore found that the plaintiffs had been represented by Selim Mia and dismissed their suit. In the lower Appellate Court, the question of representation appears to have been argued on the basis of s. 146-A, Ben. Ten. Act, and that Court also found that the plaintiffs had been represented by Selim Mia within the terms of sub-cl. (ii) of sub-s. (3) of s. 146-A. The lower Appellate Court also held that the plaintiffs' claim was barred under a special law of limitation. In this Court two points are urged, first that the lower Appellate Court should not have allowed the question of limitation to be canvassed before it, and secondly that s. 146-A, Ben. Ten. Act, does not apply to certificate proceedings.

As regards the question of limitation, we think that the lower Appellate Court was in error. The learned Judge discussed s. 3 and s. 29, Lim. Act, and O. VIII, r. 2, Civil P. C. It is to be noted however that the case is really governed by s. 184, Ben. Ten. Act, although this fact in itself appears to make no difference to the decision. Section 184, sub-s. (1) provides that every suit instituted after the period of limitation provided in Sch. III shall be dismissed although limitation has not been pleaded. We are of opinion that this does not overrule the provisions of O. VIII, r. 2 which require that the defendant must raise by his pleading all matters which raise issues of fact not arising out of the point, as for instance, limitation. Section 184, would require a suit to be dismissed if in fact it has been filed after the period of limitation and would apply even in an *ex parte* case if the facts appeared but it is clearly evident from the judgment of the lower Appellate Court itself that in this case the facts were not clear and undisputed and indeed he discussed the evidence at some length in order to arrive at a conclusion that the suit must necessarily have been filed, at any rate, a few days after the period of limitation had expired, and he uses for the purpose some of the evidence that appeared in the case. We

do not think, this was the proper way of treating the matter and we consider this was clearly a case in which the question of limitation should not have been allowed to be raised as the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial.

Coming next to the question of representation, it is to be noted that the trial Court did not rely on specific terms of s. 146-A, Ben. Ten. Act. This section was enacted in the Amendment Act of 1928, and in fact substantially codified the previous law on the subject, at any rate as regards decrees. We think however for reasons that will appear hereafter that it must be conceded that it cannot be held to apply in terms to certificate proceeding and that if it is desired by the Legislature that it should be so, some specific reference to the Ben. Public Demands Recovery Act, 1913, is necessary in that section. The decision on the question turns on the interpretation of s. 20, Ben. Public Demands Recovery Act, 1913. Sub-s. (1) of that section provides that :

"Where property is sold in execution of a certificate there shall vest in the purchaser merely the right, title and interest of the certificate debtor at the time of the sale even though the property itself be specified."

We have then the terms of sub-s. (3) which runs as follows :

"Notwithstanding anything contained in sub-s. (1) in areas in which Chap. XIV, Ben. Ten. Act, 1885, is, in force, where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof, the tenure or holding shall, subject to the provisions of s. 22 of that Act, pass to the purchaser, subject to the interests defined in that chapter as 'protected interests' but with power to annul the interests defined in that chapter as incumbrances."

Mr. Sen Gupta who argued the case for the appellants appeared to urge that the meaning of the words "where the holding is sold in execution of a certificate" must be taken to be equivalent to "where all the tenants of a holding are certificate debtors, and hence all of their interests are sold", but, we think, it must be taken as meaning "where the interests of all the tenants of a holding are bound by the sale and sold in execution of a certificate." The real intention of sub-cl. (3) is evidently to make clear that, just as in a sale in execution of a rent decree more than the interests of the tenants themselves shall pass, namely the right to annul incumbrances under Chap. XIV, Ben. Ten. Act, so also in the case of a certificate sale a similar right shall pass. In support of his contention Mr. Sen Gupta referred to the case in

Mst. Raja Koer v. Ganga Singh (1), which has been relied on in *Ghanshyam Das v. Ragho Singh* (2), but the former case was decided before the Act of 1913, and on the ground that a certificate sale did not contemplate enforcement of a security. The provisions of s. 20 (3) now clearly provide for such enforcement, and it is in cases of such a kind that the question of representation becomes of importance, for, the interests of third parties are vitally affected, and the decision as to this interest may turn on a question whether some obscure heir or co-sharer tenant who had taken no interest in his share has been named as a certificate debtor in a certificate or was a party to the decree for arrears of rent. We must suppose that when the Legislature gave this extended effect to sales in execution of certain certificates for rent it intended to make it as effective as in the case of a sale in execution of a decree for rent, and legislated on the assumption that the principle of representation then recognized in respect of rent decree without statutory provision would also apply in the case of sales in execution of certificates.

Mr. Rama Prasad Mukherjee, appearing for the Secretary of State pointed out that the phrase "where a tenure or holding is sold in execution of a certificate for arrears of rent due in respect thereof," which appears in s. 20 (3), Public Demands Recovery Act, occurs also in s. 159, Ben. Ten. Act (with the substitution of 'decree' for 'certificate') and that it was inserted in other sections of Chap. XIV of that Act, for example in ss. 166, 171, 172; by s. 62, Public Demands Recovery Act, itself. He urges that the phrase should be given the same interpretation throughout. Section 61 of that Act inserted s. 158-B into the Ben. Ten. Act, in order to make it clear in what circumstances so far as affected the landlords the holdings should pass or not, and a distinction was made in that the holding passed in the case of a decree if it was obtained either by a sole landlord or by the entire body of landlords or by one or more co-sharer-landlords who had made all remaining co-sharers party defendants to the suit, whereas in the case of a certificate the holding would only pass if the certificate was signed on the requisition of, or in favour of, a sole landlord or of the entire body of landlords. Thus, in the case of certificate procedure, there was no provision

(1) 13 O W N 750; 1 Ind. Cas. 197; 10 O L J 201.

(2) 10 Pat. 234; 130 Ind. Cas. 257; A I R 1931 Pat. 64; 11 P L T 898; Ind. Rul. (1931) Pat. 161.

for bringing in co-sharer-landlords who were not themselves applying for a certificate and s. 20 (4), Public Demands Recovery Act, itself points this out. These provisions were amended in 1928, but the same distinction between decree and a certificate was maintained and so far as a certificate was concerned, the terms of s. 158-AAA were to the same effect as those of s. 158-B which was repealed. So far as a decree was concerned, some special provision was made so that a co-sharer-landlord in certain circumstances might have the advantage of a rent sale in respect of his separate share of the rent. (Chap. XIII-A including s. 158-AAA has since been repealed by the amendment of 1938.)

It will be seen that the formula "where a tenure or holding is sold in execution of a decree for arrears due in respect thereof" in s. 159 and other sections in Chap. XIV, Ben. Ten. Act, has a different meaning according as whether a decree or a certificate is referred to, in the sense that the tenure or holding is "sold" within the meaning of those sections only according as whether the procedure of s. 148-A or the terms of s. 158-AAA, respectively are complied with. Similarly, then it appears that the formula may have a different meaning according as a decree or certificate is referred to in so far as the interests of the tenants are affected. In other words, when the amendment to Ben. Ten. Act was made by the insertion of s. 146-A by which in the case of sales by execution of decrees it was provided that in certain circumstances the interests of certain persons not actually parties to the suit might be affected, it does not follow that this applied also to certificate sales in so far as any change was made from the law as it stood at the time when Ben. Public Demands Recovery Act itself was passed in 1913. To this extent therefore the contention of Mr. Sen Gupta must prevail and we hold that s. 146-A does not apply in terms to certificate sales, but on the other hand both Courts have found as a fact that the heirs of Hakimuddin *patwari* possesses this holding jointly and that the rent was paid by the son. It would seem that, as was indeed found by the trial Court, apart from the explicit terms of s. 146-A the plaintiff daughters were represented and therefore their interests were bound by the sale. The result is that although the appellant's contention on the point of limitation succeeds, they fail on the question of representation, and

this appeal must be dismissed. There will be no order as to costs.

B. K. Mukherjea, J.—I agree.

s.

Appeal dismissed.

LAHORE HIGH COURT

First Appeal No. 162 of 1939

October 3, 1939

DIN MOHAMMAD, J.

ISHAR DAS, PROPRIETOR,
PUNJABEE BHAION KI DOKAN,
MACHHI HATTA, LAHORE
—DEFENDANT—APPELLANT

versus

FIRM BHAION KI DOKAN
THROUGH SARDAR JAWAHAR
SINGH AND OTHERS—PLAINTIFFS
—RESPONDENTS

Trade name—Temporary injunction restraining defendant from using disputed trade name, when can be granted—Injunction—Temporary—Temporary injunction declined by Judge—His successor, if can go behind order and subsequently grant it.

Where the name of one particular individual or firm has such universal reputation in connection with a particular class of goods that it becomes evident that if a second person enters the trade under a name which is the same or so similar as likely to cause confusion in the mind of the intending purchasers and the harm thus caused is *prima facie* such as no compensation would be enough to counterbalance it, the Court can grant temporary injunction restraining the second person from using the disputed trade name till the decision of the suit.

Where a Judge has declined to grant a temporary injunction, his successor can go behind that order when new circumstances have subsequently arisen and make another order which the exigencies of the case require.

F. A. from an order of the Sub-Judge, First Class, Lahore, dated June 26, 1939.

Messrs. Achhru Ram and Din Dayal Kapur, for the Appellant.

Messrs. Dev Raj Sawhney and Kishori Lal, for the Respondents.

Judgment.—In a suit instituted by the firm 'Bhaion Ki Dokan' against Ishar Das and Devi Dayal, a temporary injunction has been issued by the Subordinate Judge "restraining the defendants from using the disputed trade name 'Punjabi Bhaion Ki Dokan' *** "as well as from using the trade labels with the inscription of 'Punjabi Bhaion Ki Dokan' till the decision of the suit." The defendants have appealed. It is contended by the appellants' Counsel that the application for injunction was belated inasmuch as the defendants' business had started in 1935, that since then the goods

manufactured by them have been displayed in several exhibitions to the knowledge of the plaintiffs and that the balance of convenience was on the defendants' side and not on the plaintiffs' side. It is further urged that these contentions had prevailed with *Lala Sardari Lal*, Subordinate Judge, who was first dealing with the case and who had consequently declined to comply with the plaintiffs' wishes. It is added that the injury to the defendants is irremediable and that the purpose of the plaintiffs can be served if the defendants keep regular accounts and undertake to pay their profits to the plaintiffs in case their suit is decreed. It is also emphasized that *Sardar Prahlad Singh* who succeeded *Lala Sardari Lal*, had gone out of his way in entertaining another application from the plaintiffs to the same effect and disturbing his predecessor's order.

The facts, as stated by the appellants' Counsel, are correct, but I do not agree with him that in the new circumstances that had arisen, Mr. Prahlad Singh could not go behind the order of *Lala Sardari Lal* and make another order which the exigencies of the case required. I am also not disposed to agree with the appellants' Counsel that no order should have been made inasmuch as the defendants' business had been in existence for some time before the grant of the temporary injunction. So far as the balance of convenience is concerned. I have no hesitation in remarking that the injury done to the plaintiffs' business is in a way irreparable. The two names 'Bhaion Ki Doka' and 'Punjabi Bhaion Ki Doka' are apparently so similar as likely to cause confusion in the mind of the intending purchasers and the harm thus caused is *prima facie* such as no compensation would be enough to counterbalance it. In trade it is the name that counts and if once a name gains publicity it forms the main asset of the concern. The principle governing such cases has been very succinctly enunciated in Lord Halsbury's *Laws of England*, Vol. 27, pp. 750-51. (Edn. 1913). The passages read as follows:

"In some cases, however, the name of one particular individual or firm has such universal reputation in connexion with a particular class of goods that it becomes evident that if a second person enters the trade under a name which is the same or similar, confusion must arise unless special precautions are taken. In such cases the Court interferes either to insist on the second individual taking proper measures to prevent such confusion arising, or, in certain cases, to restrain him from trading under a name which is the same as or closely resembles that of the

well-known trader, or from using such trader's name as the trade name of his goods.

Where the plaintiff can show that the defendant's object is to produce confusion the Court intervenes much more readily, and often grants the plaintiff wider relief than he would otherwise obtain. The evidence of such fraudulent intention may be derived from the manner of trading or from the circumstances under which the name was adopted".

I am in respectful agreement with these remarks and consequently find no justification in interfering with the discretion of the Court below which, to my mind, has not been injudiciously exercised. Counsel for the appellants has referred to several authorities in this connexion: *Varcados v. Mcleod* (1), *New Delhi Theatres Ltd. v. Kailash Chand* (2), *North Western Railway Administration v. N. W. Ry Union, Lahore* (3), *Prabhu Das Suri v. Law Reporter Ltd, Lahore* (4), *Mahomed Ahmad Khan v. Ahmad Nabi* (5), *Hari Chand Anand & Co. v. Singer Manufacturing Co.* (6), *Yoshimi Beshaka Kaisha Ltd. v. Firm of Dwarkadas Fateh-Chand* (7), and *Kerr & Co. v. Ahmedabad Cotton Manufacturing & Calico Printing Co.* (8), but, in my view, none of them is in point, especially as every case is to be decided on its own facts. Moreover, the probability of deception cannot be denied in the present case and I have arrived at this conclusion by personal inspection of the goods manufactured which were shown to me at the time of hearing. I accordingly dismiss this appeal with costs.

S.

Appeal dismissed.

(1) 45 P R 1919; 51 Ind. Cas. 434; A I R 1919 Lah 90; 83 P L R 1919.

(2) A I R 1933 Lah. 73; 140 Ind. Cas. 843; 34 P L R 51; Ind. Rul. (1933) Lah. 41 (2).

(3) A I R 1933 Lah. 203; 148 Ind. Cas. 49; 14 L 330; 34 P L R 975; 6 R L 493.

(4) A I R 1933 Lah. 448; 149 Ind. Cas. 984; 34 P L R 249; Ind. Rul. (1933) Lah. 165.

(5) A I R 1933 Lah. 621; 146 Ind. Cas. 67; 6 R L 173.

(6) A I R 1933 Lah. 1046; 149 Ind. Cas. 1064; 6 R L 794 (2).

(7) A I R 1933 Sind 26; 139 Ind. Cas. 490; 26 S L R 335; Ind. Rul. (1932) Sind 127 (2).

(8) A I R 1938 Cal. 458; 177 Ind. Cas. 473; 11 R O 249.

ALLAHABAD HIGH COURT

Application in First Appeal No. 86 of 1939
May 5, 1939

MOHAMMAD ISMAIL, J.

PARBHU DAYAL—APPLICANT

versus

LALDAS MAGANLAL AND OTHERS

—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XX

rr. 1, 2; s. 151—Enforcement of mortgage, if waste or damage of property—Suit by mortgagor at Agra for reduction of interest under s. 33, U. P. Agriculturists Relief Act (XXVII of 1934)—Suit by mortgagee on mortgage in Bombay Court—Mortgagee, if can be restrained by injunction from proceeding with his case at Bombay.

The enforcement of a mortgage can never be characterized as an attempt to waste or damage any property.

The lawful exercise of a right vested in a person cannot be legally restrained by the Court under r. 2, O. XXXIX, Civil P. C.

A mortgage contained properties situated outside U. P. The principal and interest due under a previous mortgage formed part of the consideration of this mortgage and the deed stated that the first mortgage was satisfied and discharged. The mortgagor paid some instalments according to the terms of the mortgage on account of the interest but subsequently being advised that he was paying higher rate of interest than what he was bound to do as an agriculturist, a suit was filed by the mortgagor under s. 33, U. P. Agri. Relief Act, in the Court at Agra against the mortgagee. While this suit was pending the mortgagee brought a suit in Court at Bombay which had jurisdiction, for the enforcement of the mortgage. The mortgagor applied to the Court at Agra for the issue of an injunction restraining the mortgagee from proceeding with the Bombay suit and the application was granted. The suit at Agra was, however, dismissed and the injunction came to an end. An appeal was preferred by the mortgagor and he asked for an issue of an *ad interim* injunction which was rejected. An appeal was preferred to the High Court from this order and an application for temporary injunction pending the disposal of appeal was made:

Held, that O. XXXIX, r. 2 and s. 151, Civil P. C., had no application. The mortgagee had a right to bring the suit in Bombay and his action was neither illegal nor dishonest nor even improper and hence the injunction restraining him from proceeding with the Bombay case could not be granted.

[Case-law discussed.]

Mr. G. S. Pathak, for the Applicant.

Messrs. S. N. Sen and M. L. Chaturvedi, for the Opposite Party.

Judgment.—This is an application by Pt. Parbhu Dayal under O. XXXIX, rr. 1 and 2 and s. 151, Civil P. C. The facts that have given rise to this application may be briefly stated. It appears that the applicant executed an equitable mortgage on May 14, 1930, in favour of Seth Lal Das for a large sum of money. The properties hypothecated under this mortgage were situate within the United Provinces. On October 9, 1934, the applicant executed another mortgage in favour of Seth Lal Das and his wife. In this mortgage, some properties outside this province were also included. The principal and interest due under the bond of May 14, 1930, formed part of the consideration of the latter mortgage. It was stated in the deed that in consequence of the execution of the second

mortgage the first mortgage was satisfied and discharged. Under the terms of the mortgage deed the applicant was required to pay certain amount periodically on account of interest due under the mortgage. It is stated by the applicant, and this statement is not disputed, that the applicant paid the instalments till April 1938. Since then the payment of interest has been withheld. The applicant states that he was advised that he was paying higher rate of interest than what he was bound to do as an agriculturist according to the provisions of the Agri. Relief Act. He therefore called upon the creditors to render accounts to the applicant. As the creditors failed to render accounts a suit was filed by the applicant under s. 33, Agri. Relief Act, in the Court of the Civil Judge, Agra on March 5, 1937. On the objection of the mortgagees the plaint was returned for presentation in the Court of the Munsif of Agra. The plaint was then presented in the latter Court on February 10, 1938. While this suit was pending in October 1938, the mortgagees brought a suit at Bombay for the enforcement of the mortgage of 1934. It is assumed for purposes of this application that the Bombay High Court has got jurisdiction to try the suit instituted by the mortgagees. The applicant made an application to the Munsif of Agra for the issue of an injunction restraining the mortgagees from proceeding with the Bombay suit. The Munsif rejected the application but the learned District Judge granted it. Ultimately the suit pending in the Court of the Munsif under s. 33, Agri. Relief Act, was dismissed. The applicant then filed an appeal from the decision of the trial Court in the Court of the District Judge which is still pending.

The injunction granted by the District Judge having come to an end with the termination of the suit, the applicant applied to the District Judge for the issue of an *ad interim* injunction. This application however was rejected. The applicant has filed a first appeal from order to this Court against the order of the District Judge refusing to grant injunction. This appeal has not been admitted yet. The applicant after filing the appeal made an application for the issue of a temporary injunction pending the disposal of the appeal. This was granted on March 17, 1939, by a learned Judge of this Court and notice was issued to the opposite party to show cause why the *ex parte* order granting a temporary injunction may not be confirmed. The opposite party

has now appeared and contests the application of the applicant on several grounds. I have heard learned Counsel for the parties at considerable length and I now proceed to consider some of the points raised at the Bar.

Learned Counsel for the opposite party contends that the suit instituted by the applicant under the Agri. Relief Act is not maintainable as some of the properties hypothecated are situate outside the United Provinces. In support of this contention, reliance is placed on a Bench ruling of this Court reported in *Wahiduddin v. Makhan Lal* (1). In that case properties in Meerut and Delhi were hypothecated by an agriculturist. The mortgagor brought a suit under s. 33 of the Act. The learned Judges held that the suit was not maintainable as the mortgage was indivisible and some of the properties were outside this province to which the provisions of the Act did not apply. Learned Counsel for the applicant has attempted to distinguish this ruling. In my opinion it is not proper for me to express any opinion on the merits of the case. This is a question that will have to be considered later. It is urged by learned Counsel for the opposite party that the suit in Bombay is for the enforcement of the second mortgage, while the suit under s. 33 of the Code refers to the mortgages of 1930 and 1934 both. It is urged that the mortgage of 1930 does not subsist while the suit with reference to the second mortgage is not maintainable in view of the ruling cited above. This again is a matter which will have to be determined later if the appeal filed by the applicant is admitted. It may be mentioned that the ruling of the Bench would be binding on me as a single Judge. As stated above, I am not prepared to enter into the merits of the case.

The next point stressed by learned Counsel for the mortgagees is that O. XXXIX, r. 1, has no application to the facts of the present case and that this Court has no jurisdiction to issue an injunction restraining the mortgagees from seeking their legal remedy in the Bombay High Court. Learned Counsel for the applicant contends that his application is covered by O. XXXIX, rr. 1 and 2. I now proceed to examine the aforesaid Rule. Rule 2, provides: "In any suit for restraining the defendant from committing a breach of contract or other injury of any kind . . ." The words "any kind" have been added in the present Civil

P. C. They were absent in the old Code. In *Darab Kuar v. Gomti Kuar* (2), it was held that s. 493, applied to suits restraining a defendant from committing a breach of contract or injuries akin to breaches of contract. The learned Judges declined to grant an injunction restraining the defendant from interfering in the management of the properties in dispute. This ruling however is no longer good law in view of the addition of the words "of any kind." The question is whether the lawful exercise of a right vested in a person can be legally restrained by the Court under this Rule. In my opinion, this cannot be done. It must be conceded that the mortgagees have as much right to bring a suit in Bombay as the applicant has got a right to institute a suit at Agra. The mortgagors want to take advantage of a local legislation which is enacted exclusively for the benefit of the agriculturist. The mortgagees on the other hand are anxious to enforce the terms of a contract solemnly entered into by the parties. It is impossible to hold that the action of the mortgagees is illegal or dishonest. In my judgment, r. 2, does not help the applicant. Coming to r. 1, I find it difficult to hold that the property in suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree. The mortgagees have not yet obtained a decree and therefore no question of execution arises. The enforcement of a mortgage can never be characterized as an attempt to waste or damage any property. Sub-cl. (b), obviously has no application. In my opinion, therefore, r. 1, in terms does not apply.

It may be urged that apart from the provisions of the Code this Court has power to restrain a party from proceeding with a suit in another Court. This view has been taken in several cases in Bombay. In *Narain Vithal v. Janki Bai Sitaram* (3), a Full Bench of the Bombay High Court held that a single Judge sitting on the Original Side is competent under s. 151, Civil P. C., to restrain the parties in a suit before him from proceeding with a suit in a Subordinate Judge's Court in the *mofussil* and so in effect stay proceedings. The suit for the enforcement of the mortgage however is not pending in a Court subordinate to this Court and therefore this ruling is inapplicable. Similar view was taken in

(1) (1938) A L J 872; 178 Ind. Cas. 177; A I R 1938 All. 564; I L R (1938) All. 781; 1938 R D 782, 11 R A 279; 1938 A L R 822.

(2) 22 A 449; A W N 1900, 170.

(3) A I R 1915 Bom. 146; 30 Ind. Cas. 580; 39 B 604; 17 Bom. L R 655 (F B).

Mulchand Raichand v. Gill & Co. (4), at pp. 298 and 299. In *V. R. Naik v. Balwant Sitaram* (5), it was held that the Bombay High Court had jurisdiction in the plaintiff's suit to pass an order restraining the defendant from proceeding with his suit in the Hyderabad Courts. The facts were that the defendant filed a suit in Hyderabad State, being a resident of that State, against the plaintiff and subsequently the plaintiff filed another suit against the defendant in the Bombay High Court. The subject-matter of the suit was the same and the defendant entered appearance in the plaintiff's suit without protest and also made a counterclaim. On these facts an injunction restraining the defendant was issued. This case no doubt shows that the High Court has got inherent jurisdiction apart from the provisions of the Code. In *Vanechand v. Lakshmi Chand* (6) Pratt, J., observed:

There is no doubt as to the jurisdiction of this Court to restrain a party from prosecuting a suit in a foreign Court. The principle on which this jurisdiction is exercised is set forth in the judgment of Lord Cranworth in *Carren Iron Co. v. Maclaren* (7). It is that the Court acts *in personam* and will not suffer anyone within its reach to do what is contrary to its notions of equity merely because the act to be done may be in point of locality beyond its jurisdiction."

It will be observed that the only justification for the exercise of the equity jurisdiction by this Court is that a party to the suit is doing something which is against its notions of equity. The question therefore is whether the mortgagees in the case are guilty of any such conduct. After giving my very serious consideration to the able arguments advanced by learned Counsel for the parties, I am unable to say that the action of the mortgagees can be characterized as illegal or even improper. The Legislature in its wisdom has thought it fit to grant reliefs to certain class of persons. In conferring such a right the terms of the contract entered into between the parties are to be ignored. Even the provisions of other enactments are superseded by this special enactment. The applicant is fully entitled to claim benefit of the possession of the Act and no reasonable objection can be raised against his attempt to obtain a reduction of interest payable under the

bond. On the other hand the mortgagees cannot be blamed for instituting a suit for the enforcement of their mortgage in a Court which will not recognize the provisions of the local Act. In my judgment, the applicant is within his rights in instituting the suit in Bombay and should not be restrained from taking such a course.

There is no doubt that the institution of two parallel suits in two Courts may lead to complications which if possible should be avoided. It is for the applicant to take such steps as may be open to him. This Court however will not be justified in restraining one of the parties from claiming his legal remedy. An order of injunction no doubt will be helpful to the applicant, but it will manifestly be detrimental to the interest of the opposite party. In my opinion there is no justification for such a discrimination. In the result I discharge the temporary injunction and dismiss the application with costs. I direct that the record be sent immediately to the Court below to enable the applicant to proceed with his appeal.

s.

Injunction discharged.

RANGOON HIGH COURT

Criminal Miscellaneous Application No. 19
of 1939

July 18, 1939

MYA BU AND MOSBLY, JJ.

ADVOCATE-GENERAL, BURMA—

APPELLANT

versus

MAUNG CHIT MAUNG AND ANOTHER

—RESPONDENTS.

Contempt of Court—Object of proceedings for contempt—Article in newspaper containing comments on finding of Magistrate held amounted to contempt of Court—Tendering of apology by accused, if sufficient for securing immunity from punishment.

The principle underlying the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the protecting of either the Court as a whole or the individual Judges of the Court from a repetition of them, but the protecting of the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. 117 Ind. Cas. 180 (1) and 89 Ind. Cas. 833 (4), relied on.

An article in a newspaper containing comments on the finding of the Magistrate in an inquest under s. 176, Criminal P. C., into the death of a person which are tantamount to imputations of deliberate perversity, incapability and partiality to the Police on the part of the Magistrate are calculated to bring into contempt, the Magistrate, in his capacity as such and for the publication of such article the

(4) A I R 1920 Bom. 296, (298 & 299); 53 Ind. Cas. 518; 44 B 263; 21 Bom. L R 963.

(5) A I R 1927 Bom. 135; 100 Ind. Cas. 951; 29 Bom. L R 132.

(6) 44 B 272; 53 Ind. Cas. 395; A I R 1920 Bom. 309; 21 Bom. L R 955.

(7) (1855) 5 H L C 416; 24 L J Ch. 620; 3 W R 597; 101 R R 229.

editor and the publisher of the newspaper are liable to be dealt with for contempt of Court. The mere fact that an apology has been tendered by the accused is not a sufficient reason for securing immunity from punishment. 89 Ind. Cas. 833 (4), relied on.

Or. Misc. App. made by the Advocate-General, Burma.

Mr. U Thein Maung, Advocate-General, for the King.

Mr. U E Maung, for the Respondents.

Mya Bu, J.—The newspaper article which has given rise to this proceeding is the editorial in the Burmese newspaper, the *New Light of Burma*, dated April 5, 1939, of which respondents Nos. 1 and 2 are the publisher and editor-in-chief respectively. The article contained comments on the finding of the Eastern Sub-Divisional Magistrate of Rangoon in his Criminal Miscellaneous Trial No. 4 of 1939 in which the Magistrate held an inquest under s. 176, Criminal P. O., into the death of one Maung Aung Gyaw which had provoked widespread public interest in this country. The Magistrate's finding was that the death was due to misadventure. The article in question was entitled "Insult to the whole Burmese Nation," and in it, it was asserted that the Magistrate's finding was entirely different from that of the eye-witnesses and of the whole country, and that it was a view which was an insult to the whole Burmese Nation, and also that an officer who had so much confidence in and reliance on the Police, as the Magistrate in question, was scarcely found. These and the other statements set out below show the true character of the article. After referring to the action of a Deputy Commissioner:

"Who, when a big mob of people attempted to man-hole him, refrained from calling in military aid or dispersing the mob by ordering a baton charge but released arrested persons as desired by the mob, thereby putting the matter to an end", the article went on to state:

"We would like to ask if U Sein Daing's failure to comment that the Rangoon Police should adopt such a procedure was because of desire to suppress the country and to praise the Police alone..... Only recently a Police Officer trod on and tore to pieces a Dobama three colour flag in Rangoon, and when a question was asked in the House, U Ba Pe, Minister for Home Affairs, replied that there were also fools in the Police force and that he would see that such a thing did not happen in future; and persons like U Sein Daing who seem to hold that every Police Officer must be a good man, should take particular note of this. So we do not want to write more about U Sein Daing who favours the Police too much (too partial to the Police)".

"Nevertheless we are indeed surprised and disgusted that U Sein Daing should have such implicit faith in the Commissioner of Police who has acted

like the Myowun (Governor) who put a person to death when asked (to use his discretion and chastise him) and pass bad remarks against the country".

These remarks are tantamount to imputations of deliberate perversity, incapability and partiality to the Police on the part of the Magistrate in question. There can be no doubt that they are calculated to bring into contempt, U Sein Daing, the Eastern Sub-Divisional Magistrate, in his capacity as such. For the publication of this article the respondents are liable to be dealt with for contempt of Court.

Their learned Advocate does not contest the proposition that the article *prima facie* amounts to contempt of Court, but he explains that the article was written in a moment of excitement and it was not the intention of the respondent to make deliberate charges of perversity, incapability and partiality against the Magistrate in question. What the intentions of the respondents were must, in the first place, be judged from their own acts, and considering that the article was written more than 3½ months after Maung Aung Gyaw's death, it is difficult to comprehend what the moment of excitement that is said to be prevailing at the time when the article was published was. The main question for consideration then is what is the suitable form of punishment. In this connexion the respondents have stated through their Advocate that in so far as the article suggests perversity, dishonesty and partiality of the Magistrate and his incapacity for holding his office, they unreservedly express regret and withdraw any such imputation on the Magistrate, and have reiterated the assertion of the absence of intention on their part to make those imputations. The object of a proceeding for contempt of Court and the object of punishment for attacks of this character upon Courts can be clearly understood from quotations of Sir Courtney-Terrell in his judgment in *In re Murli Manohar Prasad* (1):

"Blackstone, in a celebrated passage of his commentaries (Vol. 4, page 285) which will be found quoted in *Legal Remembrancer v. Motilal Ghose* (2), at page 255 specifies in his description of contempts of Court, contempts which arise 'by speaking or writing contemptuously of the Court or Judges acting in their judicial capacity and which demonstrate a gross want of that regard and respect which when once Courts of Justice are deprived of, their authority, so necessary for the good order of the

(1) 8 Pat. 323; 117 Ind. Cas. 180; A.I.R. 1929 Pat. 72; 30 Cr. L.J. 741; 9 P.L.T. 337; Ind. Rul. (1929) Pat. 388 (F.B.).

(2) 41 O. 173, (255); 20 Ind. Cas. 81; A.I.R. 1914 Cal. 69; 11 Cr. L.J. 321; 17 O.W.N. 1253; 13 Cr. L.J. 452.

Kingdom is entirely lost amongst the people.' Sir John Wilmot, C. J., in *R. v. Almon* (3) at p. 255 justifies a similar view. After quoting the opinion of Wilmot, C. J., and giving a list of recent authorities Mukherji, J., continues: 'The principle from these cases is that punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the tribunal be undermined or impaired'.

In *Emperor v. Sayyad Habib* (4), a Special Bench of the High Court of Lahore laid down that the principle underlying the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the protecting of either the Court as a whole or the individual Judges of the Court from a repetition of them, but the protecting of the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired. It was also pointed out in that case that the mere fact that an apology has been tendered by the accused is not a sufficient reason for securing immunity from punishment for him. That was a case in which a daily newspaper of Lahore in the course of an article called the Judge "sycophantic" and accused him of having decided the case not according to the dictates of justice but in order to please and curry favour with others. The Special Bench considered that the scandalous nature of that article called for punishment that shall be a deterrent not only to the offender in the case but to all others. Similarly in *Emperor v. Jagannath Prasad* (5), a Bench of the Allahabad High Court dealing with the case in which, for groundless attacks made by the respondent on the judicial conscience and independence of the presiding officers of certain Courts, the learned Counsel for the respondent stated that his client tendered an apology and threw himself on the mercy of the Court, observed:

"We shall be failing in our duty to uphold the legitimate dignity of the Courts below if in a case like the present, which is a glaring example of gross contempt of the Subordinate Court, we were to accept this apology".

Bearing all these judicial principles in

(3) (1765) Wilmot 243, (255).

(4) 6 L 528; 89 Ind. Cas. 833; A I R 1926 Lah. 1; 26 P L R 772; 26 Cr. L J 1409.

(5) I L R (1938) All. 548; 176 Ind. Cas. 110; A I R 1938 All. 358; 39 Cr. L J 677; (1938) A L J 430; 11 R A 46; 1938 A L R 547.

mind, we are of the opinion that we shall be failing in our duty if we, accepting the apology tendered, as stated above, allow the respondents to go unpunished. The nature of the attacks made upon the Magistrate in this case is far worse than those which were the subject-matter of the proceeding in *Government Advocate, Burma v. Saya Sein* (6). Considering all the circumstances of the case, we order that the respondents do pay a fine of Rs. 250 each in default each to suffer three months' simple imprisonment. The respondents are granted one week's time to pay their fines.

s.

Order accordingly.

(6) 7 R 844; 122 Ind. Cas. 282; A I R 1930 Rang. 124; (1930) Cr. Cas. 412; 31 Cr. L J 397; Ind. Rul. (1930) Rang. 124.

CALCUTTA HIGH COURT

Criminal Reference No. 86 of 1939

July 13, 1939

McNAIR AND KHUNDKAR, JJ.

Chaudhury BEJOY KRISHNA DEB—

FIRST PARTY

versus

Thakur SHYAM NARAIN SINGH—

SECOND PARTY

Criminal Procedure Code (Act V of 1898), ss. 10, 438—District Magistrate invested with powers under s. 10 has also other powers not contemplated by Code—"Proceeding" in s. 438—Order of District Magistrate not judicial one—No penalty exacted for its non-compliance—Interference by High Court under s. 438.

From the mere fact that the District Magistrate has been invested with certain powers under s. 10, it does not follow that he has not other powers which are not contemplated by the Criminal P. O. He is in addition the Collector of the district. He is also the District Officer and in those capacities he has to perform many functions which are not covered by the Criminal P. O.

The word "proceeding" used in s. 438 must be a proceeding as referred to in s. 435, that is to say, a proceeding before any inferior Criminal Court. The High Court will not interfere where the Magistrate or other officer is acting in an executive and not in a judicial capacity. It is only when an order has been made, and for non-compliance of that order some penalty has been exacted that the High Court will interfere. *The Empress v. Surja Narain Das* (2), relied on.

Held, that the High Court could not interfere under s. 438 as the order of the District Magistrate was not a judicial order and secondly, because the order was not enforceable and no penalty had been exacted under it.

Sir A. K. Roy (Advocate-General) and Mr. Anil Chandra Roy Choudhry, Against the Reference.

McNair, J.—This is a reference under s. 438, Criminal P. O., by the District

and Sessions Judge of Midnapur. The facts are simple. One Mahadeo Singh, an employee of Thakur Shyam Narain Singh, had started on pilgrimage to Puri on one of his master's elephants. They stopped near a village named Kushmai to cook their food. The elephant which was chained nearby somehow escaped into the jungle and was subsequently captured by Choudhury Bijoy Krishna Deb. The captor informed the District Magistrate of the circumstances by a petition filed in his Court. The petitioner alleged that the elephant was causing damage to property and interfering with traffic and that the petitioner after much effort "bagged the said elephant in his own house at a cost of about Rs. 700." The petitioner further stated that nobody claimed the elephant and he asked leave to keep it. The learned District Magistrate granted leave pending an inquiry, and the fact that the elephant was found was advertised, and the District Magistrate at once wrote to the Chief Secretary to the Govt. of Bengal stating the facts and asking for instructions. Thakur Shyam Narain Singh put in his claim to the elephant which was admitted after investigation and the District Magistrate ordered the elephant to be returned to him forthwith. The captor then claimed nearly Rs. 2,000 for his cost of the capture and for feeding the elephant. The District Magistrate considered this figure exorbitant and after directing the captor to appear before him he assessed the costs of capture at Rs. 150 and the costs of feeding the elephant at Rs. 100 a month. He then directed the owner to deposit that amount in Court within three days. The owner appealed to the District Judge who has referred the matter to this Court treating the appeal as a petition for revision. In his report the learned Sessions Judge says that the appeal filed before him was evidently under the impression that the learned District Magistrate was acting under s. 523, Criminal P. C. He thereupon called upon the Additional District Magistrate for a report. The Additional District Magistrate sent a report in which he said that the orders were purely executive in character as distinguished from judicial and cannot form the subject-matter of a criminal appeal. The learned Sessions Judge then sets out his reasons for saying that no appeal lay under s. 523, because the seizure of the elephant was not by a Police Officer, nor was the elephant captured in circumstances creating suspicion of the commission of any offence. He then

says that the question however is whether the order passed by the learned District Magistrate is liable to revision by the High Court and if so, whether it should be revised. He states his own view that the District Magistrate's order passed by him was in the capacity of a Magistrate. He considers that the District Magistrate's order was without jurisdiction and he argues that because a District Magistrate derives his powers principally from the Criminal P. C., he may be presumed to be acting under the Criminal P. C., or, in other words, all his orders may be presumed to be judicial rather than executive and his conclusion is that such orders are liable to revision by the High Court under ss. 435 and 438, Criminal P. C.

This opinion of the learned Sessions Judge seems to me to lose sight of the fact that the District Magistrate acts in a dual capacity. In this instance the fact that the learned District Magistrate at the outset wrote to the Political Secretary to the Govt. of Bengal asking for orders suggests that he was not acting in a judicial capacity but possibly in an executive capacity. Again there was no suggestion of a criminal offence and there was no proceeding of a criminal nature. Section 5, Criminal P. C., provides for the investigation of an offence under the I. P. C., according to the provisions contained in the Criminal P. C., and sub-s. (2) of the same section provides that all offences under any other law shall be similarly investigated subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying, or otherwise dealing with such offences. Section 6 enumerates the classes of Criminal Courts, Class 3 being Magistrates of the First Class. Section 10 provides that in every district outside the presidency towns the Local Govt. shall appoint a Magistrate of the First Class who shall be called the District Magistrate and indeed in this case the learned District Magistrate has been appointed by the Local Govt. under the provisions of s. 10. But because the learned District Magistrate has been invested with certain powers under s. 10, it does not follow that he has not other powers which are not contemplated by the Criminal P. C., as is pointed out by the learned District Magistrate in his letter of explanation. He is in addition the Collector of the district. He is also the District Officer and in those capacities he has to perform many functions which are not covered by the Criminal P. C.

The provisions relating to reference and revision, which are relevant to this enquiry, are found in ss. 435 and 438. Section 435 provides that the High Court or any Sessions Judge or certain other officers may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of such inferior Court. Section 438, under which this reference has been made, empowers the Sessions Judge, on examining under s. 435 or otherwise the record of any proceeding to report for the orders of the High Court the result of such examination. It is quite clear that the word "proceeding" which is used in s. 438 must be a proceeding as referred to in s. 435, that is to say, a proceeding before any inferior Criminal Court, and there is authority for this proposition. There was not in the present instance any 'proceeding' so as to empower the learned Sessions Judge to report under s. 438. The learned District Magistrate has given his opinion that he was acting in an executive and not in a judicial capacity and it has been held in several reported cases that the Court will not interfere where the Magistrate or other officer is acting in an executive and not in a judicial capacity. The question arose before a Bench of this Court in *In the matter of Rahman Sirkar* (1), where the High Court while considering that an order by a Magistrate professing to act under s. 17 of the Police Act of 1861 was illegal, refused to interfere, on the ground that the order was one of an executive nature. The point of that decision is not that the order was illegal but that the Court considered that it was an order of an executive nature with which this Court had no power to interfere. If an order under s. 17 of the Police Act is an executive order, it seems to me clear that an order of the nature now before us might be an executive order but would certainly not be a judicial order.

The learned Advocate-General, who opposes this reference, has referred us to ss. 25, 26 and 27 of the Police Act. Section 25 empowers a Police Officer to take charge of unclaimed property and to dispose of it under the orders of the District Magistrate. Section 26, empowers the Magistrate to detain the property and to issue a proclamation

requiring any person who has any claim thereto to appear and establish his right within six months. Section 27, provides for confiscation of the property if no claimant appears. It has been suggested that possibly these sections were in the mind of the District Magistrate when he issued the proclamation to which I have already referred. The learned Sessions Judge in his report has stated that the real grievance of the petitioner is that though if the animal were impounded, which it is suggested would have been the correct procedure, the charges payable by him could not have exceeded Rs. 93, yet he was being ordered to pay Rs. 550 by the District Magistrate. The learned District Magistrate suggests that the Cattle Trespass Act does not apply. The only reference to the Cattle Trespass Act in the Criminal P. O. is in s. 4, sub-s. 1 (c), where 'offence' is defined as any act or omission made punishable by any law for the time being in force including any act in respect of which a complaint may be made under s. 20, Cattle Trespass Act of 1851. No complaint has in fact been made in this case under s. 20 and it has also been pointed out to us that under s. 31, Cattle Trespass Act, the Local Govt. has transferred the powers of the District Magistrate under that Act to the District Board so that the District Magistrate has no longer power to act under the Cattle Trespass Act unless a complaint has been made under s. 20.

The other point which arises and which in my opinion, prevents this Court from interfering is that the order although the learned District Magistrate suggests that it was made in his executive capacity was not in my opinion, even an executive order. It was, it appears to me, merely advise. An inflated charge had been made by the captor. The owner objected to this strongly and the learned District Magistrate in the capacity apparently of an arbitrator gave an opinion which seems to me very reasonable as to the probable costs of capture and feeding of the elephant. The order was not enforceable and it is only when an order has been made, and for non-compliance of that order some penalty has been exacted that this Court will interfere. This proposition was stated very clearly by Jackson, J. in *The Empress v. Surja Narain Das* (2). The portion to which I refer is at p. 90. The learned Judge there says:

"When the Criminal P. O. authorizes the making

of orders by executive authorities with the view of preventing a breach of the peace or for similar purposes it has always been held and is now enacted in the existing Code, that the propriety of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the Courts have to step in and see whether the orders made were with authority or not."

In the case to which I have referred in *In the matter of Rohoman Sirkar* (1), the Court refused to interfere upon an order made under s. 17, Police Act. But there are authorities to show that the Court has interfered under ss. 19, 28 or 29, Police Act, where the orders were not made in a judicial capacity but because persons had been convicted and fined. To sum up we are unwilling to interfere in this reference, because in the first place, the order of the District Magistrate was not a judicial order and secondly, because the order was not enforceable and no penalty had been exacted under it. The reference is rejected.

Khundkar, J.—I agree. To the reasons already given by my learned brother in the judgment just now delivered by him, I may add that I entertain considerable doubt whether the order in question is an order at all. It was submitted by the learned Advocate-General that at best it was an executive order; but no law, proclamation or other direction has been cited which gives the District Magistrate any power, executive or otherwise, to assess the proper sum of money which ought to be paid by the owner of an animal to the custodian thereof in circumstances similar to those which have happened in this case. The learned Magistrate was not acting under the Police Act, the Cattle Trespass Act, or even in pursuance of any rules framed or orders passed by the Govt. He seems to have been acting in the role of an arbitrator, more or less self-constituted. The order was as my learned brother has observed merely a piece of advice. It was not in any way enforceable and it was open to the parties to ignore it altogether. At the time when the so-called order was made the rights of the parties were regulated as indeed they are still by the civil law. That position has not in any way been altered or prejudiced by the Magistrate having said that the captor of the elephant would make the elephant over to the owner upon the latter depositing the sum which the Magistrate thought fair.

s.

Reference rejected.

ALLAHABAD HIGH COURT

Full Bench

Execution Second Appeal No. 979 of 1937
December 22, 1939

THOM, C. J. AND ALLSOP AND GANGA
NATH, JJ.

BHAN DATTA UPADHIA AND ANOTHER—
DECREE-HOLDERS—APPELLANTS

versus

Mst. TULSA KUER—JUDGMENT-DEBTOR—
RESPONDENT

Limitation Act (IX of 1908), Art. 181—Stay of execution under O. XXI, r. 29 and execution consigned to record room pending disposal of judgment-debtor's suit—Application to continue execution after stay order has ceased—Whether governed by Art. 181.

Execution proceedings are not terminated when the execution is stayed under O. XXI, r. 29, Civil P. C., pending disposal of judgment-debtor's suit and the execution application is thereon consigned to record room. When the stay order has ceased to operate it is not incumbent on the decree-holder to make an application to set execution proceedings in motion. Where, however, he makes such an application, it is not governed by Art. 181, Lim. Act, and cannot be barred even if made more than three years after the disposal of judgment-debtor's suit. 100 Ind. Cas. 692 (1), *Ruddar Singh v. Dhanpal Singh* (7) and 148 Ind. Cas. 525 (8), not followed. 162 Ind. Cas. 654 (2), 92 Ind. Cas. 782 (9), 77 Ind. Cas. 497 (10), 155 Ind. Cas. 831 (11) and 165 Ind. Cas. 798 (12), relied on. [p. 313, col. 2; p. 314, col. 1.]

Ex. S. A. from a decision of the Additional Civil Judge, Azamgarh, dated January 30, 1937.

Order of Reference to a Full Bench

Thom, C. J. and Ganga Nath, J.—This is an execution second appeal which raises an important point of law. A mortgage decree was passed on January 5, 1928. A final decree under O. XXXIV, r. 5, Civil P. C., was passed in favour of the mortgagees on August 9, 1928. The decree-holders applied for execution of their decree on December 19, 1930. An objection was preferred to the execution application by the judgment-debtors under s. 47, Civil P. C. This objection was dismissed on August 15, 1931. Thereafter the execution application was transferred to the Court of the Collector. On November 6, 1931, one Mst. Tulsa, one of the judgment-debtors, filed a regular suit in which she sought to recover a sum of Rs. 550 on the basis of a receipt, upon which the aforesaid objection to the execution of the mortgage decree under s. 47, Civil P. C., had been preferred. She obtained an order from the Court staying the execution of the mortgage decree pending the result of her suit. Under O. XXI, r. 29, Civil P. C., the Court

stayed the execution of the decree "till the disposal of this suit." This order was communicated to the Collector to whose Court the execution proceedings had been transferred. Upon receipt of this order, the Collector returned the record to the executing Court. The learned Munsif on receipt of the record ordered that the papers be filed and consigned to the record room. This order was passed on February 3, 1932.

Mst. Tulsa's suit failed. A final decree of dismissal was passed on February 14, 1933. On July 25, 1935, the decree-holders applied for execution of the mortgage decree against *Mst. Tulsa* and the other judgment-debtors. The application was opposed by the judgment-debtors who contended that it was barred by time. The learned Civil Judge in the lower Appellate Court has sustained the objection of the judgment-debtors. Following certain decisions to which he refers in the course of his order he has held that the application made on July 25, 1935 having been made beyond three years from the final disposal of *Mst. Tulsa's* suit it was barred by limitation. In appeal it was contended for the decree-holders that the application of July 25, 1935, should be regarded merely as a step taken by the decree-holders to inform the executing Court that the bar to the execution proceedings had been removed and that it should not be regarded as either a fresh application for execution or an application to revive execution proceedings.

The question whether it is necessary for a decree-holder to make an application for revival of execution proceedings after a bar imposed by the Court to these execution proceedings has been removed is one which has not been specifically considered by this Court. It was held by a Full Bench of this Court in *Chhattar Singh v. Kamal Singh* (1) that an application such as the application under consideration in this appeal, was not an application for execution but an application to revive execution proceedings and that it was not governed by Art. 181 of Sch. I, Lim. Act. It appears to have been assumed rather than decided that such a revival application was necessary. The Calcutta, Patna and Madras High Courts on the other hand have taken the view that it is not incumbent upon the decree-holder under the provisions of the

Civil P. O. to make any application for revival of execution proceedings upon the removal of a bar to these proceedings. The opinion of these Courts has been that in such circumstances it is the duty of the Court to proceed *suo motu*. The matter was discussed at length in *Krishtokaminee Debi v. Girishchandra Mandal* (2). The only case in which the question now raised was considered by this Court was *Prem Narain v. Ganga Ram* (3). That case was disposed of by a Bench consisting of Sulaiman and Niamtullah, JJ. The question now raised was not discussed by Sulaiman, J., but Niamatullah, J., in the course of his judgment, observes:

"It is not in my opinion necessary that a formal application for reviving the proceeding should be made. It is the duty of the Court to proceed to conclusion in a matter pending before it, even though it may be to dismiss the application in default of prosecution. Assuming that an application to 'revive' proceedings is essential I have no doubt that the second application fulfils, in substance, all the requirements of an application for 'reviving' execution proceedings in abeyance. Where it is the duty of the Court to do something or to take some action Art. 181, Lim. Act, does not govern an application asking the Court to do such a thing or to take such action."

The learned Judge then proceeds to dispose of the question before the Bench for decision upon the assumption that Art. 181 was applicable. The expression of opinion above quoted by Niamatullah, J. is therefore clearly *obiter*. The question appears to us to be one of general importance which in our view should be considered and decided by a Full Bench. Let the record be laid before the Chief Justice for the constitution of a Full Bench to dispose of the appeal.

Mr. K. L. Misra, for the Appellants.

Messrs. Shiva Prasad Sinha and Chaturbhuj Sahai, for the Respondent.

Judgment of the Full Bench

Thom, C. J.—This is a decree-holders' appeal in execution proceedings. The appellants obtained a final decree under O. XXXIV, r. 5, in a suit upon the basis of a mortgage. They initiated execution proceedings. These proceedings were stayed in circumstances hereinafter set forth. More than three years after the bar imposed by the stay order had ceased to operate the appellants presented an application which has been described in the

(2) 63 O 57; 162 Ind. Cas. 654; A I R 1936 Cal 239; 39 C W N 1030; 8 R O 628.

(3) A I R 1931 All. 458; 133 Ind. Cas. 316; (1931) A L J 436; Ind. Rul. (1931) All. 636.

(1) 49 A 276; 100 Ind. Cas. 692; A I R 1927 All. 16; 25 A L J 201 (F B).

Courts below as an application for the revival of the execution proceedings. The application was dismissed on the ground that it was time-barred. The final decree under O. XXXIV, r. 5, in favour of the mortgagees who are the appellants was passed on August 9, 1928. On December 19, 1930, the decree-holders presented an application for execution. One of the judgment-debtors, *Mst. Tulsa*, preferred an objection to the application under s. 47, Civil P. C. This objection was dismissed on August 15, 1931. Thereafter the execution Court directed that the application be transferred to the Court of the Collector for disposal.

On November 6, 1931, *Mst. Tulsa* filed a suit in the Civil Court and obtained an order on January 28, 1932, from the Court staying the execution of the mortgage decree pending the result of her suit. The Court stayed the proceedings under O. XXI, r. 29, Civil P. C., "till the disposal of this suit." This stay order was communicated to the Collector who thereupon returned the record to the execution Court. On receipt of the record the learned Munsif passed an order directing that the papers be filed and consigned to the record room. This order was passed on February 3, 1932. *Mst. Tulsa's* suit was dismissed on June 14, 1932. An appeal against the order dismissing the suit was dismissed on February 14, 1933. On July 25, 1935, that is more than three years after the dismissal of *Mst. Tulsa's* suit on February 14, 1933, the appellants, the decree-holders, presented an application praying that their original application be re-transferred to the Collector for disposal. This application was dismissed by the learned Munsif in the execution Court on the ground that it was barred under the provisions of Art. 181, Lim. Act. The Munsif's order has been upheld in the lower Appellate Court. The decree-holders have preferred a second appeal in this Court. If the order of the learned Munsif of February 3, 1932, directing the record to be consigned to the record room had the effect of terminating the execution proceedings then clearly the application of July 25, 1935 is time-barred. The application would then necessarily be a fresh application for execution and it was preferred more than three years after the bar had been removed by the dismissal of *Mst. Tulsa's* suit.

We are satisfied that the order of the Munsif directing that the file be consigned to the record room did not determine the

execution proceedings. There is no warrant for such an order in the Civil P. C. It was in fact an administrative order by which directions were given for the custody of the file pending the result of *Mst. Tulsa's* suit. On the dismissal of *Mst. Tulsa's* suit, the execution Court, *suo motu*, could appropriately have recalled the application for execution from the record room and directed that it should be sent again to the Collector for disposal. The effect of such an order as was passed on February 3, 1932 has been considered in a number of cases in this Court. It is unnecessary to refer at length to the decisions in these cases. Reference may be made however to the cases in *Mohammad Taqi Khan v. Raja Ram* (4), *Rama Kant v. Satya Narain* (5), *Qamar-ud-Din Ahmad v. Jawahir Lal* (6). In the judgments in these and other cases, there is abundant authority for the view which we hold that an order "striking off" an application and consigning it to the record room does not terminate the proceedings in which the order is passed. The Courts below have not treated the application of July 25, 1935 as a fresh application for execution. They have nevertheless held that the application is one to which the provisions of the Lim. Act, and in particular Art. 181, Sch. I thereof, apply. In other words the Courts below have held that an application to set in motion execution proceedings which have been stayed by the execution Court pending the disposal of a suit is an application which, if not presented within three years of the disposal of the suit, that is from the date on which the stay order has ceased to operate, is barred by limitation.

Upon general principle, judicial authority apart, we are unable to agree with this decision. It is to be observed that there is no special provision in the Civil P. C. for such an application as was presented by the decree-holders to set in motion the execution proceedings which had been stayed pending the result of *Mst. Tulsa's* suit. The application was made in proceedings which were still pending and in our judgment in the absence of any special provision such an application cannot be barred by limitation. If such an application were subject to the provisions

(4) A I R 1936 All. 820; 166 Ind. Cas. 106; (1936) A L J 1140; I L R (1937) All. 272; 1936 A L R 1002; 9 R A 359 (F B).

(5) A I R 1938 All. 552; 177 Ind. Cas. 695; 1938 A L R 776; 11 R A 213.

(6) 27 A 334; 2 A L J 397; 32 I A 102; 8 Sar. 110 (P O).

of Art. 181 of Sch. I, Lim. Act, the anomalous position might result of execution proceedings remaining pending in the execution Court whilst an application to continue these pending proceedings would fail. Whether the execution Court could, in such circumstances, dismiss the execution application for want of prosecution is at least doubtful. There is high authority of this Court however for the view which has been taken by the Courts below. In *Ruddar Singh v. Dhanpal Singh* (7), a Bench of this Court held that Art. 178, Sch. II, Lim. Act, 1-77, applied to such an application as the decree-holders in the present suit have made to revive execution proceedings. In *Chhattar Singh v. Kamal Singh* (1), a Bench of five Judges held that an application to revive execution proceedings which had been stayed was governed by Art. 181 of the Schedule of the Lim. Act of 1908. This decision was followed by a Bench of this Court in *Nabban Begam v. Moti Begam* (8). In *Chhattar Singh v. Kamal Singh* (1), the facts were that the application for revival was made within three years from the removal of the bar imposed by a stay order. The application was held therefore not to be time-barred, but it is clear from the judgment in the case that the Court accepted the proposition that Art. 181 of the Schedule of the Lim. Act applied to such an application.

There are a number of other decisions to which we do not consider it necessary to refer in detail. In none of the cases decided by this Court however has the question as to whether it was incumbent upon the decree-holder to make an application to set execution proceedings in motion been considered. It appears in every case to have been assumed rather than decided that it was the duty of the decree-holder to make an application after the stay order had ceased to operate and that the provisions of Sch. I, Lim. Act, applied to such an application. As Sulaiman, J. observed in his judgment in *Chhattar Singh v. Kamal Singh* (1):

"The application for revival not being a fresh application for execution cannot be governed by Art. 182. There is not however any special Article which would apply except the omnibus Art. 181. It has been held in several cases that this Article applies to such applications. When Art. 181 applies the period of limitation is three years from the date when the bar to the execution was removed."

(7) 26 A 156; A W N 1903, 221.

(8) (1934) A L J 363; 148 Ind. Cas. 525; A I R 1934 All. 294; 6 R A 709.

The argument that the executing Court should have acted *suo motu* and listed the execution application for disposal on the removal of the bar to the execution does not appear to have been considered. It has been assumed but never specifically decided by this Court in the past that some Article of the Lim. Act must apply. All applications are not governed by the provisions of the Lim. Act. An application to expediate the hearing of an appeal for example is not governed by the provisions of the Lim. Act. An application to set in motion an execution application which has already been made within time and is still pending is in our judgment an application of a similar nature. In the present case, so far as the execution application was concerned, the decree-holders had done everything that was required of them. They had presented their application for execution within time. They had taken all the necessary steps in the execution Court. That Court had sent the application to the Collector for disposal since the property to be sold in execution of the decree was ancestral property. Nothing more was left for the decree-holders to do. It was for the Collector to have acted in accordance with the rules of Chap. XL of the Revenue Manual promulgated by the Local Govt. under s. 68, Civil P. O. Before the Collector could act in accordance with the provisions of these rules however he was directed by the execution Court to stay proceedings. He accordingly did so and returned the file to the execution Court. When the stay order ceased to operate it clearly was the duty of the execution Court to re-transmit the file to the Collector. If this had been done the Collector would have proceeded to dispose of the application in accordance with the aforementioned rules. It was in fact unnecessary for the decree-holders to have moved in the matter at all. No doubt in their own interests the decree-holders might have brought the fact that *Mst. Tulsa's* suit had been disposed of, to the notice of the execution Court by means of a minute, but there is no statutory provision under which it was incumbent on them to make an application and if therefore they did make an application clearly it was not governed by the provisions of the Lim. Act. It is true that this view is not in accordance with the opinions expressed in the decisions of this Court above referred to. But as we have already remarked the ques.

tion as to whether it was incumbent upon the decree-holders to move when the bar imposed by the stay order had been removed and whether therefore the provisions of the Lim. Act applied at all to an application to set in motion proceedings which had been suspended was never considered by the Court. We do not consider therefore that the Court is bound to follow these decisions in an appeal where the question has been definitely and specifically raised for the first time. It is no doubt true that if the provisions of the Lim. Act do not apply to an application to set suspended execution proceedings in motion the disposal of these proceedings, it is possible, may be indefinitely delayed. This contingency however can be avoided if the execution Court refuses to stay proceedings *sine die*. The view which we take that Art. 181 of the Schedule of the Lim. Act does not apply to an application to continue execution proceedings which have been stayed has been accepted by the High Courts of Madras, Calcutta, Bombay, Patna and the Chief Court of Oudh. In this connexion we refer to the cases in *Pattanayya v. Pattayya* (9), *Krishtokaminec Debi v. Girishchandra Mandal* (2), *Thana Zalalji Shet v. The Shop "Dhana Jawhri"* (10), *Banarsi Prasad v. Kirtyanand Singh* (11), and *Narain Baksh Singh v. Shiva Bhiku* (12).

In the result we hold that the appellants' application is not time-barred. The appeal is accordingly allowed and the order of the lower Appellate Court is set aside. The appellants' application will be returned to the execution Court for disposal according to law.

D

Appeal allowed.

(9) A I R 1926 Mad. 453; 92 Ind. Cas. 782; 50 M L J 215; (1926) M W N 262.

(10) A I R 1923 Bom. 268; 77 Ind. Cas. 447.

(11) A I R 1934 Pat 532; 155 Ind. Cas. 831; 16 P L T 301; 7 R P 626.

(12) A I R 1937 Oudh 158; 165 Ind. Cas. 798; 12 Luck. 743; 1936 O W N 1239; 1936 O L R 701; 9 R O 262.

OUDH CHIEF COURT

Second Civil Appeal No. 238 of 1937

March 1, 1940.

HAMILTON, J.

Mst. SHUBRATAN—PLAINTIFF—APPELLANT
versus

SHABBIR ALI AND OTHERS—DEFENDANTS—
RESPONDENTS

Pre-emption—Improvement by vendee—Compensation, when can be granted—Transfer of Property Act (IV of 1882), s. 51—Costs—Plaintiff alleging true consideration to be much less than that found by lower Court—Defendant taking unreasonable defence—Parties ordered to bear their own costs—Order held good—Evidence—Presumption—Party's failure to go into witness-box—Presumption—Party pardanashin lady, effect.

Claim for compensation for improvements by a vendee when a pre-emption suit is filed, is based on s. 51 of the T. P. Act. The question whether or not a transferee believed in good faith that he was absolutely entitled to the property cannot be the subject of any hard and fast rules but should be decided on the merits according to the circumstances of each case. [p. 318, col. 2.]

What constitutes good faith is a question of fact to be inferred from the circumstances of each case; failure to make due enquiry does not constitute good faith. The vendee acts in good faith, i. e., under the honest belief that he has secured good title to the property in question, and is the rightful owner thereof, and for this belief there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it. The belief in good faith includes not only acting honestly but includes due enquiry. 6 Ind. Cas. 141 (6) and 107 Ind. Cas. 36 (7), relied on. [p. 320, col. 1.]

The existence of the right of pre-emption is well-known in the Province of Oudh, and it is a legitimate presumption to hold that the vendee would know of the existence of it. Where the vendee is not co-sharers in the village and even if he does not know all the details of the law of pre-emption he would certainly know that every co-sharer in the village would have the right of pre-emption and the vendee has not shown that he took any step whatsoever to assure himself that co-sharers would not pre-empt and makes improvements in property without waiting for the limitation for pre-emption to expire, he cannot be granted compensation, in a suit for pre-emption against him. *Bindeshuri Singh v. Pandit Balraj Sahai* (1), 146 Ind. Cas. 36 (2) and *Nasib Ali v. Sahib Ali* (3), explained. [p. 320, cols. 1 & 2.]

Where in a pre-emption suit the defendants wrongly alleged that the plaintiff was not entitled to pre-emption at all and claimed a further sum for improvements to which in law they were not entitled and the plaintiff did not claim pre-emption on the consideration recited in the deed which had been found to be the true consideration but alleged that the real consideration was less than half of what the Court found it to be:

Held, that in the circumstances when the lower Appellate Court ordered that parties should bear their own costs by which order the pre-emption decree of the trial Court was varied, it was impossible to say that in its order as to costs Court did not judicially exercise the discretion vested on him. [p. 318, col. 1.]

A party's failure to go into the witness-box raises a strong presumption against the truth of her case.

The fact of her being a *pardanashin* lady is not a sufficient excuse for her not getting herself examined even on commission. *Mohammad Abbas v. Abdul Bari* (5), relied on. [p. 320, col. 1.]

S. C. A. against the order of the District Judge of Lucknow, dated March 17, 1937.

Mr. Hargobind Dayal, for the Appellant.

Mr. D. P. Khare, for Respondents Nos. 1 and 2.

Judgment.—A plaintiff in a pre-emption suit has appealed against an order of costs passed by the first Appellate Court and there are cross-objections by the defendants-respondents.

The plaintiff in the pre-emption suit was given a decree for pre-emption on payment of the sale consideration as recited in the deed, namely, Rs. 1,000, though he alleged that the real consideration was Rs. 419. The vendees claimed a further sum as money spent on improvements but this claim was not granted in the Courts below and it forms the subject of the cross-objection.

The appeal before me by the plaintiff pre-emptor is against the order of the lower Appellate Court that parties should bear their own costs by which order the decree of the trial Court was varied.

The learned District Judge found that the plaintiff wanted pre-emption on payment of Rs. 419 instead of Rs. 1,000, while, on the other hand, the defendants wrongly alleged that the plaintiff was not entitled to pre-emption at all and claimed a further sum for improvements to which in law they were not entitled. The learned District Judge refers to a number of unreasonable pleas raised by the defendants without specifying them, but I presume that the two that I have given are among them and are the most important. Had the plaintiff claimed pre-emption on the consideration recited in the deed which has been found to be the true consideration possibly the case would not have been defended at all. In the circumstances I find it impossible to say that in his order as to costs the learned District Judge did not judicially exercise the discretion vested on him, or to be more correct, I should perhaps say that he was correct in finding that the plaintiff should not have been given costs in the trial Court when he alleged that the real consideration was less than half of what the Court found it to be. I am not prepared to interfere with the order of the learned District Judge as to costs and the appeal stands dismissed.

The cross-objection raises a more complicated question. The plaintiff's suit for pre-emption was filed on May 16, 1936, the last day of limitation. In August 1935 the vendees started improving the property which consisted of a plot of land with a ruined house by, as alleged by them, raising the level with earth that was brought on donkeys and secondly by improving the foundation of the house or, at any rate, the lower part of it with new bricks which were plastered together by masons. The Courts below found it not proved that new bricks were purchased or that masons were employed and, therefore, found that there was no justification in fact for the claim of Rs. 50-6 for the bricks and Rs. 130-4-6 for the wages of masons. The Courts below, however, found that earth was put there to raise the site and consequently the vendees had incurred an expenditure of Rs. 20 for the earth and Rs. 161-8 for the labourers. The Courts below, however, found that the vendees could not recover this amount because of the decision in *Bindeshuri Singh v. Pandit Balraj Sahai* (10 O. C. 49) (1) which was to be preferred to *Qaim v. Ghulam Din* (A. I. R. 1933 Lahore, 540) (2). The Court below found that Sajjad Ali, the guardian of the minor vendees, must have known perfectly well that the property was liable to pre-emption, and, therefore, they could have waited for a year till the expiry of the period of limitation before making improvements.

There is a decision of a Single Judge of this Court reported in *Nasib Ali v. Sahib Ali* (1938 O. W. N. 281) (3) on the question of compensation for improvements by a vendee when a pre-emption suit is filed. It was pointed out there that compensation for improvements was based on s. 51 of the T. P. Act. The learned Judge referred to *Qaim v. Ghulam Din* (A. I. R. 1933 Lahore 540) (2) and also to another case reported in *Narayanaswami Ayyar v. Ram Ayyar* (57 I. A. 305) (4) and stated that it appeared to him that the question whether or not a transferee believed in good faith that he was absolutely entitled to the property could not be the subject of any hard and fast rules but should be decided on the merits according to the circumstances of

(1) 10 O. C. 49, (56).

(2) A. I. R. 1933 Lah. 540; 146 Ind. Cas. 36; 6 R. L. 167.

(3) 1938 O. W. N. 281; 1938 R. D. 356.

(4) 57 I. A. 305; 128 Ind. Cas. 261; 32 L. W. 656; A. I. R. 1930 P. C. 297; 59 M. L. J. 666; 53 M. 692; 32 Bom. L. R. 1564; 52 O. L. J. 442; 7 O. W. N. 1166; 34 O. W. N. 1045; Ind. Rul. (1931) P. C. 5 (P. O.).

each case. With all respect I may say that I entirely agree with this opinion of the learned Judge. The facts in the case before him were that a *riaya* had a *kachcha* house and he began to rebuild it *pucca* when it fell down. After starting the reconstruction he took a sale deed of the site from the majority of the co-sharers, presumably because they objected to a *riaya* converting a *kachcha* house into a *pucca* one. A co-sharer who was living elsewhere brought a suit for pre-emption and the learned Judge held that as the sale was made by the majority of the co-sharers it was not to be wondered at if the defendant in the pre-emption suit entertained the belief in good faith that he was absolutely entitled to the site and he continued building the house. The learned Judge also mentioned the fact that the suit was brought in the twelfth month after the sale in favour of the respondent defendant vendee. On the facts one may say that if the defendant knew of the existence of the custom of pre-emption he knew that the persons entitled to pre-empt were the co-sharers and he did, attempt to prevent pre-emption by taking a sale deed from apparently as many of them as he could find in the village. He limited, therefore, at any rate to a considerable extent, the possibility of pre-emption and he could well think that a non-resident co-sharer would not want that site in preference to him. The learned District Judge preferred *Bindeshuri Singh v. Pandit Balraj Sahai* (10 O. C. 49) (1) to *Qaim v. Ghulam Din* A. I. R. 1933 Lahore, 540 (2), but he did not consider the facts in either case. In the Lahore case the sale was apparently by one co-sharer to another, for, the learned Judges pointed out that it was due to the fact that an exchange had been agreed upon but mutation was refused because one of the parties was not present before the Revenue Officer on the date fixed for attestation. The pre-emptor was a collateral of the vendor. Ghulam Din, vendee therefore, had justification for the belief, although it was an erroneous belief, that as the sale merely replaced an exchange it would not give rise to a pre-emption suit and, therefore, it was held that he built on the property believing in good faith that he was absolutely entitled to it. There is no reason to hold that the same opinion would have been arrived at by the learned Judges had there not been that incomplete exchange before, for the learned Judges were careful to point out the importance of the circumstance

that there had been that exchange which only failed because of the action of the Revenue Officer. In *Bindeshuri Singh v. Pandit Balraj Sahai* (10 O. C. 49) (1) at 56 it was held that the vendee purchased certain villages at his own risk on a title from the vendor which he knew might be challenged by the appellant, and that title was not a perfect title and was to this extent defective that it was dependant upon a right of pre-emption vested in the appellant which he might or might not exercise as he thought fit. Section 51 of the T. P. Act was not referred to in this case although it was in the Lahore case, but the view adopted in *Bindeshuri Singh v. Pandit Balraj Sahai* (10 O. C. 49; (1) on the facts found could well have been held, had s. 51 of the T. P. Act been referred, since if the vendee knew that the title might well be challenged, he could not in good faith believe that he had obtained an absolute interest.

Considering the different facts I do not think it can be held that the decisions in *Bindeshuri Singh v. Pandit Balraj Sahai* (10 O. C. 49) (1), in *Qaim v. Ghulam Din* (A. I. R. 1933 Lahore 540), (2) or in *Nasib Ali v. Sahib Ali* (1938 O. W. N. 281) (3), are in any way in disagreement for the facts were different and consequently the findings were different.

Coming now to the facts of the present case, the learned Counsel arguing the cross-objection says that the vendor Imamuddin did in fact offer the land to the plaintiff in the pre-emption suit and she refused it so that after this the vendee would naturally believe that as against her at any rate they had an absolute interest. The learned Counsel argues that the finding of the learned District Judge that the uncorroborated statement of Imamuddin was insufficient contains a mistake in law because the learned Judge brushed aside the fact that the plaintiff did not appear in the witness-box to deny the statement of Imamuddin because she was a lady and could not be expected to come into the witness-box. He urges that the fact that the plaintiff is a lady does not affect the matter, and her failure to give a denial to Imamuddin should have had the result that Imamuddin should have been believed. The learned District Judge was evidently not aware of *Mohammad Abbas v. Abdul Bari* (1937 O. W. N. 1022) (5) where it was held that a party's failure to go into the witness-box raises a strong pre-emption (5) (1937) O W N 1022.

sumption against the truth of her case. The fact of her being a *pardanashin* lady is not a sufficient excuse for her not getting herself examined even on commission. It may be that on this decision the learned Judge should have believed Imamuddin had there been nothing else to cast doubt on his truthfulness. It has, however, been pointed out to me that the learned Civil Judge who tried the suit noted the fact that Imamuddin in examination-in-chief denied that he had a talk with one Juman about a sale of the property in suit and that in such a talk Juman offered him Rs. 400. On the next day in cross-examination he admitted that Juman had in fact offered him Rs. 400. I have been through the statement of Imamuddin and I must come to the conclusion that his statement that Juman had not offered him Rs. 400 was not true and was deliberate and not the result of any mistake or failure to understand any question. If Imamuddin, therefore, deliberately said that he had not offered it to Juman when he had, his statement that he did offer it to the plaintiff loses much of its value without corroboration. There was, therefore, sufficient reason to disbelieve the statement of Imamuddin that he offered it to the plaintiff.

What constitutes good faith is a question of fact to be inferred from the circumstances of each case but it has been held in various cases that failure to make due enquiry does not constitute good faith. In *Kandarpanath Ghose v. Jogendranath Bose* (12 O. L. J. 391) (6), the learned Judges stated that the vendee must have acted in good faith, i. e. under the honest belief that he has secured good title to the property in question, and is the rightful owner thereof, and for this belief there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it.

In *Lachmi Prasad v. Lachmi Narain* (A. I. R. 1928 All. 41) (7), it was held that the belief in good faith includes not only acting honestly but includes due enquiry.

The existence of the right of pre-emption is well known in the Province of Oudh, and it is a legitimate presumption to hold that a person like the vendee's guardian in the present case would know of the existence of it. The vendees were not co-sharers in the village and even if he did

not know all the details of the law of pre-emption he would certainly know that every co-sharer in the village would have the right of pre-emption against his wards. He, I mean Sajjad Ali, the guardian of the minor vendees, has not shown that he took any step whatsoever to assure himself that co-sharers would not pre-empt. Once the statement of Imamuddin that he offered the land to the plaintiff is disregarded, we have only his statement that he approached one Juman. Sajjad Ali has not even stated that he enquired from his vendor whether any offer had been made to co-sharers. The position, in fact, in my opinion is this, that Sajjad Ali must have known that there was a custom of pre-emption here as in other villages and he did not take any step whatsoever to satisfy himself that the danger of pre-emption was in any way reduced by any action of his vendor, and, as I have said, the danger was great because any one of the co-sharers might exercise his right of pre-emption. The facts, therefore, are very different from the case reported in *Nasib Ali v. Sahib Ali* (1938 O. W. N. 281) (3) where the vendee did buy the land from a number of co-sharers and the suit for pre-emption was brought by a non-resident co-sharer from whom such action could hardly be expected. Under the circumstances, I am not prepared to hold that the vendee through their guardian can be said to have made the improvements believing in good faith that they had an absolute interest and consequently they are not entitled to any amount on account of improvements.

The learned Counsel supporting the cross-objection also urges that he is entitled to his expenditure on the stamp and registration fees. Even supposing that he would otherwise be entitled to a refund of these—and I do not say that he would, for such expenses can hardly be considered as the price or purchase money—he is certainly not entitled to them when he knew that there was a right of pre-emption against which he had taken no precaution.

Both the appeal and the cross-objection are therefore dismissed with costs.

D.

Appeal dismissed.

(6) 12 O L J 391; 6 Ind. Cas. 141.

(7) A I R 1928 All 41; 107 Ind. Cas. 36; 25 A L J 26.

MADRAS HIGH COURT Full Bench

Second Appeal No. 863 of 1935

November 24, 1939

LEACH, C. J., KRISHNASWAMI AYYANGAR
AND PATANJALI SASTRI, JJ.

SIVAPRASAD SOWCAR—APPELLANT
versus

SEKHARAMANTRI NARASIMHAMURTHI AND OTHERS—RESPONDENTS

Madras Survey and Boundaries Act (IV of 1897), ss. 11, 12—Order of survey officer under s. 11 or of appellate authority under s. 12, if breaks continuity of adverse possession held by unsuccessful party—No boundary dispute—One claimant's name entered in register by survey officer as owner of holding—Other claimant, if can institute suit to establish his title as true owner—Res judicata—Applicability to decision of survey officer.

An order of the survey officer under s. 11, or of the appellate authority under s. 12 of the Mad. Survey and Boundaries Act, in itself has not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of 12 years required by the Lim. Act, to complete his title. If the unsuccessful party remains in adverse possession of the disputed area for over 12 years his title is good irrespective of any order passed under the Act. 141 Ind. Cas. 307 (9) and 152 Ind. Cas. 462 (12), Overruled. Observation of Wadsworth, J., in 150 Ind. Cas. 543 (10), held, should be disregarded. [p. 329, col. 2.]

[Case-law discussed.]

There was no provision in the Mad. Survey and Boundaries Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey. There was no provision in the Act which could be read as operating in such circumstances to prevent A when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner. [p. 327, cols. 1 & 2.]

Per *Krishnaswami Ayyangar and Somayya, JJ.*, (in order of reference).—The rule of *res judicata* cannot be applied to the decision of a survey authority under the Mad. Survey and Boundaries Act. 74 Ind. Cas. 584 (4), relied on. [p. 323, col. 2.]

S. A. against the decree of the Sub-Judge, Vizagapatam, in A. S. No. 203 of 1934.

Order of Reference to a Full Bench

Krishnaswami Ayyangar and Somayya, JJ.—The plaintiff is the appellant. The property in dispute is a house in Allipuram, a suburb of Vizagapatam. The original owner was one Sekharamantri

Appalaswami, the father of defendant No. 1 in the suit and respondent No. 1 in the second appeal. Sekharamantri Appalaswami was indebted to the father of respondents Nos. 2 to 5, one Kanti Mahanti Appalanarasayya. For the recovery of the debt, K. Appalanarasayya instituted a suit against Appalaswami and in execution of the decree obtained therein purchased the suit house on January 7, 1916, and obtained a sale certificate on July 2, 1920. Though he thus obtained a perfect title to the house, he never reduced it to possession, either by process in execution or otherwise. S. Appalaswami and after him his son respondent No. 1 have continued in undisturbed possession of the house. By the date of the suit, they had been in possession for over 15 years, a period sufficiently long to give them a prescriptive title under Art. 144, Lim. Act, against K. Appalanarasayya or anyone claiming under him, or indeed against all the world. The plaintiff derives his title to the suit house from K. Appalanarasayya. He had advanced money on a mortgage of the house to the latter. On that mortgage the plaintiff instituted a suit and obtained a decree. In execution the plaintiff himself purchased the house on September 6, 1929 and a sale certificate was issued to him on October 10, 1929. Resisted in obtaining possession by defendant No. 1, he filed an application to remove the obstruction, but the application was dismissed. Within one year of this adverse order, the plaintiff instituted the present suit to set aside the order, and to recover possession of the house. The claim is resisted by defendant No. 1, on the ground that the appellant's title assuming he had a good title has been lost by adverse possession. Seeing that on the findings of the Courts below respondent No. 1 and his father have been in continuous and exclusive adverse possession of the property, the appellant would *prima facie* be barred. Acting on this view the Courts below have dismissed the suit, overruling a contention of the appellant advanced with the object of getting over the bar of limitation.

To appreciate that contention a few facts are necessary. In 1922 there was a Town Survey of Vizagapatam and its suburbs, in one of which, namely, Allipuram, we have said that the suit house is situate. The site of the house was demarcated as No. 967 belonging to K. Appalanarasayya, who as we have already

mentioned, had purchased the property in Court auction in 1916, and had accordingly a perfectly good title at the time. This survey number as well as certain others formed the subject-matter of a survey dispute, as shown by the order dated November 29, 1922 of the appellate survey authority in land complaint Appeal No. 126-F. B. It may at this stage be mentioned that the survey was conducted under the provisions of the Survey and Boundaries Act (IV of 1897). It is found from the the appellate order aforesaid that the appellant was one Mantri Lakshminarasimham. There were four respondents and two of them were K. Appalanarasayya and S. Appalaswami. It looks as if Survey No. 967 was claimed by the appellant as against K. Appalanarasayya and it does not appear that there was any dispute between K. Appalanarasayya and S. Appalaswami *inter se* as regards the suit house. The former produced his sale certificate of 1920, and on its strength he was recognized as the owner, and registered as such. The latter whose adverse possession was at the time only six years old could not with any chance of success object to the title of the former and for that reason apparently, acquiesced in the decision without raising any objection then or thereafter either within the time limited by s. 13 of the Act or even afterwards. The survey order accordingly became final under s. 12 (3) and conclusive under s. 13.

It is contended for the appellant that the survey decision by reason of its statutory attributes has the effect of dissipating and putting an end to the prior title if any, in the unsuccessful party, inclusive of such growing but immature right arising out of a possession for less than the statutory period. There can be no doubt, that such a possession is not to be treated as carrying no legal consequence, as the law invests the possessor with certain limited rights not only as against a stranger but even against the true owner. On the argument of the appellant the period of adverse possession prior to the order must be ignored altogether, and is not to be tacked on to the later period. The order of the survey authority, it is urged, has the effect in law of interrupting the continuity of the possession, and creating or recognizing on its date a complete title, which can only be displaced by a fresh period of adverse possession for the statutory period to be counted from the date of the order. This is a question on which there has been

a divergence of judicial opinion due to a decision of a Division Bench in *Azhagerumal Pillai v. Rasa Pillai* (1) which strikes a note, it seems to us, different to that involved or expressed in the other cases of this Court including the Full Bench decision in *Muthirulandi Poosari v. Sethurama Iyer* (2). We shall revert to this question a little later.

It is to be observed that the finality attached by s. 12 (3) of the Act to a survey officer's decision, is a finality only for the purposes of the survey operations, and the survey records compiled as a result of those operations. It has no further efficacy and does not affect title in particular; *vide Chinna Venkatrayudu v. Ramamurthi* (3). But the provisions of s. 13 have a more far-reaching effect and it is settled that if a case fell within the section, and the suit contemplated by it is not instituted within the time limited, the survey order becomes decisive of even a question of title. But to have this consequence it must be clearly shown that the conditions of the section have been fully satisfied. In the present case we are of opinion that they are satisfied. Section 13 is as follows:

"Any party to a boundary dispute before the survey officer, and any party to an appeal preferred under s. 12 or to whom notice of such appeal is given, and any person claiming under any such party, deeming himself aggrieved by the order of the survey officer or by the decision of the appellate authority, as the case may be, may, subject to the provisions of Parts II and III, Lim. Act, 1877, institute, within the period of one year from the date of such order or decision, a suit to establish the right which he claims in respect of the boundary of the property surveyed: Provided that, subject to the result of such suit, if any, such order or decision shall be conclusive as between the parties to the dispute or to the appeal, including those to whom notice of such appeal has been given and those claiming under such parties or any of them."

The section makes it obligatory on the following descriptions of persons who deem themselves aggrieved by the order, to institute a suit within the period of one year to establish their claim on pain of being forever precluded from agitating it by suit or otherwise. They are: (i) a party to a boundary dispute, (ii) a party to an appeal preferred under s. 12, and (iii) a person though not impleaded as a party to the appeal has yet had notice of the appeal served on him.

(1) 62 M. L. J. 399; 138 Ind. Cas. 362; A. I. R. 1932 Mad. 310 (2); (1932) M. W. N. 158; 35 L. W. 388; Ind. Rul. (1932) Mad. 515.

(2) 42 M. 425; 50 Ind. Cas. 43; A. I. R. 1919 Mad. 779; 36 M. L. J. 356; 9 L. W. 323; 25 M. L. T. 293; (1919) M. W. N. 226 (F. B.).

(3) 44 M. 340; 61 Ind. Cas. 986; A. I. R. 1921 Mad. 63; 40 M. L. J. 148; (1921) M. W. N. 117; 13 L. W. 451.

The effect of the section is to treat class (iii) as on the same footing as class (ii), as service of the notice of appeal makes them in fact, though not in form, parties to the appeal. If we refer to s. 12, it is clear that a right of appeal is conferred on a registered holder the boundaries of whose holdings are affected by the order of the survey officer. If the boundary is before the officer, the order settling the dispute is made conclusive as between the disputants by force of s. 13 unless challenged by suit. Even where no dispute had been brought up before the officer, and the officer had merely directed the boundary to be laid down as pointed out by the registered holder or his agent, a right of appeal is given to a neighbouring holder on the issue of the notification contemplated by s. 11 (4). In this case, notice is directed by s. 12 (1) (c) to issue "to all registered holders, the boundaries of whose holdings may be affected by the proceedings in appeal." Both classes of persons, namely, those originally impleaded by the appellant, and those others to whom notice is issued by reason of the fact that the boundaries of their holdings may be affected by the result of the appeal are bound by the order passed by the appellate authority. This is the language of s. 13.

In the present case, both K. Appalanarasayya and S. Appalaswami were made parties to the appeal at the outset and we must presume that notice went to the latter in the appeal, and he was aware of the proceedings when they went on, and of the result after they ended. It is clear that the interests of these two individuals conflicted, as Appalaswami was holding possession adversely to K. Appalanarasayya though it is equally clear that no actual conflict or dispute between them was brought up for determination by the appellate authority. On the contrary it is the claim of the appellant alone who apparently set up a right as against K. Appalanarasayya or perhaps even against all the respondents as a body, that was determined by the order. If the rule of *res judicata* as between co-defendants, is to be applied, we should be inclined to hold that the order in question cannot be taken to have conclusively determined the question of title as between the two respondents, namely, K. Appalanarasayya and S. Appalaswami as the adjudication on the point was not necessary for giving relief to the appellant. None of the respondents had a case which can be said to have been common to him and the appellant, so that the decision could be said to have settled a dispute

latent at least in character as between the respondents though it did not come up in a practical form before the survey authority. Even apart from this consideration it seems to us that we shall not be warranted in applying the rule of *res judicata* to the decision of a survey authority under the Act especially after the pronouncement on the point by the Privy Council in *Radhakrishna Iyer v. Sundaraswamier* (4) where their Lordships cited with approval the following passage in the judgment of the High Court, namely :

"The answer is that the general doctrine of *res judicata* is not in question, but the application of the special rule stated in s. 52 (3), Estates Land Act . . ."

The language of the section has therefore to be construed without reference to the body of rules evolved in relation to the doctrine of *res judicata* as applied to the decision of a Civil Court. From this standpoint it is only necessary to enquire whether K. Appalanarasayya and S. Appalaswami were parties to the appeal within s. 13, and not whether there was any active contest between them. Once it is shown, as it has been shown in this case, that S. Appalaswami was a party, the order is conclusive against him even though he had not actively resisted K. Appalanarasayya's claim. There is no hardship or injustice involved in this view being accepted. For it is difficult to imagine that a person being a party to the appeal and not realizing the nature or the consequence of a decision, if it went against him. If in spite of this knowledge, he chooses to keep quiet without questioning it by suit, he must take a consequence for which he alone is responsible.

It therefore becomes necessary to decide for the disposal of this second appeal the question to which we have adverted above. It will be enough to refer to three decisions of this Court to indicate the reason which has prompted us to refer the consideration of the question to a Full Bench. We may at once say that our inclination is to interpret the Full Bench decision in *Muthirulandi Poosari v. Sethurama Iyer* (2) in favour of the appellant, that is to say in support of the view that the adverse possession of the unsuccessful claimant during the period anterior to the decision of the survey authority is to be ignored as of no legal consequence. In the case before the

(4) 45 M 475; 74 Ind. Cas. 584; A I R 1922 P C 257; 49 I A 211; 36 C L J 450; 16 L W 18; 31 M L T 31; 43 M L J 323; 27 C W N 1; 20 A L J 937 (P O).

Full Bench, the plaintiffs whose title to the property in dispute had been established by a decree of the Civil Court in 1900 continued in undisturbed possession till 1913 when on account of the defendants attempting to interfere with their possession they instituted the suit for an injunction against them. It appeared that some time between 1904 and 1906 in the course of a survey conducted under the Act, the survey officer had passed an order demarcating the land as belonging to the defendant's father in spite of the plaintiff's opposition. The possession of the property however continued with the plaintiffs undisturbed by the defendants notwithstanding the survey order. The District Judge reversed the judgment of the District Munsif who had decided in favour of the defendants and held, following *Krishnamma v. Acharyya* (5) that the plaintiffs were entitled to succeed as the demarcation of boundaries by the survey officer did not interfere with plaintiffs' continued enjoyment from even before the date of the order. A second appeal was preferred and came before Phillips and Seshagiri Ayyar, JJ., who considered it necessary to refer the following question to the Full Bench, viz:

"When a plaintiff's claim has been disallowed under the Survey and Boundaries Act IV of 1897, but he has been in possession of the property, does the decision of the survey officer operate as *res judicata* in a subsequent suit for possession."

This reference was rendered necessary as in the view of the referring Judges the decision in *Krishnamma v. Acharyya* (5) was felt to be of doubtful authority. In his order of reference, Phillips, J., expressed his inability to accept the contention based on this decision that the plaintiffs' title could be supported on the strength of their adverse possession. If their possession both prior and subsequent to the survey order were taken into account, it was for more than the required duration, and the argument would have prevailed. But the learned Judge was of opinion that such addition was not permissible, as the survey officer's order had the effect of interrupting the continuity of the possession which the plaintiffs had held. The other referring Judge, Seshagiri Ayyar, J., appears to have shared the same opinion as in any other view it is not possible to understand his observation that the defendants acquired a title to the property on the date of the survey officer's demarcation. The italics are ours and the words italicized involve the proposition that the survey order had the effect of

(5) 2 M 306.

creating a new title requiring to be displaced by a sufficient period of adverse possession to commence after its date.

The question propounded for answer by the Full Bench did not in terms expressly refer to the point adverted to above. Nonetheless it is clear that the prior possession of the unsuccessful party which had continued undisturbed even after the order was obviously the ground of the doubt which called for solution. The answer was given by Wallis, C. J., on behalf of the Full Bench in a somewhat terse statement that the order

"if not reviewed by the appellate authority or questioned by suit as provided in the section was conclusive as to the rights of the parties, and nonetheless so because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession."

There is no specific mention here of the effect of the survey order on the running of adverse possession, but it is equally certain that there is nothing to suggest a dissent from the opinion of the referring Judges. The continuance of the possession in the unsuccessful party was held not to affect the conclusiveness of the order against him. When the second appeal came again before the Division Bench after the return of the answer by the Full Bench, the Court reversed the judgment of the District Judge, and negatived the claim of the plaintiffs. This result could have been arrived at only on the footing that the Full Bench had sanctioned the view of the referring Judges, viz., that the survey officer's order brought about a break in the continuity of the adverse possession which should therefore be dated as from the date of the order and not earlier. It was in this sense Devadoss, J. understood the principle underlying the section, as interpreted by the Full Bench, and we think there is a great deal of force in it as the opposite view would tend to detract from the conclusiveness of the order, enacted by the section. His judgment was, however, upset on appeal under the Letters Patent, by a Bench of two Judges, Reilly and Ananthakrishna Ayyar, JJ. who took a different view of the ruling, supporting themselves by a pronouncement of Ramesam, J. in *Kuppuswami v. Venkataswami* (6) and also by an unreported decision of Benson and Krishnaswami Ayyar, JJ. in S. A. No. 1102 of 1900. They observed:

"Neither the decision of the survey officer, nor the planting of stones in accordance with it in proceedings under the Act *ipso facto* dispossesses any party, nor could it make a legal break in existing possession

(6) 16 L W 99; 70 Ind. Cas. 672; A I R 1923 Mad. 29; 31 M L T 62.

so as to render ineffective for purposes of limitation any adverse possession running at its date."

To our mind it appears, if we may say so with respect, that this expression of opinion is contrary to the view of the Full Bench, whatever merit there may be in the reason adduced by the Court, namely that it would be very extraordinary if the survey officer's decision could have an effect denied to the decision of a Civil Court as in *Subbayya Pandaram v. Mohammad Mustapha Maracayar* (7) and *Singaraivelu Mudaliar v. Chockalinga Mudaliar* (8). In a later decision reported in *Ramamurthi v. Narayana Gajapati Raju* (9), the view which prevailed in *Azhagaperumal Pillai v. Rasa Pillai* (1), was not accepted. The matter first came before Spencer, J. sitting as a single Judge in Second Appeal, from whose decision a Letters Patent Appeal was preferred which came up before a Division Bench composed of Waller and Pandalai, J.J. who differed. The main question on which the difference of opinion arose was as to what should be considered as a boundary dispute within the meaning of the Act. With reference to the point now under consideration after referring to the Full Bench decision, Waller, J., expressed himself emphatically as follows:

"The referring Judges in that case were definitely of opinion that the decision of the survey officer made a break in the adverse possession and that the period before the decision could not be tacked on to the period after it, so as to make the adverse possession continuous. And the Full Bench did not dissent from their opinion."

Pandalai, J. favoured the other view, accepted in *Azhagaperumal Pillai v. Rasa Pillai* (1), holding that a survey officer's decision as to boundary does not have the legal effect of terminating the possession of the man who was in possession or of breaking the running of his possession for purposes of limitation. On a reference to a third Judge, Wallace, J., endorsed the opinion of Waller, J. in preference to that of Pandalai, J. and animadverted on the contrary decision of the Division Bench, as not in accordance with the effect of the Full Bench ruling which, according to him

"held that the decision of a survey officer is a (7) 46 M 751; 74 Ind. Cas. 492; A I R 1923 P O 175; 50 I A 295; 21 A L J 730; 45 M L J 588; 25 Bom. L R 1275; 18 L W 903; (1924) M W N 65; 28 O W N 493; 2 Pat. L R 104; 33 M L T 285; 40 O L J 20 (P O).

(8) 46 M 525; 70 Ind. Cas. 994; A I R 1923 Mad. 88; 43 M L J 737; 16 L W 514; 31 M L T 298; (1922) M W N 676.

(9) 56 M 366; 141 Ind. Cas. 307; A I R 1933 Mad. 279; 64 M L J 361; 36 L W 847; Ind. Rul. (1933) Mad. 106.

decision that the successful party is in possession even though the unsuccessful party was really in possession, and that the decision estops the unsuccessful party from urging later on that he was in possession."

An attempt at reconciliation of the conflicting views has been made by Wadsworth, J. in *Tallapragada Achutharamaya v. Ayyagari Soorappayya* (10), in which he has also endeavoured to support the decision in *Azhagaperumal Pillai v. Rasa Pillai* (1), by suggesting that the survey officer in that case had not determined any question of possession. According to the learned Judge, the survey officer's decision can be regarded as final only to the extent to which it purports to decide the rights of the parties, the governing factor being the actual decision. On this view it will be necessary in every case to enquire whether the decision of the survey officer was based on possession or on title. If it is based on an adverse finding against the title of the unsuccessful party on a mere consideration of the documentary evidence of ownership, that finding should not according to the learned Judge, stand in the way of his adding up his possession anterior as well as posterior, so as to make up the period required by the Lim. Act, for a prescriptive title. With very great respect, we feel that the survey officer is not called upon to give an express decision on either title or possession. The Court is merely called upon to interpret the conclusiveness attributed to a demarcation of boundary by an officer charged with the duty of deciding a question of boundary only. An analysis of the basis of his decision, leading to a difference in the effect of the decision on the rights of the parties does not appear to be warranted by anything in the language of the section. We regret to say that we are not convinced of the correctness of the reasoning either on which the learned Judge has supported the decision in *Azhagaperumal Pillai v. Rasa Pillai* (1), as not being really inconsistent with the Full Bench ruling. However that may be, we think that the time has arrived for the conflict of opinion noticed above being resolved by a reference to the Full Bench of the following question:

"Whether the order of a survey officer under s. 11, or of the appellate authority under s. 12, Mad. Act IV. of 1897 has the effect of causing a break as on the date of the order, in the continuity of

(10) (1938) 2 M L J 894; 180 Ind. Cas. 543; A I R 1939 Mad. 61; (1938) M W N 1066; 48 L W 595; 11 R M 719.

the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Lim. Act to perfect a title by adverse possession."

Mr. B. V. Ramanarasu, for the Appellant.

Mr. Y. Suryanarayana, for the Respondents.

OPINION

Leach, C. J.—A person named Kantimahanti Appalanarasayya obtained a decree against one Sekharamantri Appalaswami and in execution of that decree attached immovable property belonging to the latter in Allipuram, a suburb of Vizagapatam. The property was sold at a Court-auction on January 7, 1916 and the decree-holder became the purchaser, the sale certificate being issued to him on July 2, 1920. Appalanarasayya took no steps to gain possession of the property which remained with the judgment-debtor. In the year 1922 a re-survey of all the properties lying within the boundaries of Vizagapatam took place. The property which was the subject of the Court-auction was registered as Survey No. 967. Notwithstanding that Appalanarasayya had made no attempt to obtain possession of this property he claimed it as his, and although the survey officer's order has not been produced it would appear that he was registered as the owner and that Appalaswami as the owner of an adjoining area marked as Survey No. 999. The Court has been given to understand that before the sale Appalaswami was the owner of both the arrears. The survey officer's order was passed under the provisions of s. 11, Mad. Survey and Boundaries Act, 1897. An appeal from the order was preferred under the provisions of s. 12 of the Act and the appellate authority passed an order in these terms:

"The complaint in respect of S. Nos. 967 and 999 relate to wrong registration and as such does not fall within the scope of the Boundary Disputes Act of IV 1897. The present registry in the names of Kantimahanti Appalanarasayya and Sekharamantri Appalaswami respectively is confirmed."

It is common ground that there was no dispute as to the boundaries of the respective properties. The only dispute was whether Appalanarasayya or Appalaswami's name should be registered as the owner of S. No. 967. In 1926 Appalanarasayya mortgaged S. No. 967 to the appellant in the appeal out of which this reference

arises. The appellant filed O. S. No. 299 of 1927 of the Court of the District Munsif of Vizagapatam to enforce his mortgage. He obtained a decree and the property was sold by the Court on July 6, 1929, the purchaser being the appellant to whom a sale certificate was granted on October 10, 1929. Appalaswami, who was in possession and had remained in possession throughout, refused to deliver the property to the appellant and Appalaswami's possession having been established the appellant's application was dismissed. Within one year of the order of dismissal the appellant instituted the present suit in the Court of the District Munsif of Vizagapatam for a decree for possession. At the date of the suit Appalaswami had been in adverse possession of the property continuously for fifteen years, unless the orders passed under the Mad. Survey and Boundaries Act, 1897 operated to create in law a break. The District Munsif dismissed the suit holding that the orders passed in the survey proceedings did not disturb the continuity of Appalaswami's possession. On appeal the Subordinate Judge concurred in this decision. A second appeal was then filed to this Court and came before Krishnaswami Ayyangar and Somayya, JJ. In view of the conflict which exists in the authorities the learned Judges have referred the following question to a Full Bench:

"Whether the order of a survey officer under s. 11, or of the appellate authority under s. 12, Mad. Act IV of 1897 has the effect of causing a break as on the date of the order, in the continuity of the adverse possession held by the unsuccessful party, so as to preclude his making use of the period of his prior possession to make up the period of twelve years required by the Lim. Act to perfect a title by adverse possession?"

This Bench has been constituted to answer the question. Before turning to the authorities it is necessary to examine in some detail the provisions of the Mad. Survey and Boundaries Act, 1897. That Act has been replaced by the Mad. Survey and Boundaries Act, 1923, but as the survey proceedings took place under the old Act regard can only be had to the provisions of the former Act. I may in passing mention that so far as this case is concerned, there is no material difference between the two Acts. The Act of 1897 was an Act relating to survey of lands and settlement of boundary disputes and its provisions can only have application to such matters. Section 11 (1) provided that if, at the time of survey, a boundary was undisputed the survey officer might order that the boundary should be

laid down as pointed out by the registered holder or his agent. Sub-s. (2) said that if the registered holder was not present, or if the boundary was disputed, the survey officer should order it to be laid down, as nearly as might be, in accordance with the village records, or as ascertained from the village officers and from such other evidence as the survey officers might be able to procure. Sub-section (3) said that the order passed by the survey officer in the case of any dispute under sub-s. (2) should be recorded in writing and the purport thereof communicated forthwith to the parties to the dispute a copy of the order being furnished to them on their application and at their cost. Sub-section (4) said that when the survey of a village or other defined local area forming part of the land under survey had been completed in accordance with the orders passed under sub-ss. (1), (2) and (3), the survey officer should notify the fact as soon as practicable thereafter. Section 12 provided for appeals against orders under s. 11. Sub-section (3) of that section said that the order of the survey officer, or, in the event of an appeal being filed, the decision of the appellate authority, should be final, and there should be no further appeal from such decision. But s. 13 allowed the matter to be carried further by a suit. It said that any party to a boundary dispute before the survey officer, and any party to an appeal preferred under s. 12 or to whom notice of such appeal was given, and any person claiming under any such party, who deemed himself aggrieved by the order of the survey officer or by the decision of the appellate authority, as the case might be, might, subject to the provisions of the Lim. Act, institute within a period of one year from the date of such order or decision, a suit to establish the right which he claimed 'in respect of the boundary of the property surveyed,' provided that, subject to the result of the suit, if any, the order or decision should be conclusive. To this section was added an explanation in these words;

"Where parties litigate *bona fide* in respect of boundaries of property claimed in common for themselves and others, all persons interested in such boundary dispute shall, for the purpose of this section, be deemed to claim under the parties so litigating."

There was no provision in the Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. If there was a boundary dispute the Act provided the machinery for its settlement and the survey officer's order demar-

cating the boundaries was final subject to an appeal under s. 12 or to the decision in a suit under s. 13. When it was a matter of a boundary dispute the survey officer had to decide where the boundary should lie and if he decided that the piece of land in dispute fell within the boundary of one of the opposing parties his order did affect the title to that particular piece of land. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey. I can find no provision in the Act which can be read as operating in such circumstances to prevent A, when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner.

In *Kuppuswami v. Venkataswami* (6), Courts-Trotter and Ramesam, JJ. held that where the survey officer had found that the plaintiffs were in possession and no suit had been filed under s. 13 of the Act of 1897 the plaintiffs were entitled to a decree for possession, even though the defendants had as a matter of fact been in possession for over the statutory period of twelve years part of which was before and the remainder was subsequent to the decision of the survey officer. Courts-Trotter, J. had no doubt that the survey officer's order was wrong but he considered that the case was governed by the decision of the Full Bench of this Court in *Muthammal v. Secretary of State* (11). I am unable to share the opinion that the Full Bench decision had application. In the Full Bench case Wallis, C. J. and Ayling and Seshagiri Ayyar, JJ. applied the doctrine of *res judicata* in these circumstances. A boundary settlement officer had decided under the Boundaries Act of 1860 that certain land did not fall within the boundaries of a *mitta* and had never formed part of the *mitta*. No suit was brought by the *mittadar* to contest this finding under s. 25 of the Act. The Full Bench considered that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the *mittadar* to recover the

(11) 39 M 1202; 26 Ind. Cas. 817; A I R 1915 Mad. 106; 27 M L J 529; 16 M L T 432 (F B).

lands as having formed part of the *mitta* or in the alternative for a deduction of the *peshkush* of the *mitta*. This dispute can only be regarded as a boundary dispute and the decision of the Full Bench is not in point in the present case, nor was it in point in *Kuppuswami v. Venkataswami* (6). The Privy Council in *Radha Krishna Iyer v. Sundaraswami* (4) held in a case arising out of the Mad. Estates Land Act of 1908 that the doctrine of *res judicata* did not apply to a suit under that Act, although the Board recognized that a statute might embody a special rule which operated as a bar to the same question being re-agitated in subsequent proceedings, and some day *Muthammal v. Secretary of State* (11) may have to be reconsidered in the light of the ruling of the Privy Council in the case under the Mad. Estates Land Act, but it is not necessary to dwell on the question here. Before leaving *Kuppuswami v. Venkataswami* (6) I may mention that in his judgment in that case Ramesam, J. indicated that in his opinion the decision in *Muthirulandi Poosari v. Sethurama Iyer* (2) to which I shall next refer did not prevent a plea of adverse possession being raised subsequent to the decision of the survey officer.

In *Muthirulandi Poosari v. Sethurama Iyer* (2) Wallis, O. J., and Ayling and Kumaraswami Sastri, JJ. held that an order passed by a survey officer under s. 11 of the Act of 1897 on a dispute arising between two parties with regard to the boundary of a certain property was conclusive as to the rights of the parties if not set aside either on appeal or by a suit brought within one year, and it was nonetheless so, because the unsuccessful party who was in possession on the date of the order was not subsequently ousted from possession. The dispute merely related to the boundary of the two holdings and therefore fell within the four corners of the Act. The statement that the decision was nonetheless conclusive as to the rights of the parties, because the unsuccessful party who was in possession at the date of the order was not subsequently ousted from possession carried the decision no further. The Court was not considering whether one of the parties had obtained a title to an area by adverse possession.

In my opinion the correct view of the scope of the Act was taken by Reilly and Ananthakrishna Ayyar, JJ., in *Azhagaperumal Pillai v. Rasa Pillai* (1). There it

was said that the decision of a survey officer for the planting of stones for the demarcation of the boundary does not *ipso facto* dispossess any party, nor make any legal break in existing possession so as to render ineffective for purposes of limitation any adverse possession running at the date of the decision. In that case it was argued that the judgment in *Muthirulandi Poosari v. Sethurama Iyer* (2) ran contrary, but this argument was rejected by the learned Judges and the opinion of Ramesam, J. in *Kuppuswami v. Venkataswami* (6) was accepted as supporting their decision.

There are two cases which conflict with the decision in *Azhagaperumal Pillai v. Rasa Pillai* (1). The first is *Ramamurti v. Narayana Gajapati Raju* (9) and the second is *Seetharamaraju v. Narayanaraju* (12). In the first case in the course of a survey, a dispute arose whether a certain field lying wholly within the boundaries of a *zamindari* should be demarcated as an *inam* or as part of the *ryoti* land of the *zamindari*. The *zamindar* claimed the land as *ryoti* land and the *inamdār* as his *mirasi inam*. The survey officer demarcated the land as *mirasi inam*, and his decision was upheld on appeal. The *zamindar* did not file a suit under s. 13 of the Act but in a suit brought subsequently by the *inamdār* against the *zamindar* the question of title was raised. The appeal was heard by Waller and Krishnan Pandalai, JJ. Waller, J. was of the opinion that the dispute was a boundary dispute within the meaning of the Act, that the survey officer had jurisdiction to decide the dispute and that as the *zamindar* did not file a suit within a year under s. 13 to get the decision set aside it had conclusively decided that the land was Govt. service *inam* and not part of the *zamindari*. Pandalai, J. held that the Act did not preclude the institution of the suit. He observed:

"In my opinion when two people dispute title to an ascertained and definite piece of land or to subordinate interests therein, the dispute cannot in any proper sense be described as a boundary dispute though as a result of the disputed title being settled, the boundaries of the property of one or other of the disputants may be accordingly shifted. If there was a real boundary dispute I can understand that a question of title depending solely on the boundary may become concluded as a necessary logical consequence but not by virtue of the Act. But if there was no such dispute, it cannot be inferentially introduced into a dispute about title and then held to be inferentially decided under the Act so that the question of title becomes con-

(12) 40 L. W. 536; 152 Ind. Cas. 462; A. I. R. 1934 Mad. 685; 7 R. M. 230; (1934) M. W. N. 1251.

cluded by a further inference. There was, in my opinion, no boundary dispute in the proper sense before the Assistant Superintendent of Survey, and his order, Exs. G and 23, being one on a matter beyond his jurisdiction could not become conclusive under the Mad. Survey and Boundaries Act."

As the result of the disagreement the appeal was referred to a third Judge, Wallace, J., who agreed with Waller, J. Wallace, J. refused to accept the argument that there could not be a boundary dispute unless there was a dispute between two estates or between Govt. and an estate regarding the physical boundary of some piece of land contiguous to both, that is a dispute as to "when, where and how" the boundary between both should run, but that if the dispute involved on one side or the other the whole of the contestant's property there could not be any boundary dispute, because the boundary of the disputed portion was not itself in dispute. The learned Judge said that he could see no principle in such a contention. I cannot agree. In my opinion the judgments of Wallace and Waller, JJ. are contrary to the scheme and the provisions of the Act. The Act was never intended to vest in the survey officer or in the appellate authority power to decide a pure question of title when the boundaries were accepted by both sides, which was the case in *Ramamurti v. Narayana Gajapati Raju* (9). The decision in *Seetharamaraju v. Narayanaraju* (12) was given by Butler, J. who followed *Ramamurti v. Narayana Gajapati Raju* (9). These two cases therefore stand or fall together.

The only other case which calls for mention is *Tallapragada Achutharamayya v. Ayyagari Soorappayya* (10). There, Wadsworth, J. endeavoured to reconcile the two conflicting views but I consider that they are too divergent for reconciliation. The learned Judge read the judgment of the Full Bench in *Muthirulandi Poosari v. Sethurama Iyer* (2) as laying down the rule that the survey officer's decision under s. 11 of the Act of 1897 is conclusive as to the rights of the parties, but he said that it was apparent that the survey officer's decision could only be final to the extent to which it purported to decide those rights. If the survey officer decided that the unsuccessful claimant was not in possession, the learned Judge considered that it would not be open to the unsuccessful claimant to contend that he had acquired a title by adverse possession. On the other hand, if the survey officer merely on a

consideration of the documentary evidence of ownership gave an adverse finding regarding title Wadsworth, J. saw no reason why that finding should bar the unsuccessful claimant from contending in subsequent proceedings that at the time of the survey officer's order he had trespassed successfully on the land in question and that his unlawful possession continued and was openly hostile to the real owner, taking into consideration possession before and after the survey officer's order. The governing factor was what the survey officer actually decided; the unsuccessful claimant could not go behind that. I have already indicated what my reading of the Act is and I cannot regard these statements of Wadsworth, J. as embodying a correct interpretation of the law.

The answer which I give to the reference is that an order of the survey officer under s. 11, or of the appellate authority under s. 12 of the Act, in itself had not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of 12 years required by the Lim. Act to complete his title. If the unsuccessful party remained in adverse possession of the disputed area for over 12 years his title was good irrespective of any order passed under the Act. As my learned brothers are in agreement with me the majority decision in *Ramamurti v. Narayana Gajapati Raju* (9) and the decision of Butler, J. in *Seetharamaraju v. Narayanaraju* (12) must be overruled. It follows that the observations of Wadsworth, J. in *Tallapragada Achutharamayya v. Ayyagari Soorappayya* (10) which are in conflict with the answer given to the reference should also be disregarded. The costs of the reference will be made costs in the appeal.

Krishnaswami Ayyangar, J.—After the fuller and more elaborate discussion of the question before the Bench as now constituted I feel that the opinion expressed by my Lord is the better and sounder one. In the order of reference I had expressed an inclination in favour of the other view which on further consideration, I agree, is not maintainable on general principles no less than on the language of the statute. It is difficult to support a view of the law which attributes to the decision of a survey authority, a higher efficacy than that which is annexed to the

decision of a Civil Court of competent jurisdiction as per *Subbayya Panikaram v. Mohamad Mustapha Maracayar* (7). To have this consequence, language must be much more clear than what we have. I may add that my former inclination towards the opposite construction was in a large measure the outcome of the limitation imposed on me as a member of a Division Bench, bound by the opinions expressed by other Benches and the legal consequences which might be regarded as flowing out of them. I now feel no doubt that the correct decision is the one now given expression to by my Lord, and I have no hesitation in preferring it to the other.

Patanjali Sastri, J.—I agree with the judgment of my Lord and have nothing material to add.

Final Judgment.

Krishnaswami Ayyangar, J.—In view of the answer given by the Full Bench, this second appeal is dismissed with costs of respondent No. 1.

N.-8.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 1463 of 1937

April 28, 1939

B. K. MUKHERJEA AND LATIFUR RAHAMAN, JJ.
JYOTISH CHANDRA CHAUDHURI

AND ANOTHER—DEFENDANTS—APPELLANTS
versus

PROFULLA CHANDRA SANYAL

AND OTHERS—PLAINTIFFS—RESPONDENTS

Grant—Construction—Grantor creating annuity in favour of his daughter and her lineal descendants—Some lineal descendants of daughter dying without leaving lineal descendants—Annuity held could be claimed by lineal descendants of daughter that might be living—Shares to be calculated on principle of per stirpes—Hindu Law—Succession—Brothers—Dayabhaga School.

A person executed a document creating an annuity in favour of his daughter and her lineal descendants, which contained a clause providing that none but the lineal descendants of the grantee would be entitled to have this allowance and that the daughters and other agnatic relations of the said daughter would not be entitled to the allowance. Some of the lineal descendants of the daughter who enjoyed the annuity themselves died without leaving any lineal descendants:

Held, that it was not the intention of the donor that the shares of these persons would lapse and revert back to the grantor and his heirs, if the other lineal descendants of the original grantee are alive. The annuity could be claimed by the lineal descendants of the original grantee who may be living at any particular time and the shares amongst them

should be calculated on the principle of *per stirpes* and not *per capita*.

The principle of law according to the Dayabhaga School is that if a brother dies leaving another brother who was living jointly with him that would not entitle the joint brother to have preference over a separated brother unless the former could be said to have re-united.

A. from the appellate decree of the Sub-Judge, Third Court, Mymensingh, dated June 28, 1937.

Dr. Basak, Messrs. Ramaprosad Mookerjee and Abdul Quasem, for the Appellants.

Messrs. Jatindra Mohan Choudhury and Gobinda Mohan Roy, for the Respondents.

B. K. Mukherjea, J.—This appeal is on behalf of defendants Nos. 2 and 3 and it arises out of a suit commenced by three plaintiffs for recovery of a sum of Rs. 1,763 odd annas alleged to be due as two-thirds share of certain annuities payable for the years 1336 to 1342 B. S. under the terms of a deed executed by the predecessor of defendants Nos. 1 to 3. There was also a prayer for declaration of a charge in respect of the amounts decreed upon the estate left by the grantor.

Now, the facts are not disputed. Defendants Nos. 1 to 3 represent the estate of one Bhairab Chandra Choudhury, who created an annuity in favour of his daughter Shiba Sundari and her lineal descendants by a document executed on February 7, 1856. The material portion of the document stands as follows:

"You are my daughter and I being pleased very much with you, I wanted to give you some immovable property for defraying the expenses of your food and clothing but that not being possible now, I am creating this *mashokara* in your favour fixing a sum of Rs. 41 and annas odd per month or Rs. 500 a year as your allowance. In my absence you will be entitled to realise this amount together with your sons, grandsons and other heirs of your body from my heirs and successors."

Then there was a clause providing that none but the lineal descendants of the grantee would be entitled to have this allowance and that the daughters and other agnatic relations of the said daughter Shiba Sundari would not be entitled to the allowance. It appears that Shiba Sundari enjoyed the annuity during her lifetime and she died leaving behind her four sons, to wit, Mahendra, Prasanna, Harendra and Narendra. Of these four sons, Harendra died first without leaving any wife or issue and Narendra, the fourth brother, is alleged to have separated from the other two, who continued to live together in common mess. Mahendra died next leaving a widow

named Rashmoni. After that Narendra died and his son Surendra has been made a *pro forma* defendant in this suit. Prasanna died last and his two sons were Ramesh and Suresh. Both these brothers are dead. Plaintiffs Nos. 1 and 2 are the two sons of Suresh and plaintiff No. 3 is the widow of Ramesh. The three plaintiffs claim two-thirds share of the annuity as representing the line of Prasanna who is alleged to have got besides his own one-third share the other third share of Mahendra after the death of the latter. The defence of the contesting defendants was that no charge was created by the deed and none could be declared by the Court. It was contended further that the annuity being descendible only to the lineal heirs of the grantee the shares of Harendra, Mahendra and Ramesh must have lapsed and reverted back to the grantor and his heirs. In other words, the contention was that the plaintiffs were entitled to only one-eighth share in the annuity created in favour of Shiba Sundari.

The trial Court gave the three plaintiffs a money decree against the contesting defendants but refused their prayer for declaration of a charge. On appeal the lower Appellate Court was of opinion that plaintiff No. 3 was not a lineal descendant of the grantee and was therefore not entitled to have any share in the annuity and consequently the decree would be in favour of plaintiffs Nos. 1 and 2 alone. The Subordinate Judge however was of opinion that plaintiffs Nos. 1 and 2 would be entitled to have two-thirds share of the annuity claimed, inasmuch as the share of Mahendra would devolve upon Prasanna after the death of the former, Prasanna being his undivided brother whereas Narendra had already separated from him. It is against this decision that the present second appeal has been preferred. Dr. Basak, who appears in support of the appellants, has raised before us a two-fold contention. In the first place he has argued that the plaintiffs are not entitled to any relief whatsoever inasmuch as the grant fails altogether after the death of Shiba Sundari, the donor having attempted to create, after her death, a line of succession which is repugnant and contrary to Hindu Law. The second argument which he has put forward in this, that the shares of Harendra, Mahendra and Ramesh must be deemed to have gone back to the grantor and his heirs and consequently the plaintiffs Nos. 1 and 2 are not entitled to get more than one-eighth share of the amount claimed.

Now, so far as the first ground is concerned, it is not disputed that no such case was made in the written statement of the contesting defendants; on the other hand, the case made therein was that the deed was a valid and operative one and on a proper construction of its terms no charge could be declared and the shares of these lineal descendants of the grantee as did not leave any lineal descendants behind them would go back to the heirs of the grantor. It is also not disputed that this point was not raised either in the trial Court or in the Court of Appeal below. Dr. Basak however says that he is entitled to raise this point as a pure point of law in second appeal. It appears to me that there are considerable difficulties in his way. It transpires from the records that after the death of Shiba Sundari her sons did institute several suits for the purpose of recovery of this maintenance allowance from the predecessors of the defendants. These suits culminated in decrees and some of them have been made exhibits in this case. If, as Dr. Basak contends, the gift failed altogether after the death of Shiba Sundari, it was open to the defendants' predecessors to contend in those suits that no annuity was payable to the plaintiffs. As this was a ground of defence which was open to the defendants but which was not raised, I think, the principle of constructive *res judicata* can very well be invoked in their favour. Mr. Chowdhury, who appears for the respondents, has further contended before us that grants of this description which rank in Hindu Law as *nibandha* or *corrody* do come within the exceptions to the principle enunciated in *Tagore v. Tagore* (1), which were indicated in the very judgment of their Lordships of the Judicial Committee. He has argued that *nibandha* or *corrody* amounts to creation of what is called an incorporeal right and it is a species of property which is recognized in Hindu Law. He says therefore that if the intention of the transferor to create a *nibandha* is apparent from the deed itself and his clients do come within the category of persons sought to be benefited by it, they are entitled to have the annuity even though they do not come in as the heirs of the original grantee. In support of this contention reliance has been placed upon a decision of this Court, viz. *Jatindra Mohan Mandal v. Ghanshyam Chowdhury* (2). The point may have some substance

(1) (1872) 1 A Sup. Vol. 47; 9 Beng. L R 377; 18 W R 352.

(2) 50 O J 266; 72 Ind. Cas. 1019; A I R 1923 Cal. 27; 36 O L J 426.

in it which I need not decide in the present case and I am only referring to this argument for the purpose of showing that these and other answers were available to the plaintiffs, if, as a point of fact, the contesting defendants had cared to raise this question in the proper place and at the proper time. Another question of fact might have to be investigated *viz.* as to which of the descendants of Shiba Sundari were alive at the date of the grant. In view of these circumstances I do not think it proper that the defendants-appellants should be allowed to raise this point for the first time in second appeal.

The only other point which has been raised by Dr. Basak relates to the share of the plaintiffs. Now, as the deed states, none who is not a lineal descendant can have any interest in the annuity. Neither Rashmoni, the widow of Mahendra, nor Satadalbasini, the widow of Ramesh, can therefore lay any claim to this allowance. The question therefore arises as to whom would the shares go if some of the lineal descendants of the grantee who enjoyed the annuity themselves died without leaving any lineal descendants behind them. In my opinion, reading the document as a whole, the only proper inference seems to be that it was not the intention of the donor that the shares of these persons would lapse and revert back to the grantor and his heirs, if the other lineal descendants of the original grantee are alive. The position therefore is this: the annuity could be claimed by the lineal descendants of the original grantee who may be living at any particular time and the shares amongst them, in my opinion, should be calculated on the principle of *per stirpes* and not *per capita*. In the present case Prasanna was entitled undoubtedly to one-third share and this interest has devolved upon plaintiffs Nos. 1 and 2.

So far as Mahendra's share is concerned, I am unable to agree with the lower Appellate Court that it would go to Prasanna and not to Prasanna and Narendra jointly. The reason assigned is that Prasanna was at that time living together with Mahendra whereas Narendra had already separated. The principle of law according to the Dayabhaga School seems to be that if a brother dies leaving another brother who was living jointly with him that would not entitle the joint brother to have preference over a separated brother unless the former could be said to have re united. In the present case there is no evidence or

suggestion whatsoever that there was any re-union between Prasanna and Mahendra and in these circumstances I am unable to say that Prasanna would have a preferential right of succession to the interest of Mahendra to the exclusion of Narendra. In these circumstances, I would vary the decree passed by the lower Appellate Court to this extent: that plaintiffs Nos. 1 and 2 will be entitled to get half of the annuities and not two-thirds as claimed. They would therefore be entitled to recover Rs. 1,836-15-8 together with the costs of both the Courts below. There will be no order as to costs in this appeal.

Latifur Rahaman, J.—I agree.

s.

Decree varied.

ALLAHABAD HIGH COURT

Second Appeal No. 919 of 1937

October 16, 1939

IQBAL AHMAD, J.

HAR PRASAD—DEFENDANT—

APPELLANT

versus

SITA RAM—PLAINTIFF—

RESPONDENT

Transfer of Property Act (IV of 1882), s. 52—Subsequent mortgagee in execution of his decree for sale obtained on his mortgage purchasing property himself and suing for possession transferee pendente lite—Whether entitled to unconditional possession—Liability to reimburse transferee in respect of prior mortgages redeemed by him.

It may be assumed that a transfer in contravention of the provisions of s. 52, T. P. Act, is only voidable and not void, but even then there is no analogy between a suit for possession by a decree-holder against a transferee *pendente lite* and a suit by Hindu reversioner for possession of property alienated by a widow. Even though s. 52 does not operate to annul a transfer *pendente lite* it renders the transfer subservient to the rights of the parties to the action as determined by the judgment or decree passed in the action. In other words, unlike a transfer by a Hindu widow there is a statutory prohibition against transfers *pendente lite* so as to affect the right of either party to the action.

Consequently where a subsequent mortgagee who in execution of a decree for sale obtained on the basis of the subsequent mortgage has purchased the mortgaged property, brings a suit for possession against a usufructuary mortgagee *pendente lite* who redeemed certain prior mortgages, the mortgagee decree-holder is entitled to an unconditional decree for possession of the property. To put the matter in another way, he is, in view of the provisions of s. 52, T. P. Act, entitled to ignore the usufructuary mortgage executed *pendente lite* and the transferee cannot, therefore, rely on that mortgage and claim reimbursement with respect to the earlier mortgages that he redeemed in his capacity as a usufructuary mortgagee.

Mr. S. K. Mukerji, for the Appellant.

Mr. Jagnandan Lal, for the Respondent.

Judgment.—The contest in the present appeal is between a subsequent mortgagee who in execution of a decree for sale obtained on the basis of the subsequent mortgage purchased the mortgaged property and a transferee *pendente lite* who redeemed certain prior mortgages and held the same up as a shield against the claim of the subsequent mortgagee auction-purchaser in a suit for possession of the mortgaged property. The transferee *pendente lite* succeeded in the trial Court but the lower Appellate Court passed an unconditional decree for possession in favour of the subsequent mortgagee auction-purchaser. In order to appreciate the respective contentions of the parties, it is necessary to briefly state the facts. One Girdhari Lal was the owner of the property in dispute. On May 25, 1916 he (Girdhari Lal) executed a simple mortgage with respect to the property in dispute in favour of one Banarsi Das. Again, on June 11, 1917, he executed a simple mortgage in favour of Har Prasad defendant-appellant. Then on May 30, 1918, Girdhari Lal executed a third simple mortgage in favour of Sita Ram plaintiff-respondent. Sita Ram put his mortgage of 1918 into suit and obtained a final decree for sale in the year 1922.

Before Sita Ram put his decree into execution Girdhari Lal on September 27, 1926 executed a simple mortgage in favour of Har Prasad in lieu of the mortgage of 1917. In other words, this mortgage of 1926 was in renewal of the mortgage of 1917. Finally, on April 10, 1928, Girdhari Lal executed a deed of usufructuary mortgage in favour of Har Prasad. The consideration of this usufructuary mortgage was the amount due on the basis of the mortgages of 1916 and 1926. Har Prasad thereafter redeemed the simple mortgage of 1916. In execution of his decree for sale Sita Ram purchased the property in dispute on August 2, 1930, and when he proceeded to take possession of the property he was resisted by Har Prasad, the usufructuary mortgagee. Sita Ram then filed the suit giving rise to the present appeal for possession of the property in dispute. Har Prasad contested the suit *inter alia* on the ground that in consequence of the facts stated above he was subrogated to the position of the mortgagees of 1916 and 1917 and that Sita Ram could not be

granted a decree for possession without redeeming these mortgages. This contention as already stated, was overruled by the lower Appellate Court and in my judgment rightly.

The mortgages of 1916, 1917 and 1926 were simple mortgages and the only remedy of Har Prasad under those mortgages was to sue for sale of the mortgaged property. Har Prasad was not entitled to possession of the mortgaged property under any one of those three mortgages. It was only by virtue of the usufructuary mortgage of 1928 that Har Prasad acquired possession of the mortgaged property. This usufructuary mortgage however offended against the provisions of s. 52, T. P. Act, which *inter alia* provides that during the pendency of any suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein. The explanation added to s. 52, T. P. Act, makes it manifest that *lis pendens* continues till the decree obtained in the suit is completely satisfied or discharged or the execution of the same becomes barred by limitation.

By the auction-purchase made by him Sita Ram became entitled to the possession of the property in dispute and this right could not be adversely affected by the usufructuary mortgage for the simple reason that that mortgage was made during the pendency of the suit for sale brought by Sita Ram. Sita Ram was, therefore, entitled to the possession of the property untrammelled by the usufructuary mortgage of 1928. It is however contended by the learned Counsel for Har Prasad that, as a transfer *pendente lite* is not void but only voidable, Sita Ram ought to be put to terms and should not be allowed to take possession of the property without paying the amount due on the basis of the mortgages of 1916 and 1926. In this connection it is pointed out that Sita Ram's suit is analogous to a suit by a Hindu reversioner for possession of property transferred by a Hindu widow and it is said that as the reversioner is liable to reimburse a transferee with respect to encumbrances discharged by the transferee Sita Ram must also be called upon to redeem the mortgages of 1916 and 1926. I am unable to agree with this contention.

It may be assumed that a transfer in contravention of the provisions of s. 52, T. P.

Act, is only voidable and not void, *vide Jagannatha Kone v. Ramchandra Naidu* (1) and *Mathura Prasad v. Ghansham Das*, 132 Ind. Cas. 767 (2) but even then there is no analogy between a suit like the present and a suit by a Hindu reversioner for possession of property alienated by a widow. A Hindu reversioner is entitled to possession of the property of the last male holder subject to the liability to discharge encumbrances validly created on that property. If a transferee from a widow has already discharged certain valid encumbrances the reversioner can be granted a decree for possession conditional on the payment of the amount spent by the transferee in redeeming the valid encumbrances for the simple reasons that the liability to redeem those encumbrances rested on the shoulders of the reversioner.

But in a case which attracts the provisions of s. 52, T. P. Act, the position is entirely different. Even though s. 52 does not operate to annul a transfer *pendente lite* it renders the transfer subservient to the rights of the parties to the action as determined by the judgment or decree passed in the action. In other words, unlike a transfer by a Hindu widow there is a statutory prohibition against transfers *pendente lite* so as to affect the right of either party to the action. It follows that Har Prasad cannot by virtue of the usufructuary mortgage jeopardise the right of Sita Ram to possession of the property, which right Sita Ram acquired by virtue of the decree in the suit for sale brought by him. That being so Sita Ram is entitled to an unconditional decree for possession of the property in dispute. To put the matter in another way, Sita Ram is, in view of the provisions of s. 52, T. P. Act, entitled to ignore the usufructuary mortgage of 1928. Har Prasad cannot, therefore, rely on that mortgage and claim reimbursement with respect to the two earlier mortgages that he redeemed in his capacity as a usufructuary mortgagee. For the reasons given above, I hold that Sita Ram's suit was rightly decreed by the lower Appellate Court and dismiss this appeal with costs. Leave to appeal under the Letters Patent is granted.

D.

Appeal dismissed.

(1) A I R 1936 Mad. 589; 165 Ind. Cas. 453; (1936) M W N 443; 9 R M 251.

(2) 132 Ind. Cas. 767; A I R 1931 Oudh 157; 8 O W N 179; Ind. Rul. (1931) Oudh 319.

MADRAS HIGH COURT

Appeal No. 265 of 1936.

September 15, 1938

KING AND KRISHNASWAMI AYYANGAR, JJ.

JHORAMA—APPELLANT

versus

VISWASARAYI LATCHANNA DORA

—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 48—Execution application not made within 12 years—Court, if can allow amendment to enable decree-holder to proceed.

Where an application has not been properly made within the 12 years' period provided in s. 48, Civil P. O., no amendment can be allowed which would have the effect of depriving the judgment-debtor of putting forward the plea of limitation. But in special and exceptional circumstances the Court has discretion to order such amendments in order to enable the decree-holder to proceed further with execution.

A. against an order of the Sub-Judge, Berhampur, dated October 30, 1935.

Messrs. C. S. Venkatachariar and D. Ramaswami Ayyangar, for the Appellant.

Messrs. P. V. Rajamannar and K. Subba Rao, for the Respondents.

King, J.—The appellant here is the decree-holder in O. S. No. 68 of 1921. In 1926 the appellant filed an execution petition seeking to attach certain property and obtain orders of attachment. That execution petition was recorded in 1927 with a direction to the appellant to apply by separate application for sale of the attached property. A subsequent application, E. A. No. 49 of 1928, was made in March 1928 and was ordered in July to be "struck off the file to be restored when applied for after the stay is raised," an order having been received from the High Court, where a civil miscellaneous appeal has been filed, to stay execution shortly before this. Unfortunately the disposal of the civil miscellaneous appeal occupied several years, and it was not until April 27, 1934, that the judgment of the High Court was delivered. That judgment runs as follows:

"The only question for decision is whether the attachment of the several items made on February 2 and 3, 1926, is according to law. So far as the superstructure of the houses described in Items Nos. 4 to 6 are concerned, no objection to the validity of the attachment is raised before us and the attachment thereof must be held to be lawful. As regards the other items and the land on which the superstructure stand, they were undoubtedly unenfranchised Dorathanam service *inams* on the dates of the attachments and therefore not liable to attachment. In this view of the case it is unnecessary to decide whether the subsequent order of Govt. directing the resumption of the *inams* was a completed and effective resumption. The attachment of Items Nos. 1 to 3 and of the lands on which the houses are situate

must be set aside and the appeal allowed to this extent."

About six months after the judgment had been delivered, the appellant applied in E. A. No. 256 of 1934, praying for the restoration of E. A. No. 4 of 1926 to file and for ordering attachment for the second time of the property which had been attached in 1926 and the attachment of which, as we have just seen had been set aside by the High Court. The learned Subordinate Judge of Berhampore in his order dated October 17, 1935, refused to grant this part of the appellant's application but permitted him to continue the petition, E. P. No. 49 of 1928, with respect to those items of property the attachment of which had been declared valid by the High Court. This is therefore an appeal by the appellant against that part of the learned Subordinate Judge's order which is against him. The learned Subordinate Judge has recognized the right of the appellant to make this application in 1934 even though the 12 years period laid down in s. 48 of the Code had already expired, and there is no serious contest before us that one if not two execution petitions were not still pending from 1926 to 1928, as there had been no final order disposing of them. The only questions therefore which have to be decided are: (1) whether the High Court in its judgment in O. M. A. No. 234 of 1928 has in effect dismissed these execution petitions so that with respect to the items with which we are now concerned it is impossible to regard them as any longer continuing or being regarded as valid; and (2) whether the circumstances of this case are such that we ought to permit such amendment of these petitions as may be necessary in order to enable the appellant to proceed further with his execution.

On the first point we think considerable difficulty might arise if we consider only execution application No. 4 of 1926, but we are of opinion, that if E. P. No. 49 of 1928 is taken into account there can be nothing in the judgment of the High Court in O. M. A. No. 234 of 1928 which in any way relates to the prayers in that petition. All that the High Court said was that an attachment effected in February 1926, was invalid. In 1928, the appellant applied for the sale of properties which had been attached in 1926. The High Court has said nothing as to whether if a prayer had been inserted in the petition in 1928 for the attachment of those properties and the attachment had been effected accordingly

that attachment would or would not have been valid. That matter, as we read the judgment of the High Court, has been left open. The appellant's learned Counsel has therefore requested us to permit him to amend E. P. No. 49 of 1928 by asking for the attachment of the properties now in dispute, a request which he did not make in 1928 itself because at that time an attachment was already in force.

The second question which we have to decide is whether in the special circumstances of this case we should permit such an amendment to be made. It has been argued by Mr. Subba Rao, for the respondent, that we have no discretion in this matter and that once it is discovered that an application has not been properly made within the 12 years period provided in s. 48, no amendment can be allowed which would have the effect of depriving the respondent of putting forward the plea of limitation. The authorities however which he has brought to our attention on this point do not go so far as to say that there is no discretion left to the Court. They lay down the very salutary rule that ordinarily an amendment should not be allowed which would have the effect of depriving the respondents of putting forward such a plea. They do not say that in special circumstances the Court is powerless to order such amendments. We are clearly of opinion, that the circumstances in this case are so exceptional as to justify the amendment proposed. In 1926 the appellant obtained the attachment of these properties. No doubt it has since been decided that that attachment was illegal. But the matter was obviously a disputed one upon which the attaching Court itself took a different view. Then when the appellant attempted to have the property which had been attached sold in 1928 his attempt was frustrated by an order of stay issued by this Court. By that time proceedings to resume the *inams* had been taken by the Govt. and it is the contention of the appellant that had attachment not already been effected he might have validly applied in 1928 for the attachment of these properties. But for the whole of the period 1928 to 1934 he could take no such action owing to unfortunately long continued pendency of the appeal in the High Court. He took no steps after the appellate judgment had been delivered within a reasonable time, and although he appears to have asked specifically only for the revival of the earlier petition No. 4 of 1926 the learned Subordi-

nate Judge himself has decided that the proper petition to be revived for the limited purpose which he was prepared to concede was E. P. No. 49 of 1918. Although until the actual hearing of this appeal there has been no explicit request either to the Court below or to this Court for the granting of the amendment which is now proposed, we think in all the circumstances that the amendment should be allowed. It appears that E. P. No. 49 of 1928 has by this time been dismissed as it was not seriously pressed with regard to the comparatively unimportant properties against which it was allowed to proceed. We direct that the application be restored to file and that the petitioner-appellant be allowed to amend it by asking for the attachment of the properties which are the subject-matter of this appeal. The learned Subordinate Judge will then proceed to dispose of E. P. No. 49 of 1928 according to law. We direct in the peculiar circumstances of this case that each party bear his own costs of this appeal. It is of course clear that this judgment has in no way decided the question whether these properties are or are not liable to attachment.

N.D.

Order accordingly.

ALLAHABAD HIGH COURT

Civil Revision No. 256 of 1938

October 6, 1939

MULLA J.

DAL SINGAR KOERI—PLAINTIFF

—APPLICANT

versus

CHANDI SINGH AND ANOTHER—**DEFENDANTS—OPPOSITE PARTY.**

Limitation Act (IX of 1908), s. 14—Suit on mortgage—Cause of action, how determined—Striking out relief for sale of property, whether changes cause of action—Plaint returned after amendment to proper Court—Plaintiff, if entitled to benefit of s. 14—Want of jurisdiction, if should exist at date of suit, for applicability of s. 14.

"Cause of action" and "relief" are quite distinct and the question whether two proceedings are based upon the same cause of action or different causes of action cannot be decided upon the terms of the reliefs claimed in either proceeding:

A suit based upon a mortgage deed is essentially a suit to recover a loan and the cause of action for such a suit is the failure of the defendant to discharge the loan. A mortgagee in a suit founded upon a simple mortgage proceeds on the same cause of action whether he claims only to recover the loan advanced by him or presses also for the additional relief to enforce the charge in his favour. Where the plaintiff based on a mortgage deed after deletion of relief as to sale is returned from regular side for presentation

to the Small Cause Court the plaintiff is entitled to the benefit of s. 14, Lim. Act.

The want of jurisdiction or other cause of a like nature referred to in s. 14 need not be in existence at the very institution of a suit. All that the law requires for the applicability of s. 14 is that the Court in which the previous proceeding is prosecuted should be unable to entertain it from defect of jurisdiction or other cause of a like nature. Want of jurisdiction or other cause of a like nature may arise at any stage of a suit or proceeding and if upon that basis the Court in which the suit or proceeding is being prosecuted arrives at the conclusion that it cannot entertain it and makes an order accordingly the condition laid down in s. 14 is sufficiently fulfilled.

O. R. against the order of the Judge, Small Cause Court, Azamgarh, dated April 30, 1938.

Mr. K. L. Misra, for the Applicant.

Mr. L. M. Roy, for the Opposite Party.

Order.—This is a plaintiff's application in revision under s. 25, Small Cause Courts Act, against a decree passed by the learned Munsif of Azamgarh in the exercise of Small Cause Court jurisdiction dismissing a suit on the ground that it was barred by limitation. The relevant facts of the case may briefly be stated as follows: The applicant Dalsinger Koeri and Kharpattu Koeri who appears as opposite party No. 2 in the present case held a simple mortgage from the opposite party No. 1, Chandi Singh, for Rs. 55. The mortgage deed was executed on January 30, 1932 but was not registered. The omission to register the deed was presumably due to a mistaken belief that the value of the mortgage being less than Rs. 100 no registration was necessary. On January 29, 1938 the applicant and Kharpattu Koeri instituted a suit on the basis of that mortgage in the Court of the learned Munsif at Azamgarh on the regular side.

There is no contest that the suit was within time on that date inasmuch as the mortgage deed provided for a period of three years for repayment of the loan. The relief claimed in the suit was the usual one that a decree for the principal and interest due under the mortgage deed may be passed in favour of the plaintiffs and in case of the defendant failing to discharge that amount the property mentioned in the mortgage deed may be sold. It is quite obvious that this relief consisted of two distinct portions (1) that a decree should be passed for the whole amount due under the mortgage on account of principal and interest and (2) that the property which was the subject of the charge under the deed should be sold

to satisfy that amount in case the defendant failed to discharge it. It is admitted that there was a clear personal covenant in the deed of mortgage upon which the suit had been brought and the plaintiffs were therefore clearly entitled to a personal decree against the defendant on the basis of the loan. In the written statement filed by the defendant he raised the plea that the deed in suit not being registered could not operate as a mortgage deed. This plea was obviously sound and the plaintiffs consequently got the plaint amended by scoring out the relief to sell the property covered by the mortgage. It was then found that the valuation of the suit being within the cognizance of the Court of Small Causes the learned Munsif had no jurisdiction to entertain the suit on the regular side. He accordingly directed the plaint to be returned for presentation to the proper Court. This order was passed on March 19, 1938, and the plaint was actually returned to the plaintiffs on March 24, 1938. On the same date the plaint was presented in the same Court on the Small Cause Court side. When the suit proceeded to trial the defendant raised the plea, amongst others, that the suit was barred by limitation. The learned Munsif has allowed this plea to prevail and has consequently dismissed the suit though he has rejected all the other pleas taken by the defence. Hence the present application in revision. The substance of the argument on behalf of the applicant is that the learned Munsif has erred in law in holding that the plaintiffs were not entitled to the benefit of s. 14, Lim. Act. The learned Munsif arrived at that conclusion for reasons which may best be set out in his own words as follows:

"I do not think that s. 14 has application to the facts of this case. It is only when the previous Court is unable to entertain the suit for want of jurisdiction or some cause of a like nature and when the cause of action in both Courts is the same that s. 14 comes into play. Here neither of the two essentials exist. Cause of a like nature should be one *ejusdem generis* with want of jurisdiction. A defect in the title deed would not be covered by the expression. Similarly, a cause of action to enforce security is different from one on a personal covenant. Suit is therefore dismissed as time-barred."

All that is necessary therefore is to examine the position taken by the learned Munsif and to see if that is right. Now s. 14, Lim. Act, runs as follows:

"In computing the period of limitation prescribed for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in Court of Appeal against the defendant shall

be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it."

The learned Munsif appears to have arrived at the conclusion that the last part of this section did not apply to the facts of the present case inasmuch as the previous proceeding in the Court of the learned Munsif on the regular side was based upon a different cause of action from that upon which the later proceeding in the same Court on the regular side was founded and also because the Court on the regular side had jurisdiction to entertain the suit as it was initially framed and the want of jurisdiction having arisen only upon an amendment of the plaint it was not possible to hold within the meaning of s. 14 that the previous proceeding was prosecuted "in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it." Upon a careful consideration of the terms of s. 14, and the facts of the case, I have arrived at the conclusion that the learned Munsif has gone wholly wrong in appreciating the true significance and scope of the provision contained in s. 14 and has consequently misdirected himself. So far as the first point is concerned, I fail to see how it is possible to urge with any force that the proceeding on the Small Cause Court side was founded upon a cause of action different from that upon which the proceeding on the regular side was based. A suit based upon a mortgage deed is essentially a suit to recover a loan and the cause of action for such a suit is the failure of the defendant to discharge the loan. The learned Munsif appears to have confused "cause of action" with "relief." In a suit based upon a simple mortgage the plaintiff can claim two reliefs; *firstly*, that a decree should be passed in his favour for the amount due under the deed, and *secondly*, that the property covered by the charge should be sold. The right to sell the property covered by the charge is only an additional relief to which the plaintiff is entitled under the deed. Both the reliefs however flow from the same cause of action, namely the failure of the defendant to repay the loan. The plaintiff in a suit founded upon a simple mortgage proceeds on the same cause of action whether he claims only to recover the loan advanced by him or presses also for the additional relief to enforce the charge in his favour. The distinction between "cause of action"

and "relief" is clarified by sub-s. (2) of s. 14 which is applicable to applications alone and runs in the following terms:

"In computing the period of limitation prescribed for any application the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in Court of Appeal against the same party for the same relief shall be excluded where such proceeding is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it."

The question whether two proceedings are based upon the same cause of action or different causes of action cannot be decided upon the terms of the reliefs claimed in either proceeding. It may easily be conceived that the relief claimed on both proceedings might be identical but the cause of action may be wholly different. In the present case I do not find any justification for holding that the proceeding on the Small Cause Court side was based upon some cause of action different from that upon which the proceeding on the regular side was founded. Turning now to the other point I find that the learned Munsif laboured under the misapprehension that the want of jurisdiction or other cause of a like nature referred to in s. 14 must be in existence at the very institution of a suit. There is nothing in the terms of s. 14 to justify that conclusion. All that the law requires that the Court in which the previous proceeding is prosecuted should be unable to entertain it from defect of jurisdiction or other cause of a like nature. Want of jurisdiction or other cause of a like nature may arise at any stage of a suit or proceeding and if upon that basis the Court in which the suit or proceeding is being prosecuted arrives at the conclusion that it cannot entertain it and makes an order accordingly the condition laid down in s. 14 which is under consideration is sufficiently fulfilled. In the present case want of jurisdiction arose when the plaintiffs got their plaint amended by scoring out a portion of their relief. The Court was then unable to entertain the suit and had to return the plaint for presentation to the proper Court. That was a sufficient fulfilment of the condition laid down in s. 14. The learned Munsif seems to think that it was the non-registration of the mortgage deed in suit which brought about want of jurisdiction and such defect does not fall within the purview of "other cause of a like nature" as contemplated by s. 14. This is, to my mind, wholly beside the point.

It was only the pecuniary value of the claim after the amendment of the plaint which placed it beyond the jurisdiction of the learned Munsif on the regular side in consequence of the provision contained in sub-s. 2 of s. 15, Prov. Small Cause Courts Act. If we suppose for a moment that the value of the claim was high enough so that it could be entertained by the learned Munsif on the regular side no question of want of jurisdiction could possibly arise and the learned Munsif on the regular side could not have refused to entertain the suit. It has been repeatedly held by various Courts that s. 14 ought to be liberally construed and in my judgment the interpretation put upon the section by the learned Munsif in the present case is against the letter as well as the spirit of the law. The result therefore is that I allow this application in revision and setting aside the decree passed by the learned Munsif decree the plaintiffs' suit with costs in all the Courts.

D.

Application allowed.

MADRAS HIGH COURT

Appeal No. 59 of 1936

July 29, 1938

KING AND STODART, JJ.

RAMASWAMI (MINOR) AND OTHERS—

APPELLANTS

versus

GURUKAR RUDRAPPA—

RESPONDENT

Contract Act (IX of 1872), s. 63—Agreement to remit—Consideration is necessary.

Where the decree-holder has actually remitted a portion of the debt due to him and not merely promised to remit it, no consideration is necessary. Actual remission is not completed until he accepts the part payment in full satisfaction. For an agreement to remit, consideration is necessary. 141 Ind. Cas. 429 (1); explained. 122 Ind. Cas. 641 (2), relied on.

A. against the appellate order of the District Court, West Tanjore, dated March 18, 1936.

Mr. R. Desikan, for the Appellants.
Sir A. Krishnaswami Iyer, Advocate-General, for the Respondent.

Judgment.—Appellant relies upon the case in *Rama Narasu v. Venkatarreddi* (1), but in that case it is pointed out that the promise made by the judgment-debtor was (1) 56 M 198; 141 Ind. Cas. 429; A I R 1933 Mad 28; 63 M L J 598; (1932) M W N 840; 36 L W 558; Ind. Rul. (1933) Mad. 132.

consideration. Here a promise to pay only a part of what is legally due, can afford no consideration for any promise by the decree-holder. Appellant then relies on s. 63, Contract Act, and contends that no consideration is necessary. That is no doubt true if the decree-holder has actually remitted a portion of the debt due to him and not merely promised to remit it. Actual remission is not completed until he accepts the part payment in full satisfaction: see *Illus. (b), (c), (d) and (e)* to the section. For an agreement to remit, consideration is necessary: see *Balasundara Naicker v. Ranganatha Iyer* (2). The appeal fails and is dismissed with costs.

D. *Appeal dismissed.*

(2) 53 M 127; 122 Ind. Cas. 641; A I R 1929 Mad. 794; 58 M L J 503; 30 L W 293; Ind. Rul. (1930) Mad. 385.

PATNA HIGH COURT

Appeal No. 27 of 1937

September 19, 1939

VARMA AND MANOHAR LALL, JJ.
SINGHESHWAR SINGH AND OTHERS
—DEFENDANTS—APPELLANTS

versus

MEDNI PRASAD SINGH AND OTHERS—
PLAINTIFFS AND OTHERS—DEFENDANTS
—RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7—Expression “evidenced by such document”, meaning of—“Document” in expression “based on document” can be used in two ways—Transfer of Property Act (IV of 1882), s. 67-A—Whether retrospective—Mortgage—Priority—Subsequent mortgage in favour of another, of some properties covered by earlier mortgage—Yet subsequent mortgage in favour of earliest mortgagee to pay balance due on first mortgage with additional security and lower rate of interest—Suit by first mortgagee within 12 years of due date under third mortgage but beyond that due under first mortgage—Later mortgages held not entitled to priority and suit not barred by limitation.

The meaning of the clause “evidenced by such document” in s. 7, Bihar Money-lenders (Regulation of Transactions) Act, is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document, then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word ‘loan’ which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like *bahi khata*s or based on as evidenced by the handnote which for some purposes may be inadmissible in evidence, nevertheless, a Court must refer to them for the purpose of s. 7 to find out what the loan was in order to apply the rule of *Damdapat* adopted by Legislature with the limitations provided by the Act. [p. 341, col. 1.]

Section 7 of the Act deals with two kinds of loan, a loan advanced and a loan based on a document. Under the second heading it takes into consideration two kinds of documents on which loan may be based, one kind may evidence the loan and the other which may not evidence the loan, but may be utilized to find out the amount mentioned in it. The document in the expression “based on a document” can be used in two different ways, in one case evidencing a loan and in another case simply mentioning a loan. The section cannot be interpreted to contemplate, that the same document may relate to two different amounts. [p. 345, cols. 1 & 2.]

The provisions of s. 67-A, T. P. Act, are not retrospective.

After executing a mortgage in 1912, the mortgagor executed in 1916, another mortgage in favour of another person by hypothecating some of the properties comprised in the mortgage of 1912. Again in 1922, he executed mortgage in favour of the first mortgagee, the amount secured by this mortgage being the balance then due to the first mortgagee under the earlier bond of 1912. In this mortgage, the mortgage of 1912, was specifically referred to and it was stated that the properties of the mortgage of 1922, were subject to the mortgage of 1912. In the mortgage of 1922, additional security was given and there was stipulation to pay lower rate of interest. A suit was brought within 12 years of the due date of payment of the bond of 1922, but more than 12 years of the due date of payment of the bond of 1912:

Held, that by the mortgage of 1922, the mortgagee never gave up his security under the bond of 1912, and the effect of the mortgage of 1922, was merely to substitute the covenant to pay the mortgage amount on the due date stated in this bond in place of the covenant to pay as stated in the bond of 1912. The suit was, therefore, a suit on the bond of 1922, and the right of the mortgagee, so far as the property stood charged in the bond of 1912, had never been given up; charge could still be enforced and was always enforceable so long as the full amount secured was not repaid. Consequently the suit on the bond of 1922, was not barred by limitation, the mortgage bond of 1912, was kept alive, and the claim of priority by the later mortgagees must fail. 38 Ind. Cas. 240 (1), relied on. [p. 342, col. 2; p. 344, col. 1.]

[Case-law discussed.]

A. from the original decree of the Sub-Judge, Monghyr, dated February 26, 1936.

Messrs. K. Sahai and R. S. Chatterji, for the Appellants.

Messrs. B. N. Rai and K. K. Sinha, for the Respondents.

Manohar Lall, J.—This is an appeal by defendants Nos. 1, 2, 3, 4, 5 and 6 who are the mortgagors and are appellants Nos. 1, 2, 4, 5, 6 and 7 in this Court, as well as by defendant No. 27, who is a subsequent mortgagee, against the decision of the learned Subordinate Judge of Monghyr dated February 26, 1936, decreeing the suit which was instituted by the plaintiffs-respondents to enforce a mortgage bond dated August 31, 1922 in the following circumstances: On April 27, 1906, the father

of the principal appellants, who will be hereinafter referred to as the mortgagors, executed a mortgage bond in favour of the plaintiff and his sons to secure a sum of Rs. 800. A sum of Rs. 200 was paid back later on by the mortgagor to reduce his liability but the major part remained unpaid. On October 11, 1912 the mortgagors executed another mortgage bond in favour of the same mortgagees to secure a sum of Rs. 1,391 stipulating to pay compound interest at Rs. 1-2-0 per cent. per mensem. The amount due under the earlier bond had come up to Rs. 1,241 and a sum of Rs. 150 was taken in cash by the mortgagors. On May 29, 1916 the mortgagors executed another mortgage—a usufructuary mortgage—for a sum of Rs. 900 in favour of defendant No. 27, an appellant before us. The property covered by this usufructuary bond is included in the properties given in the mortgage of the earlier bond of 1912. The mortgagees of 1916 paid the sum of Rs. 900 to the earlier mortgagees as stipulated in the mortgage of 1916. On August 5, 1920, the mortgagors gave a *sudhbharna* to the plaintiffs for a sum of Rs. 1,500, some property which was also given in security in the earlier bond of 1912. This bond is Ex. 3, and by it the mortgagor stipulated to pay the whole amount of Rs. 1,500 in one lump sum in *Baisakh* 1394; the possession of the mortgaged properties was for a fixed period of seven years.

The amount of Rs. 1,500 was arrived at by calculating the dues of the mortgagee of this bond under another bond of Rs. 888 and the balance of Rs. 612 was paid in part payment of the liability under the bond of 1912 which is Ex. 2 in the case. On August 31, 1922 the mortgagors again executed a mortgage bond, the bond in suit, for Rs. 2,000 stipulating to pay interest at 13 annas per cent. per mensem to be compounded. The whole of the amount secured by this document was the balance then due under the bond of 1912. In this bond, which is Ex. 2 (a) in the case, it is stated that the amount of Rs. 2,000 is the balance of the principal and interest after deduction of the payment towards the bond of October 11, 1912, that the bond is being executed on account of previous dues and the amount will be paid on *Baisakh* 30, 1330 *Fasli*. It is also stated in the bond that the mortgaged properties under this document are not subject to any other encumbrance than that under the bond of 1912 and another usufructuary bond of 1905. The properties

given in security consist of all the properties which were given under the bond of 1912, but there are additional properties also. The present suit was instituted on April 27, 1935, that is to say within 12 years of the due date of payment of the bond of 1922, but beyond 12 years of the due date of the payment of the bond of 1912 which was renewed as aforesaid by giving additional security in 1922 and with a stipulation to pay a lower rate of interest. It is unnecessary to state the different defences taken in the Court below as the matter in controversy before us has resolved itself into two questions of law: one concerning the application of the provisions of the Bihar Money-lenders Act, 1939 and the other concerning the priority of defendant No. 27.

The learned Subordinate Judge held that the bond in suit was a valid document, that the plaintiffs never agreed to release the property given in security to defendant No. 27, that the bond of 1912 was not fully satisfied by the payment by defendant No. 27 in 1916 and therefore his claim for subrogation was negatived. He also held that the usufructuary mortgage bond of the year 1920 in favour of the respondents, which covers the properties included in the bond of 1912, was executed with the full knowledge and consent of the mortgagors. He also negatived the contention of the defendant that the stipulation to pay compound interest at 13 annas per cent. was excessive. The plea of limitation was not pressed and was overruled by the learned Subordinate Judge. In appeal it is argued that having regard to s. 7, Bihar Money-lenders Act, this Court should not pass any decree for a sum larger than Rs. 1,391, the amount stated in the bond of October 1912, and that from the interest due on this amount, a deduction should be made of the sum of Rs. 1,512 which was admitted or proved to have been paid towards the bond of 1912 from time to time in lieu of interest. In other words, the contention is that a decree for mortgage amount should be passed not exceeding Rs. 1,391 if there are no other obstacles in the way of the plaintiffs. I do not agree with this contention. The wording of s. 7 is clear. A Court has to find out in each case where the loan is based upon a document what is the exact amount of the loan stated in the document. The word 'loan' has been defined in the Act to include a transaction on a bond bearing interest executed in respect of past liability.

Applying these tests, I am satisfied that the amount of loan advanced in the present case for the purposes of the Bihar Money-lenders Act, is the amount stated in the document of 1922; 'the loan' is based upon that document. That amount, I find is Rs. 2,000. The plaintiffs are therefore entitled to a decree for this amount and to a decree for interest for a sum not larger than Rs. 2,000 as no payment has been proved to have been made after the execution of this bond. But it was argued by Counsel appearing on behalf of the appellants that the wording of s. 7, Bihar Money-lenders Act, justified him in urging that although the amount of Rs. 2,000 is mentioned in the document upon which the loan is based, nevertheless the document evidenced the loan of Rs. 1,391 originally advanced in 1912 which swelled up to Rs. 2,000 in 1922. The argument is based upon the last few words of s. 7 which run as follows: "If the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

As the matter was of first impression, we had the assistance of the learned Advocate-General, who very kindly, came to assist us at our request. The learned Advocate-General submitted that the words "evidenced by such document" can only apply to a case where the loan is evidenced by *bahi khata* and the loan is based upon it and that in such cases the Court must find out from the *bahi khata* the amount evidenced thereby. On a careful consideration of the argument advanced, I am of opinion that the meaning of this clause (though somewhat obscurely worded) is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document, then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word 'loan' already pointed out, which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like *bahi khata*s or based on as evidenced by the handnote which for some purposes may be inadmissible in evidence, nevertheless, a Court must refer to them for the purpose of s. 7 to find out what the loan was in order to apply the rule of Damdupat adopted by our Legislature with the limitations provided by the Act. When I apply this construction to the present case, I am of opinion that the loan

in the present case should be taken to be Rs. 2,000. Learned Counsel for the appellants tried to argue that the finding of the learned Subordinate Judge disallowing the plea of the payment of two items of Rs. 492-7-0 and Rs. 282 was erroneous. But he could not advance any convincing argument which would justify us in differing from the findings of the learned Subordinate Judge on Issue No. 6. That finding is based upon good and cogent reasons. I agree with the learned Subordinate Judge that the story of the *panchait* and the adjustment of accounts in 1342 *Fasli* cannot be successfully established.

Defendant No. 27 who, as I have stated above, is the mortgagee of some of the properties covered by the bond of 1912 and who is a mortgagee of the year 1916, contended that by the execution of the bond of 1922, the prior bond of 1912 was fully paid off in the eye of the law, with the result that his client became the prior encumbrancer and that the mortgaged properties should not be allowed to be sold free from the encumbrances of his bond of 1916. He argued in the alternative that if it was held that the bond of 1912 was alive to sustain the mortgage charge prior to that of his charge of 1916, then the suit must be held to be barred by limitation as having been instituted beyond 12 years of the due date stated in the bond of 1912; and repelled the contention that any acknowledgment subsequent to 1916 by the mortgagor, would operate in law to keep alive the bond of 1912 against him, the mortgagee of 1916. In my opinion, these contentions are fully answered by the decision of the Madras High Court reported in *Velauda Reddi v. Narasimha Reddi*, 38 Ind. Cas. 240 (1). The facts of that case were that in 1882 a certain Rajah and his son executed a mortgage to one Subbamma of four villages to secure the advance of a sum of Rs. 25,000 and interest thereon (the amount was payable on demand). In 1888, the son, who had become the Rajah on his father's death, mortgaged the same four villages and two others in addition to the same mortgagee to secure the sum of Rs. 39,791 which had then become due on the earlier mortgage of 1882, agreeing to pay interest at a reduced rate and covenanted to pay the principal on December 30, 1893. The plaintiff was the assignee of the mortgage of 1888. In the meantime, in 1887, the

(1) 38 Ind. Cas. 240; A I R 1918 Mad. 1327; 32 M L J 263; 5 L W 111; 21 M L T 105.

same mortgagor had given in mortgage three of the four villages comprised in the first mortgage of 1882 to the ancestor of certain defendants who in due course instituted a suit on their mortgage, obtained a decree and purchased the three villages in Court sale, but the mortgagee Subbamma was not a party to these proceedings. In these circumstances, it was argued that the mortgage of 1888 extinguished the mortgage of 1882 thereby giving priority to the mortgage of 1887 which had become earlier in date. The contention was repelled by Srinivasa Aiyangar, J. with whom Ayling, J. agreed in these words :

"It is now well-settled that a mere change in the form of indebtedness, in the mode or time for payment, a variation of the rate of interest, or the giving of additional security, is not enough to rebut the presumed intention to retain the mortgage security when it is to the interest of the person who is entitled either to extinguish the security or keep it alive, so to keep it alive: a quotation from s. 924 of the well-known book of Jones on Mortgages."

The learned Judges also pointed out that the effect of the second bond of 1888 was merely to substitute a covenant to pay the mortgage amount on December 30, 1893 for the covenant to pay on demand in the bond of 1882 and to lower the rate of interest payable thereafter, without in any way affecting the security for the payment of the mortgage amount. It was also held that an agreement between the mortgagor and the first mortgagee extending the time for payment of the mortgage amount in no way impairs the security even as against the subsequent incumbrancer, for the junior encumbrancer is not a surety for the mortgagor. The learned Judges repelled the argument that even if it be assumed that the mortgage of 1882 was in full force when the third mortgage of 1888 was executed, any right to enforce that mortgage at the time when the action was brought on October 2, 1913 was barred by the law of limitation or that the mortgagee lost his priority against the appellants because they held that the mortgage money did not become due till December 30, 1893, that payments were made by the mortgagor within 12 years of the second bond of 1888 though beyond 12 years of the due date of the first bond of 1882 and these kept the two bonds alive because :

"This is not a case where there are two covenants to secure the payment of a debt, one under the mortgage of 1882, and another under the mortgage of 1888, but only one *vis.* that under the latter document which superseded the former, and so long as the latter covenant remained unbroken, the mortgagee

cannot demand or recover the mortgage amount. The mortgagee is not suing on the mortgage of 1882 as it stood when it was executed as is assumed in the argument, but on that mortgage as varied by the subsequent agreement, which agreement I have already held, in no way impaired the security as against the second mortgagee."

In my view, the decision in this case exactly applies to the facts of the present case. By the mortgage of 1922, the mortgagee never gave up his security under the bond of 1912 and the effect of the mortgage of 1922 was merely to substitute the covenant to pay the mortgage amount on the due date stated in this bond in place of the covenant to pay as stated in the bond of 1912; the mortgagee never intended to give up his security under the bond of 1912; he refers to it expressly in the later document. The suit is therefore a suit on the bond of 1922 and the right of the mortgagee, so far as the property stood charged in the bond of 1912, has never been given up; that charge can still be enforced and is always enforceable so long as the full amount secured is not repaid, and the suit is brought within 12 years of the due date of the 1922 bond. I do not see what equity there is in favour of defendant No. 27 who took the mortgage in 1916 with his eyes open, subject to a mortgage of 1912. That mortgage has not been paid off as yet and still subsists; the mortgagee merely made and accepted another arrangement with additional security for the payment of his valid and existing debt, and this in no way was prejudicial to defendant No. 27.

I now come to consider some cases which were cited on behalf of the appellants. The question in these cases was whether an acknowledgment by a mortgagor after he has transferred the equity of redemption in whole or in part is a valid acknowledgment against the puisne encumbrancer who was in existence before the acknowledgment. The Madras case which I have just been considering is also an authority for the proposition that an acknowledgment of a mortgage debt in the form it took in that case was valid not only as against the person acknowledging it but also as against those deriving title under him even prior to the date of the acknowledgment and subsequent to the debt acknowledged. The learned Advocate for the appellants cited the case in *Yagnanarayana v. Venkata Krishna Rao* (2). But that case is against his contention. In that case it was held that where after the sale of a part of the mortgaged property a fresh deed is executed

(2) A. I. R. 1925 Mad. 1108; 86 Ind. Cas. 434.

by the mortgagor in renewal of the original mortgage, there is a new promise to pay by the mortgagor and the question is not whether it operates as acknowledgment to save the bar of limitation as against the intermediate alienee because it is a new covenant substituted for the old covenant and not a mere acknowledgment for the old one—the period of limitation even as against the alienee is to be calculated from the date mentioned in the later mortgage and not from that in the original one—the effect of such a new covenant is more analogous to a part payment under s. 20, Lim. Act, and not merely to that of an acknowledgment under s. 19.

It is unnecessary to consider in the present case the correctness of the view taken in some cases that the acknowledgment by a mortgagor of the liability to his mortgagee even after he has parted entirely with the equity of redemption extends the period of limitation so as to bind an earlier encumbrancer though subsequent to the date acknowledged. The present case is not a case where the mortgagors transferred their equity of redemption in full and then gave a mere acknowledgment but is a case where the mortgagors have dealt with the equity of redemption only to the extent of giving successive mortgages of 1912, 1916 and 1920 and renewing the earliest bond. Their liability always remained, as pointed out above in August, 1922 when they renewed the mortgage of 1912 for the amount then validly due; they gave merely an additional security and covenanted to pay the amount on a different date with the stipulation to pay a lower rate of interest; this was in no way detrimental to the puisne encumbrancer.

I now deal with some of the cases which are strongly relied on by the learned Advocate for the appellants. The first case cited by him was the case in *Surjiram Marwari v. Barhamdeo Persad* (3). That case contains an elaborate exposition of the law by that distinguished Judge, Mookerjee, J. Harington, J., did not endorse the opinion of his learned colleague because he said at p. 340* that the question of limitation raised a question of some difficulty but he was inclined to think that the admission in the *ekranamah* was sufficient to bar the statutory limitation. Mookerjee, J. held that an acknowledgment by the mortgagor in favour of a prior mortgagee does not preclude a puisne mortgagee whose title

(3) 1 O L J 337.
*Page of 1 O L J.—[Ed.]

accrued before the acknowledgment was given from relying on the statute of limitation as a bar. In my opinion as I said already it is unnecessary to consider the correctness of this decision as the present case is not a case of a mere acknowledgment by a mortgagor. I may point out that Srinivas Aiyangar, J. at p 242* sought to draw a distinction at the right hand column of *Velauda Reddi v. Narasimha Reddi*, 33 Ind. Cas. 240 (1) between the case he was dealing with and the case in *Surjiram Marwari v. Barhamdeo Persad* (3). In *Krishna Chandra Saha v. Bairab Chandra Saha* (4), the facts were that A mortgaged several properties to the plaintiffs and then sold one of them, property No. 3, to B who again mortgaged the property to C who brought the property to sale in execution of a decree obtained in a suit to enforce his mortgage; the property was sold and purchased by D. The mortgagor afterwards paid part of the principal as well as of the interest under the earlier mortgage and made an acknowledgment of his liability under it. In a suit brought by the plaintiff to enforce the first mortgage, D contended that the acknowledgment by A, would not prevent the statute of limitation from running against the first mortgagee. But the Court held that the acknowledgment as well as the payments were sufficient to keep alive the debt against the property No. 3. The case in *Surjiram Marwari v. Barhamdeo Persad* (3), was referred to in the argument by the learned Advocate for the respondents. This case does not support the appellant in the least. Reliance was next placed upon the decision of the Privy Council in *Mohamad Ibrahim Hoosain Khan v. Ambika Pershad Singh* (5), but the facts of that case are entirely different as pointed out in *Velauda Reddi v. Narasimha Reddi*, 33 Ind. Cas. 240 (1), at p. 243*. Attention was next drawn to the case in *Ram Sarup v. Bhagwati Prasad* (6), where it was held that an acknowledgment by a mortgagor cannot bind a mortgagee who derived title prior to the acknowledgment. The learned Judges pointed out the distinction between the plain languages of ss. 19 and 20, Lim. Act. This case does not assist the appellant.

(4) 32 O 1077; 9 O WN 868.
(5) 39 O 527; 14 Ind. Cas. 496; 39 I A 68; 15 O L J 411; 16 O WN 505; 11 M L T 265; (1912) M W N 367; 9 A L J 332; 14 Bom. L R 280; 22 M L J 468 (P O).

(6) 58 A 912; 164 Ind. Cas. 725; A I R 1936 All. 636; (1936) A L J 586; 1936 A L R 802; 9 R A 187.

*Pages of 38 Ind. Cas.—[Ed.]

because as pointed out in the Madras case cited above, the present case is rather a case within the terms of s. 20 than within the terms of s. 19. The renewal of the bond in 1922 by giving an additional security lowering the rate of interest was a transaction which partook of the nature of part payment and therefore within the terms of s. 20. The next case cited was the case in *Mahomed Taqi v. Raja Ram* (7). That case dealt with an acknowledgment of liability by some of the heirs of a mortgagor against whom a decree for sale on the basis of a mortgage had been passed and it was held that this did not operate to save limitation as against the other heirs of the mortgagors. This question does not arise for consideration in the present case, and in any case we are bound by the decision of this Court in *Badri Das v. Pasupati Banarji* (8), where Rowland, J. has reviewed the case law on the subject exhaustively, Agarwala, J. giving a concurring judgment.

On a careful consideration of all the cases placed before us, I am of opinion that the suit on the bond of 1922 was not barred by limitation, the mortgage bond of 1912 was kept alive, and that the claim of priority by defendant No. 27 must fail. It was finally argued that the execution of the bond of 1922 will in any event operate as a novation of contract so that no suit can be instituted on the mortgage bond of 1912 unless, as was done in *Har Chandi Lal v. Sheoraj Singh* (9), the mortgage bond of 1922 became inoperative in law and then only within twelve years of the due date fixed in the bond of 1912. It is enough to say that the considerations which weighed with their Lordships in *Har Chandi Lal v. Sheoraj Singh* (9), do not arise in the case before us. In the present case it was to the interest of the mortgagee to keep alive the security under the bond of 1912, which had never been given up; he took an additional security, as pointed out above, by the bond of 1922; on that date the liability under the bond of 1912 was kept alive both by statute and by the intention of the parties as evidenced by the new arrangement. This is not a case of novation of contract within the meaning of s. 62, Contract Act.

(7) A I R 1936 All. 820; 166 Ind. Cas. 106; (1936) A L J 1140; I L R (1937) All. 272; (1936) A L J 1002; 9 R A 359 (F B).

(8) 12 Pat. 293; 140 Ind. Cas. 145; A I R 1933 Pat. 1; 14 P L T 6; Ind. Rul. (1933) Pat. 293.

(9) 44 I A 60; 39 Ind. Cas. 343; A I R 1916 P O 68; 39 A 178; 32 M L J 241; 15 A L J 223; 1 P L W 330; 5 L W 502; (1917) M W N 290; 25 O L J 316; 21 M L T 292; 21 O W N 765; 19 Bom. L R 444 (P O).

The learned Advocate faintly argued that the amount of Rs. 150 which was paid in cash on the bond of 1912 has not been proved to be advanced for legal necessity. Apart from the fact that the question was never raised either in the pleadings or in the evidence and that the defendants are the father, his sons and grandsons, the amount of Rs. 150 has been proved to have been paid off in 1916 and no part of the claim in the present suit consists of this item. It was also argued that the suit to enforce the mortgage bond of 1922 is not maintainable when the plaintiff has omitted to include in the suit his claims under the usufructuary bond of 1920 which after the period stated therein, namely after 1334, would operate as a simple mortgage bond. It is enough to state that the provisions of s. 67-A, T. P. Act, which are not retrospective do not apply to this mortgage bond. Furthermore the respondents have conceded that any mortgage decree which may be passed in this case should declare that the property which will be sold to repay the amount due, namely Rs. 4,000 including the property covered by the bond of 1912, will be sold free from any liability for the amount due under the simple and usufructuary bond of August 6, 1920. To make it clear the property will be sold free from any encumbrances other than that of the bond of 1912 except any earlier encumbrances that may be left outstanding.

Defendant No. 27 prayed as a last resort that his property in the circumstances of this case should be sold last, namely, the property covered by his mortgage bond of 1916, i. e. Ex. A (2) may be sold only in the event of the other properties covered by the bond of 1912 and the bond of 1922 are not sufficient to discharge the liability of Rs. 4,000. The respondents have agreed that this should be done but even if they had not conceded this we ourselves in our discretion would have passed a similar order in the circumstances of the case. The result is that there will be a decree in favour of the plaintiffs for a sum of Rs. 4,000 only. The office will draw up the usual mortgage decree in the light of my observations above fixing the period of grace for two months from this date. The amount of Rs. 4,000 will carry interest at 6 per cent from the date of decree of the trial Court. In the circumstances each party will bear his own costs in this appeal which is allowed in part. The plaintiff is entitled to proportionate costs in the trial Court for the amount now decreed by this Court.

Varma, J.—I agree. In view of the argument advanced by Mr. Kamla Sahay, appearing on behalf of the defendants first party, I should like to add a few words on the interpretation of s. 7, Bihar Money-lenders (Regulation of Transactions) Act, 1939. The contention is that although the bond was for Rs. 2,000 it mentioned a loan of Rs. 1,391 only and, therefore, the principle of Damdupat should be applied to the sum of Rs. 1,391 and not with regard to the sum of Rs. 2,000. He urges that the bond of 1922 mentions the sum of Rs. 1,391 and therefore the interest should not exceed that amount. If this argument were to be accepted, then the Courts will have to choose between two different sums one, the amount for which the bond has been executed and the other, the amount mentioned in it which has swelled up to the amount for which the bond was executed. But this does not seem to be the object of the Legislature from the wordings of the section itself. The section runs as follows:

"Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court shall, in any suit brought by a money-lender before or after the Commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which together with any amount already realized as interest through the Court or otherwise is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document."

Looking at the section it seems that it is dealing with two kinds of loan, a loan advanced and a loan based on a document. Under the second heading it takes into consideration two kinds of documents on which loan may be based, one kind may evidence the loan and the other which may not evidence the loan, but may be utilized to find out the amount mentioned in it. "Loan" has been defined in cl. (f) of s. 2. It says:

"'Loan' means an advance whether of money or in kind on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan; . . . etc."

It is clear that the definition includes cases of loans based on a document. Section 7 is a bit loosely worded, and we had to take the assistance of the learned Advocate-General who gave us two instances to illustrate the difference between two kinds of transactions one where the bond itself creates the loan, and the other that of a loan of *bahi khata* account. From a reading of the section, I am of opinion, that the

document in the expression "based on a document" can be used in such two different ways, in one case evidencing a loan and in another case simply mentioning a loan. The section cannot be interpreted to contemplate, as argued by Mr. Kamla Sahay, that the same document may relate to two different amounts. The argument of Mr. Kamla Sahay, therefore, fails.

D. Order accordingly.

ALLAHABAD HIGH COURT

First Appeals Nos. 159 and 167 of 1938

September 19, 1939

BENNET AND VERMA, JJ.

MUKAT LAL AND OTHERS—PLAINTIFFS—
APPELLANTS

versus

RAGHURAJ SINGH AND OTHERS—

DEFENDANTS—RESPONDENTS

U. P. Agriculturists' Relief Act (XXVII of 1934), ss. 30, 4, 3—Compound interest, if can be changed into simple—Future interest, whether can be granted on consolidated amount of principal and interest—S. 4, meaning of, explained—Alteration of number of instalments.

There is no provision in s. 30, U. P. Agri. Relief Act which entitles a Court to change compound interest into simple interest. On the contrary the table in Sch. III shows for loans different rates according as the interest is compound or simple.

The language of s. 30 is that interest is to be paid on the loan and that this interest is not to be higher than the rate in Sch. III. The whole principle of the Act is that transactions should be re-opened between debtor and creditor even in the case of s. 30 (2) where the transactions have terminated in a decree. It would be quite anomalous to hold that the Court in passing its own decree under the Agri. Relief Act should consolidate the interest and the principal and grant future interest on the whole amount. 170 Ind. Cas. 567 (1), relied on.

The provision in s. 4 is that the rate granted for future interest should not exceed the rate provided under that section. It is not stated in the section that the rate should attain to the rate at which the Govt. of India will lend money to the Local Govt. The Court has a discretion in this matter.

The matter of instalments is one of discretion and when the Court below has exercised its discretion, the High Court should not alter the number of instalments if sufficient reason has not been shown.

F. As. from the decision of the Civil Judge, Bulandshahr, dated February 16, 1938.

Messrs. S. K. Dar and G. S. Pathak, for the Appellants.

Messrs. S. N. Sen, Nanak Chand and C. B. Agarwala, for the Respondents.

Bennet, J.—F. A. No. 167 of 1938 is by the defendant against a decree by the Civil

Judge of Bulandshahr under the Agri. Relief Act. Grounds Nos. 1 to 3 of appeal allege that the calculation of the amount due from the defendant to the plaintiff is incorrect. The plaint set out that the suit was brought on two promissory notes which were in two series of separate transactions. Promissory note No. 1,—dated March 24, 1930 for Rs. 1,00,000, lent to defendant by plaintiff's firm at the rate of 12 annas per cent. per mensem with compound interest at six-monthly rests. Promissory note No. 2 of March 14, 1933 for Rs. 1,29,900-5-0, that is, the total due on No. 1, the rate of interest specified only as 12 annas per cent. per mensem, that is, this was at simple interest. No. 3, a promissory note of March 6, 1936 for Rs. 1,54,714 in lieu of No. 2. This was also specified with 12 annas per cent. per mensem, that is, simple interest. This was one of the notes in suit. Promissory note No. 4 of October 7, 1933 for Rs. 90,000 at 12 annas per cent. per mensem, also simple. Promissory note No. 5 of September 13, 1936 for Rs. 1,11,500 in lieu of No. 4 at 12 annas per cent. per mensem, which was simple. The suit therefore was brought for the total of promissory notes Nos. 3 and 5 which amounted to Rs. 2,97,033-6-6. The defendant admitted the execution of the promissory notes and the receipt of consideration in the written statement on p. 19 but he pleaded the benefit of the Agri. Relief Act. The claims put forward were under s. 30 for reduction of interest, and for instalments.

The particular point raised in the first three grounds of appeal is in regard to the calculation of interest. Now a table was supplied by the defendant-appellant on pp. 25 and 26 and in this table he calculated on promissory note No. 1 of March 24, 1930 compound interest. The Court below has however applied a higher rate of simple interest for the whole period of the transactions. The appellant claims that the Court below was not entitled under s. 30 and Sch. III to apply simple interest to transaction No. 1 because that was on a promissory note for compound interest. There is no provision in s. 30 which entitles a Court to change compound interest into simple interest. On the contrary the table in Sch. III shows for loans different rates according as the interest is compound or simple. The promissory note comes in the column of Unsecured Loans and being compound interest the rate should be $X+2\frac{1}{2}$, and under note (a) X is

$4\frac{1}{2}$ per cent. $4\frac{1}{2}+2\frac{1}{2}$ is 7 per cent. and this is the calculation which the defendant has made on p. 25. On the other hand the lower Court has given him $X+4\frac{1}{2}$ that is $4\frac{1}{2}+4\frac{1}{2}$ or 9 per cent. taking this as simple interest. We have not been shown that there is any authority for this action of the Court below. We therefore allow the appeal of the defendant on this point and we hold that the calculation in regard to promissory note No. 1 should be at the rate of 7 per cent. per annum compound interest with yearly rests. The calculation on p. 25 is only for the period of promissory note No. 1. We therefore allow the appeal for the amount of Rs. 4,402-8-11. The fourth ground of appeal is that the number of instalments should be increased. There were 20 instalments of six months each, which cover a period of ten years. This matter of instalments is one of discretion and the Court below has exercised its discretion. We do not think that we should alter the number of instalments as sufficient reason has not been shown to us. We therefore allow the appeal to the extent indicated of Rs. 4,402-8-11, with costs, as the defendant has succeeded on his main point.

F. A. No. 159 of 1938 is by the plaintiff against the decree of the Civil Judge of Bulandshahr in this, a suit on two promissory notes. The first ground of appeal was in regard to a list of property which was decreed as the property charged under s. 3 (2), Agri. Relief Act. The table in question forms part of the decree and the note on p. 35 shows that the value of the property has been taken at 33 times the annual nett profits. We consider that 33 years' purchase is much too high a rate of valuation. An additional list of property has been filed by the defendant, which forms part of this judgment. It shows five more villages out of those appearing on pp. 29 and 30 and the nett profits of these five villages amount to Rs. 7,524-2-0. Adding this to the nett profits of the villages in the list decreed which was Rs. 9,670-9-0, we get a total of Rs. 17,194-11-0. Sixteen times this annual nett profit will attain approximately to the amount of the decree and we think that 16 years' purchase is quite a fair rate. Accordingly we allow the appeal on this point and direct that these five villages shall be added to the schedule of property in the decree charged with this liability under s. 3 (2), Agri. Relief Act.

The third ground of appeal is that the

lower Court should have granted at least $3\frac{1}{2}$ per cent. interest *pendente lite* and in future. The lower Court has actually granted 3 per cent. Under s. 4 it is provided that future interest should not exceed a certain rate, namely, the rate which may be notified as the rate at which the Govt. of India will lend money to the Local Govt. Learned Counsel refers to certain commentaries which allege that on January 7, 1936 a rate was fixed of $3\frac{1}{2}$ with effect from January 15, 1936. The decree of the Court below was dated February 16, 1938 which was about two years after this order, and learned Counsel has failed to show by an inquiry from the Accountant-General that the rate of $3\frac{1}{2}$ per cent. was the current rate at the time of the decree. In any case the provision in s. 4 is that the rate granted for future interest should not exceed the rate provided under that section. It is not stated in the section that the rate should attain to the rate at which the Govt. of India will lend money to the Local Govt. The Court below has a discretion in this matter and we see no reason to interfere with its discretion.

The fourth ground is that the appellants were entitled to future interest from the date of the decree on the consolidated amount of principal and interest on that date. No authority is shown for this view. The language of s. 30 is that interest is to be paid on the loan and that this interest is not to be higher than the rate in Sch. III. The whole principle of this Act is that transactions should be re-opened between debtor and creditor even in the case of s. 30 (2) where the transactions have terminated in a decree. It would be quite anomalous to hold that the Court in passing its own decree under the Agri. Relief Act should consolidate the interest and the principal and grant future interest on the whole amount. There is no ruling which lays this principle down and on the contrary the interpretation which has been placed by the Full Bench of this Court in *Raghubir Singh v. Mulchand* (1) on a case falling under s. 30 (2) is against the contention. Although that was a case of a decree, yet sub-s. (2) states that the provisions of sub-s. (1) are to be applied. If therefore the provisions of sub-s. (2) involve the provisions of sub-s. (1) the interpretation of sub-s. (2) is the inter-

pretation of sub-s. (1). We have examined the paper book of the above First Appeal, from order, No 243 of 1935 *Raghubir Singh v. Mulchand* (1). This paper book shows that what was brought in revision was a decree of the Subordinate Judge of Meerut, dated August 24, 1935 under the Agri. Relief Act in which there had been a calculation on the aggregate amount due on December 31, 1929. Now the order which was ultimately passed by the Divisional Bench was a direction that in assessing the amount of interest due the interest will be calculated upon the original amount advanced on loan. When that order is applied to the decree under revision it will result that even for the period after the decree the interest is to be granted on the original loan. It was also a case of a decree by instalments. We see no reason to differ from the view which was taken in that case. Accordingly we hold that the principle on which the Court below has acted is correct, that is, that the Court was correct in stating in its decree on p. 33, line 17 that the rate of 3 per cent. per annum should be on the principal amounts of the loan.

The fifth ground was that the number of instalments was too large. The instalments were 20 in number of six months each for a period of 10 years. As already observed this was a matter of discretion for the Court below and we see no reason to interfere with that direction. In the result we dismiss this appeal with the exception of ground No. 1 in which we have accepted the additional five villages for the property which is to be charged with the decretal amount. We decree accordingly, and as the appeal has virtually failed we grant the respondent costs of the appeal.

s.

Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 15 of 1937
May 30, 1939

DAVIS, J. C. AND TYABJI, J.

Smt. TULSIBAI—PLAINTIFF—APPELLANT
versus

GAPUMAL NARAINDAS AND ANOTHER—
DEFENDANTS—RESPONDENTS

Hindu Law—Succession—Atma bandhus—Sister's daughter and remoter male bandhu, when former is nearer in propinquity.

In a case of competition between a remoter male

(1) (1937) A L J 671; 170 Ind. Cas. 567; A I R 1937 All. 598; I L R (1937) All. 805; 10 R A 175; 1937 A L R 741; 1937 R D 428 (F B).

bandhu and a sister's daughter who, under the Mitakshara Law, which applies to Sind, is not one of the female heirs specially mentioned, the general rule is that she must be postponed to male heirs. [Case-law discussed.]

S. A. against the decree of the District Judge, Sukkur, dated November 30, 1936.

Mr. Dipchand Chandumal, for the Appellant.

Mr. G. T. Raymond, for the Respondents.

Davis, J. C.—In the suit out of which this second appeal arises, the plaintiff one Tulsibai, wife of Naraindas, sued the two defendants, Gopumal and Tejumal, for possession of the suit property as the nearest heir of one Lilomal. She was Lilomal's sister's daughter, and the two defendants were sons of Motilbai, the daughter of Shivanmal, the son of Jashanmal, the grand-father of the propositus in this case. It is not disputed that the parties are *atma bandhus* and that Tulsibai, the plaintiff, is nearer in propinquity to Lilomal, the propositus, than the defendants Gopumal and Tejumal; but while the learned trial Judge held that Tulsibai as a female *bandhu* was not postponed to the defendants, the male *bandhus* the learned Appellate Judge came to a contrary conclusion and dismissed the plaintiff's suit. We think however that upon the present state of the authorities the Appellate Judge was right and that this appeal should be dismissed with costs. Now it is to be first observed that this is not a case of competition between male *atma bandhus*, between, for instance, the sister's son or the sister's daughter's son, and the two defendants who are father's father's son's daughter's sons, item No. 20 in the list of *atma bandhus*, given on p. 63 of Mulla's "Principles of Hindu Law" (1936 Edn.), but it is a case of competition between a remoter male *bandhu* and a sister's daughter who, under the Mitakshara Law, which applies to Sind, is not one of the female heirs specially mentioned, and the general rule is that she must be postponed to male heirs. The learned Advocate for the appellant however relies principally on two cases, one the Privy Council case in *Balasubrahmanya Pandya Thalaiyar v. Subbayya Tevar* (1), and the other, *Datta-*

traya Bhimrao v. Gangabai Ganeshbhat (2), as authority for his contention that it is the test of proximity which counts and the test of religious efficacy is only of account when the competing heirs are equal in degree; particularly the learned Advocate relies on the following passage in the Privy Council case (1, p. 712*) :

"It is difficult to suggest that the Board here discarded the test of nearness of degree, and adopted only that of religious efficacy: they clearly applied both, and it is perhaps not without significance, in view of what the Subordinate Judge had said, that nearness of degree is put first. In *Jotindra Nath v. Nagendra Nath* (3), the question was between *atma bandhus*, admittedly equal in degree so that the test of proximity was no guide, and it was laid down, strictly as their Lordships think, in accordance with the general scheme of the Mitakshara, that it was only when the test of proximity failed that religious efficacy came in. Their Lordships can see no inconsistency between the two decisions of the Board, and no antagonism between the later decision and the rule enunciated by Muthusami Ayyar, J. upon which Mr. Dunne relies so strongly. They must therefore confirm the decision of both Courts in India that, as between claimants Nos. 2 and 3 Subbayya, as nearer in degree to the last male owner is entitled to succeed to the estate."

But their Lordships of the Privy Council were dealing with a case of competing male *atma bandhus*: the mother's brother was entitled to succeed as against a father's sister's son; there was no question of the mother's sister's daughter as here, and though Shab, J.'s judgment in *Dattatraya Bhimrao v. Gangabai Ganeshbhat* (2), is some authority for the contention that a sister's daughter ranks high in the list of *atma bandhus* and is not to be postponed in favour of male *atma bandhus* more remote in degree, the learned Judge on p. 553† says :

"Applying the test of propinquity it would seem that the sister's daughter would be nearer than the sister's son's sons. I do not however decide this question as it is not necessary to do so,"

and in fact the learned Judge on other grounds dismissed the sister's daughter's suit. And this opinion runs counter to the opinion in other Bombay cases. In two cases in *Balkrishna Bhimaji v. Ramkrishna Gangadhar* (4), and *Girimallappu Channappa v. Kenchava Sanyellappa* (5), it was

(2) 46 B 541; 77 Ind. Cas. 17; A I R 1922 Bom. 321; 24 Bom. L R 69.
(3) 58 I A 372; 135 Ind. Cas. 637; A I R 1931 P O 268; 59 O 576; 33 Bom. L R 1411; 8 O W N 1011; 35 O W N 1153; (1931) M W N 978; 34 L W 465; 61 M L J 442; (1931) A L J 1009; Ind. Rul. (1932) P O 29 (P O).

(4) 45 B 353; 59 Ind. Cas. 771; A I R 1921 Bom. 189; 22 Bom. L R 1442.

(5) 45 B 768; 61 Ind. Cas. 294; A I R 1921 Bom. 270; 23 Bom. L R 213.

*Page of 40 Bom. L R.—[Ed.]

†Page of 46 B.—[Ed.]

(1) 40 Bom. L R 704; 172 Ind. Cas. 724; A I R 1938 P O 34; 1938 O L R 61; 1938 O W N 117; 4 B R 251; 10 R P O 162; 47 L W 110; 1938 A L R 77; (1938) A L J 217; 42 O W N 449; (1938) 1 M L J 426; 19 P L T 169; 66 O L J 581; I L R (1938) Mad. 551; 65 I A 93; 32 S L R 328; (1938) M W N 1266 (P O).

decided that a male *bandhu* is entitled to preference over a female *bandhu* even though the latter is nearer in degree, and the latter case went in appeal to the Privy Council. There their Lordships held that in the Bombay Presidency the male *bandhu* is to be preferred to the female *bandhu* even though the latter be nearer in degree.

Their Lordships said in *Kenchava v. Girmallapa Channappa* (6), at p. 212:

In 1908, the High Court of Madras in *Raja Venkata Narasimha v. Rajah Suranani* (7), again decided that in that Presidency a male *bandhu* is entitled to preference over a female *bandhu*, even though the latter is nearer in degree. *Saguna v. Sadashiv* (8), was not referred to in the judgment, but it was unnecessary because there was no contest between maternal and paternal *bandhus*. Then in *Balkrishna Bhimaji v. Ramkrishna Gangadar* (4), decided in 1920 by the High Court of Bombay consisting of the same Judges who decided the case now under appeal, the authority in *Rajah Venkata Narasimha v. Rajah Suranani* (7), was followed. The principle that among *bandhus* the male entitled to preference over the female—even though this latter is nearer in degree—was accepted as being law for the Bombay Presidency; and preference was given to a mother's sister's son over a brother's daughter. In that particular case the actual decision would appear to conflict with *Saguna v. Sadashiv* (8), because it apparently ignored the supposed prior and paramount claim of paternal over maternal *bandhus*; and it would seem that for some unaccountable reason *Saguna v. Sadashiv* (8), was not cited to the Court. Whenever therefore the two conflicting principles of preference of the paternal over the maternal line and preference of the male over the female sex, in the Presidency of Bombay, have to be weighed, the Court which weighs them will have to choose between these two decisions of the High Court. But it will be seen from this summary that there is no case in the Bombay Presidency which decides that some preference is not to be given to male *bandhus* over female, and there is no doubt, indeed the learned Counsel for the appellants did not contend that there was any doubt, that throughout the rest of India, preference for the male would be certain."

And if in Bombay where the Mitakshara is in some respects influenced by the Mayukha where preference is shown to female heirs, the female *bandhu* is postponed to the male *bandhu* even though she be nearer in degree, there seems even less reason why a different rule should be followed in Sind where the Mayukha was not the text-book: *Bodomal v. Krishnabai* (9). We think therefore the learned District Judge was right, and we dismiss this appeal with costs accordingly.

D.

Appeal dismissed.

(6) A I R 1924 P O 209, (212); 82 Ind. Cas. 966; 51 I A 368; 48 B 569; 26 Bom. L R 779; 20 L W 417; 47 M L J 401; (1924) M W N 719; 22 A L J 962; 40 C L J 447; 35 M L T 241; 29 C W N 271; 1 O W N 505; 3 Pat. L R 9; L R 5 A (P O) 182 (P C).

(7) 31 M 321; 18 M L J 409.

(8) 26 B 710; 4 Bom. L R 527.

(9) 20 S L R 150; 93 Ind. Cas. 844; A I R. 1926 Sind 231.

PATNA HIGH COURT

Criminal Revision Application No. 64
of 1940

March 5, 1940

AGARWALA, J.

BHIKHALI TEWARY AND OTHERS—
PETITIONERS

versus

ACHAIBAR KUER AND OTHERS—OPPOSITE
PARTY

Criminal Procedure Code (Act V of 1898), ss. 145, 144—Bona fide dispute as to possession of land—Proper way is to proceed under s. 145 and not under s. 144.

In the case of *bona fide* disputes with regard to possession of land the proper method of dealing with the dispute is by a proceeding under s. 145 of the Criminal P. C., and not by a proceeding under s. 144.

Cr. R. App. against an order of the District Magistrate of Shahabad, dated January 20, 1940, affirming that of the Sub-Divisional Officer of Buxar, dated, November 30, 1939.

Dr. Sir Sultan Ahmad and Mr. M. Rahman, for the Petitioners.

Syed Safdar Imam, for the Opposite Party.

Judgment.—This is an application by the 2nd party against an order of November 30, 1939, making absolute against them an order under s. 144 of the Criminal P. C. in respect of plots Nos. 2 and 3 of village Gaighat. The 1st party are tenants of village Gaighat and are in possession of plots Nos. 11, 12 and 13 immediately south and contiguous to plots Nos. 2 and 3. The 2nd party are tenants of village Nainijore which is south of Gaighat. The proceeding commenced on a Police report which stated that the 2nd party were in possession. The disputed plots had recently emerged from the Ganges and it is the case of the 1st party that there has been a reformation *in situ* of land which belongs to them. The 2nd party, on the other hand, relied on an *amaldustak* granted to them by the proprietor of the land about two months before the date of the Police report. The learned Magistrate who initiated the proceedings came to the conclusion that the land was an accretion to the land of the 1st party and, accordingly, decided against the 2nd party. In his order he stated that the 2nd party claimed the land as an accretion to their village Nainijore. The 2nd party moved the District Magistrate who has pointed out that the village of Nainijore is south of Gaighat and nowhere it is contiguous to the disputed plots.

In revision it is contended that the 2nd party are interested in village Rudrapur which is adjacent to plot No. 3, one of the disputed plots, and that this circumstance has not been considered by the Courts below. Now, the 2nd party had an opportunity of showing cause against the original order before the Magistrate and also an opportunity of attacking the Magistrate's order before the District Magistrate. On neither occasion did they claim these lands by reason of any interest that they may have had in Rudrapur and there is nothing in the record which enables me to hold that they in fact have any interest in Rudrapur. The learned District Magistrate observed in his judgment that the Sub-Divisional Magistrate did not trust the Police report. If the Sub-Divisional Magistrate has ever said that he distrusted the Police report certainly it does not appear from his judgment. That judgment contains no reference to the Police report at all. However, the finding given by the Courts below that the villagers of Nainijore have no claim to this plot is supported by circumstances and I see no reason to interfere in revision with an order which has already expired. Should there be any further dispute with regard to the possession of these lands the Sub-Divisional Magistrate will bear in mind the rulings of this Court that in the case of *bona fide* disputes with regard to possession of land the proper method of dealing with the dispute is by a proceeding under s. 145 of the Criminal P. O., and not by a proceeding under s. 144.

The Rule is discharged.

s. Rule discharged.

RANGOON HIGH COURT

Civil Revision No. 267 of 1935

August 2, 1939

BA U, J.

KO SAN PAW—APPLICANT

versus

KO PO YI—RESPONDENT

Civil Procedure Code (Act V of 1908), s. 115—
Facts and law duly considered by lower Court—
Decision erroneous—If can be corrected on revision.

If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider

the law or the facts, it has acted illegally and its decision may be revised.

[Case-law reviewed.]

O. R. against the decree of the Additional District Court, Yamethin at Pyinamana, in C. A. No. 19 of 1938.

Mr. J. C. Ray, for the Applicant.

Mr. P. K. Basu, for the Respondent.

Order.—Unfortunately there has been some delay in the disposal of this case. The delay is due to the fact that I have been lately very busy with urgent and important matters and partly due to the fact that I wanted to take time to consider the question whether I should refer this case to a Full Bench or not. On going through a good number of authorities cited at the Bar I found that it would not serve any useful purpose to refer this case to a Bench inasmuch as the law relating to the question as to when and under what circumstances the High Court can interfere with the decision of a Subordinate Court in revision is settled in so far as this country is concerned. The facts leading up to the institution of this suit are few and simple. The plaintiff-applicant sued the defendant-respondent for recovery of Rs. 270 alleged to be due as the price of tobacco leaves which he had sold to the latter from time to time, the transaction between the parties started on or about September 9, 1933. From that date up to December 5, 1933 the plaintiff-applicant sold leaves worth Rs. 995-11-0 from time to time and in payment thereof the defendant-respondent paid several sums amounting to Rs. 742-14-0 during that period. That left a sum of Rs. 253. Then the parties ceased dealing with each other till August 1, 1935. During that year the plaintiff-applicant sold goods to the value of Rs. 547-7-0 to the defendant-respondent and the latter paid Rs. 530-4-0 in respect thereof thus leaving a balance of Rs. 17-3-0. In respect of this sum of Rs. 17-3-0 and the balance Rs. 253 still due in respect of accounts for 1933 the present suit was instituted.

In order to get over the bar of limitation the plaintiff-applicant states in his plaint that the amount Rs. 253 was brought over to his new account opened in 1935 and the amounts paid by the defendant-respondent during that period were appropriated towards the said amount. The defence of the defendant-respondent is that he did not owe a sum of Rs. 253 as alleged and if he still owe that amount

the claim thereto is barred by time. The trial Court held that the claim to this amount was not barred by time and decreed the amount claimed with costs. On appeal the lower Appellate Court took a contrary view and held that the claim of the plaintiff-applicant to the sum of Rs. 253 was barred by time. The plaintiff-applicant therefore comes up to this Court and seeks to have the order of the lower Appellate Court revised. An objection is taken by the learned Counsel for the respondent that this application for revision does not come within the purview of s. 115, Civil P. C. Section 115 is in the following terms:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such Subordinate Court appears

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

This section was originally s. 622, Civil P. C., 1877, and it contained only cls. (a) and (b); but by s. 92 of Act XII of 1879, cl. (c) was put in. This clause was first dealt with by their Lordships of the Privy Council in *Raja Amir Hassan Khan v. Sheo Baksh Singh* (1), where Sir Barnes Peacock said:

"The question then is, did the Judges of the lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity? It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly, they had jurisdiction to decide the case; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity."

The next case in which this question was considered by their Lordships was the case in *Balakrishna Udayar v. Vasudeva Aiyar* (2), where Lord Atkinson said:

"As to the preliminary objection, s. 115, Civil P. C., enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or with material irregularity, and further enables it to pass such an order in the case as the Court may think fit."

It will be observed that the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law

(1) 11 I A 237; 11 O 6; 4 Sar. 559 (P O).

(2) 44 I A 261; 40 Ind. Cas. 650; A I R 1917 P O 71; 40 M 793; 15 A L J 643; 2 P L W 101; 33 M L J 69; 26 O L J 143; 19 Bom. L R 715; (1917) M W N 628; 6 L W 501; 22 O W N 50; 11 Bur. L T 48 (P O).

or fact in which the question of jurisdiction is not involved."

As a result of these two pronouncements there has been a conflict of decisions in India and Burma as to when and under what circumstances a Subordinate Court is said to have exercised its jurisdiction "illegally or with material irregularity." These decisions are almost irreconcilable, but so far as this country is concerned, as I have explained above, it may be said that the law is almost settled. The first case in which this question was considered was the case in *Zeya v. Mi On Kra Zan* (3), where the Chief Judge Sir Herbert Thirkell-White, after reviewing a number of cases, said:

"There are many instances in which there can be no doubt as to the power to revise. Where there is a patent illegality or material irregularity of procedure, the application of the section cannot be doubted. But where there is no illegality of so crude and obvious a kind, and where the proper procedure has been observed, in cases, that is to say, where the application of the section is doubtful owing to the difficulty in distinguishing between an error of law and illegal action, I think that the test is whether the lower Court has applied its mind to the law and the facts and come to a decision after due consideration; or whether it has failed to take into account some proposition of law or some fact in evidence which ought to affect its decision. If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised."

This decision was approved and followed in *Goridut Bagla v. H. Rookman* (4) where Ormond, J. said:

"The question I think resolves itself into this: was the method irregular by which the conclusion of fact or of law was arrived at? If the Judge arrives at a conclusion of law or of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously recording the statement of Pleders or witnesses, the method of arriving at such conclusion is illegal and irregular, and is a ground for revision, provided the irregularity is material and the petitioner has suffered an injustice thereby."

These decisions were approved and followed by this Court in *Rasu v. Kattara* (5), *Maung Pa v. Abdul Ganni* (6) and *Fut Chong v. Maung Po Cho* (7). These decisions are in accordance with the view of Rankin, J. as he then was, given in *Hindley*

(3) 2 L B R 333.

(4) 9 L B R 263; 47 Ind. Cas. 781; A I R 1919 L B 151.

(5) 2 R 202; 82 Ind. Cas. 658; A I R 1924 Rang. 349.

(6) 4 R 202; 97 Ind. Cas. 1029; A I R 1926 Rang. 214.

(7) 7 R 339; 120 Ind. Cas. 899; A I R 1929 Rang. 145; Ind. Rul. (1930) Rang. 67.

v. *Joynarain Marwari* (8), where the learned Judge said:

"A review of the cases upon this section leads me to think that whether or not this case comes within cl. (a) it can only escape this clause by falling within cl. (c). All cases of acting illegally are cases of error in law though the converse is very far from true. The element which must be present in the nature of the error to give rise to the power of revision has never been very precisely defined, but I think it clear upon the statute and not really doubted in the decided cases, that any error in law which amounts to a usurpation of authority in the act done by the Court comes within cl. (c) if it is not already within cl. (a). In the broad sense of the word no Court ever has jurisdiction to act illegally though it may have jurisdiction to make an order which in fact or in law is wrong. I think that the Legislature when in 1879 it added the last clause can only have meant to obviate unprofitable nicety in the interpretation of the word "jurisdiction" in the section as it originally stood. It was argued at the bar on the strength of the judgment given by Jenkins, C. J., in the case last cited, *Shew Prosad v. Ram Chunder* (3) at p. 339 that the words "acted illegally" refer only to matters of procedure. This is I think a misunderstanding. Save in extreme cases such matters come within the last words of cl. (c). The word "procedure" is used by the Chief Justice as covering all three clauses of the section—a clear though certainly an extended sense. The phrases are "faults of procedure," "error of law and not of procedure" and I think he is adverting to the general scope of the section as a whole in a short and comprehensive phrase. He used the word "procedure" as the key-note of the section just as the Privy Council in *Balakrishna Udaya v. Vasudeva Aiyar* (2), used the word "jurisdiction." In his judgment the words "procedure" does not mean merely the method of conducting a case and in the Privy Council's judgment the word "jurisdiction" does not mean merely propriety of forum."

That these views are in my opinion correct is confirmed by what Lord Macmillian said in the course of discussion in *Atma Ram v. Beni Prasad* (10); where his Lordship said:

"The High Court found the Subordinate Judge was in error in three ways: (1) He dealt with the matter summarily, i. e., he did not give it proper consideration. (2) He misapprehended the position of Beni Prasad. (3) He failed to do justice between the parties."

The question that therefore arises in this case is whether the learned Judge of the lower Appellate Court applied his mind to the law and facts of this case in deciding it in the way he did. I have no doubt in my mind that the learned Judge did. The evidence of the plaintiff-appli-

cant himself shows that his suit is a suit for the recovery of Rs. 253 due in respect of accounts of 1933 and a sum of Rs. 17-3-0 due in respect of accounts of 1935. He states:

"For the goods taken in 1295 B. E. a sum of Rs. 253 is due. A sum of Rs. 17-3-0 was due on the goods taken in 1297 B. E. and so the total due from the defendant is Rs. 270."

In the course of cross-examination he adds:

"There is nothing in the account book to show specifically that the amounts paid in 1297 B. E. were being paid towards the Rs. 253 due from the 1295 B. E. account."

For all these reasons the application fails and it is dismissed with costs.

B. Application dismissed.

MADRAS HIGH COURT

Appeal No. 31 of 1936

September 1, 1939

BURN AND STODART, J.J.

NARAYANAN CHETTI (MINOR) AND
ANOTHER—APPELLANTS

versus

PANCHANATHAN CHETTIAR AND

OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 16—Father, sole decree-holder, dying—Decree devolving on son—Son cannot execute decree without recognition of devolution by Court passing decree.

Even where on the death of the father who was the sole decree-holder, the decree has devolved upon his sons by the operation of law, they cannot claim to be decree-holders who can execute the decree without recognition by the Court which passed the decree of the devolution upon them of the decree. 172 Ind. Cas. 100 (1), dissented from.

A. against an order of the District Court, West Tanjore, dated April 14, 1937.

Messrs. T. R. Venkatarama Sastry and C. A. Seshagiri Sastry, for the Appellants.

Mr. N. Sivaramakrishna Iyer, for the Respondents.

Judgment.—We cannot accept the contention on behalf of the appellants that they are decree-holders who can execute the decree without recognition by the Court which passed the decree of the devolution upon them of the decree. The appellants are not "decree-holders" as defined in s. 2, Civil P. O. Their father was the sole decree-holder, and although the sons may well have been entitled along with him to the benefits of the decree—a thing which has yet to be investigated—it is impossible to say that they were, or are "decree-holders." The decree has been

(8) 46 C 962; 54 Ind. Cas. 439; A I R 1920 Cal. 305; 24 O W N 288.

(9) 41 C 323, (339); 23 Ind. Cas. 977; A I R 1914 Cal. 388.

(10) 62 I A 257; 157 Ind. Cas. 894; A I R 1935 P O 145; 57 A 678; (1935) O W N 997; 39 O W N 1249; 1935 O L R 580; 42 L W 554; 2 B R 1; 1935 A L R 981; 37 Bom. L R 871; (1935) A L J 1124; (1935) M W N 1251; 8 R P O 65; 17 P L T 93 (P O).

transferred to them by operation of law on the death of their father and O. XXI, r. 16, Civil P. O., is applicable. With respect, we are not able to agree with the learned Judge who decided the case in *Akhori Ramsewakprasad v. Saran Singh* (1). The decision of the learned District Judge on this point is in our opinion correct. This appeal is accordingly dismissed with costs.

N.-8.

Appeal dismissed.

(1) A I R 1937 Pat. 607; 172 Ind. Cas. 100; 4 B R 95; 10 R P 277.

PATNA HIGH COURT

Appeal from Appellate Decree No. 695 of 1938

February 5, 1940

AGARWALA AND ROWLAND, JJ.

OHHATRANATH DAS AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

KASHINATH DAS AND OTHERS—

DEFENDANTS—RESPONDENTS

Registration Act (XVI of 1908), s. 17—Amendment in 1929—Document executed before amendment and not requiring registration—Whether requires registration after amendment.

The amendment of s. 17, Reg. Act, in 1929 does not require documents executed before that Act came into operation and which did not require registration when it was executed, to be registered. *Desai Motilal Mangalji v. Desai Parashorotam Nandlal* (1) and *Ram Coomar Singh v. Kishari* (2), relied on. 150 Ind. Cas. 555 (3), distinguished.

A. from a decision of the District Judge of Purnea, dated June 17, 1938.

Messrs. S. C. Mazumdar and P. N. Sanyal, for the Appellants.

Messrs. Jafar Imam, Rajanikant Sinha and Ram Anugrah N. Sinha, for the Respondents.

Agarwala, J.—This is an appeal by the plaintiffs from a decision of the District Judge of Purnea reversing a decision of the Munsif. The appeal arises out of a suit for recovery of possession of *khewats* 13 and 14 of village Maranga. The principal question in the suit was whether there had been an award by arbitrators in 1913 by which these *khewats* had been allotted to the plaintiffs or whether, as alleged by the defendants, there was no award in 1913 but that there was an award in 1919 by which the land in dispute was allotted to the defendants. The plaintiffs relied on Ex. 1 which purported to be an award made on January 1, 1913. The defendants relied on a similar document relating to an award

purporting to be made in 1919. The trial Court refused to take in evidence the document tendered by the defendants on the ground that it was unregistered and found that the award of 1913 was genuine. The Appellate Court has rejected Ex. 1 also on the ground that it was not registered and has omitted to consider much of the evidence that was adduced by the plaintiffs.

The first point that arises in this appeal is whether the two awards of 1913 and 1919 should have been admitted in evidence and considered by the Court below. It has been contended in support of the judgment of the Court below that s. 49 of the Reg. Act of 1908 is a bar to the admissibility of either of the awards. That section provides that no document required by s. 17 to be registered shall be received as evidence of any transaction affecting any immovable property or conferring any power to adopt, unless it has been registered. There is no dispute that the two documents were of a nature which s. 17 of the Reg. Act as amended in 1929 requires to be registered or that such documents were not compulsorily registerable under s. 17 as the Act stood before the amendment of 1929. The question, therefore, resolves into this, whether the amendment of s. 17 in 1929 requires documents executed before that Act came into operation to be registered. A similar question was raised in *Desai Motilal Mangalji v. Desai Parashorotam Nandlal* (1) in which it was held that s. 17 of the Reg. Act of 1877 should not be construed as requiring a document to be registered which would not have required registration when it was executed. The learned Judges who decided that case followed the earlier decision of the Calcutta High Court in *Ram Coomar Singh v. Kishari* (2) in which it was held that neither s. 17 of the Act of 1877 nor the corresponding sections of the preceding Acts had the effect of rendering a document, which was not compulsorily registrable under the Act of 1861, inadmissible in evidence under the succeeding Acts, without registration. Learned Counsel for the respondents referred to the recent decision of the Bombay High Court in *Datto Shivram Gosavi v. Babasaheb Malhar Deshpande* (3) in which a question arose regarding the admissibility of a rent-note

(1) 18 B 93.

(2) 9 C 68.

(3) 58 B 419; 150 Ind. Cas. 555; 36 Bom. L R 359; A I R 1934 Bom. 194; 7 R B 1.

executed in 1865. Such a note was not compulsorily registrable at the time when it was executed but it was compulsorily registrable under s. 17 of the Act of 1908. The Act of 1866 had also rendered such documents compulsorily registrable and it contained a provision in s. 100 that documents which had not been compulsorily registrable before 1865 but were then declared to be so registrable might be registered within one year from the date from which the new Act came into operation. The holder of the rent-note had not taken the precaution of availing himself of the benefit of this provision of the Act of 1866 and in those circumstances it was held that the document was rendered inadmissible in evidence by s. 49 of the Act of 1908. That case is clearly distinguishable from the present case. The amending Act of 1929 does not contain any provision similar to that of s. 100 of the Act of 1866 and the T. P. Amendment (Supplementary) Act (Act XXI of 1929), s. 15, clearly supports the principle of the earlier Bombay decision. Section 15 (1) (b) provides that "Nothing in this Act shall be deemed to affect the validity, invalidity, effect or consequences of anything already done or suffered before April 1, 1930 when the Supplementary Act came into operation."

The decree of the Court below must be set aside and the case be re-heard. The Appellate Court will afford the defence an opportunity of giving formal proof of the award of 1919 but no other fresh evidence will be admitted. The Court will also take into consideration, in determining the questions which arise before it, the documentary and oral evidence in the case. The particular documents which the appellants complained had not been referred to by the Court below are Ex. 11 [(a rent decree obtained by the plaintiffs against certain tenants) and rent receipts produced by the plaintiffs (Ex. 4 series)]. It has also been a matter of grievance that the Court below has omitted to consider the fact that the rent receipts produced by the defendants were receipts granted by *samindari* servants who had been dismissed for misappropriation and that it was the plaintiffs who produced all the documents of title relevant to the property in dispute. These matters will now be considered by the Court below and given their proper weight. The costs of this appeal will abide the result.

Rowland, J.—I agree.

D,

Order accordingly.

BOMBAY HIGH COURT

Appeal No. 11 of 1938

June 29, 1939

WASSOODEW, J.

GANPAT GATLU AND OTHERS—PLAINTIFFS
—APPELLANTS

versus

NAVNITLAL RANOHODDAS AND OTHERS

—DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 144—Application for restitution is governed by Art. 182, Limitation Act (IX of 1908) — Distinction made by s. 144 between restitution which is properly consequential on variation or reversal of decree and which is not—Reversal of decree — Possession taken under original decree, whether always wrongful.

An application for restitution must be regarded as an application in execution and would be governed for the purpose of limitation by Art. 182, Lim. Act. Consequently, a person claiming restitution would have to do so within the period of three years from the date on which the right to make the claim arose. 41 Ind. Cas. 238 (2) and 62 Ind. Cas. 273 (3), relied on.

Held, on facts that application for restitution was in time.

Ordinarily, on the reversal of a decree for possession the judgment-debtor would be entitled to possession if claimed. The judgment-debtor would also be entitled to mesne profits during the period he was wrongfully kept out of possession. But it cannot always be said upon reversal of the decree, unless it gives clear indication of that fact, that the possession taken under the original decree is wrongful. Section 144, Civil P. O., makes a distinction between restitution which is properly consequential on the variation or reversal of the decree and restitution which is not. It emphasizes the fact that discretion is vested in the Court to make an order for mesne profits which are properly consequential on such variation or reversal. That distinction recognizes the possibility of a reversal not imprinting, on the possession taken, a wrongful character within the meaning of s. 2, sub-s. (12), containing the definition of "mesne profits." If in the order of reversal the character of that possession has been determined, then the question ceases. But if it is not and the Court remands the suit for determination of that question after fresh or further inquiry, then certainly it would be premature for the Court in the application by the successful appellant for restitution to make an order for mesne profits, for the Court would then be determining a question which was sub judice. 76 Ind. Cas. 255 (1), relied on.

A. from the order passed by the District Judge, West Khandesh at Dhulia, in Appeal No. 162 of 1935.

Mr. P. B. Gajendragadkar, for the Appellants.

Mr. S. A. Kher, for Respondents Nos. 1 to 4.

Judgment.—This is an appeal from an order of the District Judge of West Khandesh setting aside the trial Court's order dismissing as time-barred the respondent's application under s. 144, Civil P. O., for restitution. He has remanded the case for

decision thereof on the merits. The question raised in this appeal is one of limitation and it arises in this way. The plaintiff purchased in 1918 about one hundred mango trees in execution of a mortgage decree of 1910. As he found difficulty in recovering possession owing to obstruction by certain persons who claimed title to the trees, in 1921 he instituted an action for possession against those persons. Among them was one Jamnabai who claimed certain number of mango trees from a large cluster as purchaser from the mortgagor's daughter who had sold them as being outside the specific trees mortgaged. In 1924 a decree was passed in the plaintiff's favour. In execution he succeeded in obtaining possession of eighty mango trees on April 9, 1925. In appeal taken by some of the defendants it was contended that as the cluster of mango trees consisted of a very large number of trees exceeding hundred, it was incumbent on the plaintiff to establish the specific trees mortgaged and sold, and that there was no evidence of their identity. That argument appealed to the first Appeal Court which therefore reversed the trial Court's decree and remanded the suit for ascertaining "which of the trees were actually sold to the respondents."

Unquestionably, upon that reversal and remand the restitution of the trees taken possession of by virtue of the decree was properly consequential. But that was not done because there was no application for restitution under s. 144 of the Code then made. The suit thereafter upon remand proceeded to trial and the plaintiff's claim was upheld, except in respect of some trees which were claimed by defendant No. 3, Jamnabai, and since purchased on June 26, 1927, by the present respondents. The decree upon remand was passed on November 23, 1931. On April 12, 1933, Jamnabai's successors, the present respondents, applied merely for an order for mesne profits of those trees excluded from the original decree for the period of the alleged wrongful possession of the plaintiff commencing from the date of his possession in execution of the decree, namely, April 9, 1925, to the date of the application. That claim was resisted on the ground of limitation and the plea in that respect was upheld by the trial Court. But it did not find favour with the learned District Judge. He held, following *Sonba v. Parashram* (1), that the awarding of mesne profits was not

a proper consequence of the order of remand and reversal and that time commenced to run from the decree passed after remand. He therefore remanded the case for ascertaining the quantum of the profits recovered. Against that order the plaintiff's heirs have appealed.

It is clear upon authority that the application for restitution must be regarded as an application in execution and would be governed for the purpose of limitation by Art. 182, Lim. Act (IX of 1908); See *Kurgodigouda v. Ningangouda* (2) and *Hamidalli v. Ahmedalli* (3). Consequently, a person claiming restitution would have to do so within the period of three years from the date on which the right to make the claim arose. The question is which is the *terminus a quo* for computing that period. It is urged that limitation commenced from the date of the order of reversal and remand, namely, January 27, 1927 and that the application therefore is clearly barred. On the other hand it is said that the period commenced from the date on which the respondents succeeded in the suit, namely, November 23, 1931. The question is not free from difficulty. Undoubtedly, as I have remarked, it was obligatory on the Court upon an application for restitution to restore possession of the mango trees under s. 144, Civil P. C., when the first decree was reversed in appeal on January 27, 1927 and the case remanded. Ordinarily, on the reversal of a decree for possession the judgment-debtor would be entitled to possession if claimed. But no such claim appears to have been made in this case. The judgment-debtor would also be entitled to mesne profits during the period he was wrongfully kept out of possession. But it could not always be said upon reversal of the decree, unless it gives clear indication of that fact, that the possession taken under the original decree is wrongful. Section 144, makes a distinction between restitution which is properly consequential on the variation or reversal of the decree and restitution which is not. It emphasizes the fact that discretion is vested in the Court to make an order for mesne profits which are properly consequential on such variation or reversal. That distinction recognizes the possibility of a reversal not imprinting on the possession taken a wrongful character within the meaning

(2) 41 B 625; 41 Ind. Cas. 238; A I R 1917 Bom. 210; 19 Bom. L R 638.

(3) 45 B 1137; 62 Ind. Cas. 233; A I R 1921 Bom. 67; 23 Bom. L R 480.

(1) A I R 1923 Nag. 101; 76 Ind. Cas. 255; 18 N L R 200.

of s. 2, sub-s. (12), Civil P. O., containing the definition of "mesne profits." If in the order of reversal the character of that possession has been determined, then the question ceases. But if it is not and the Court remands the suit for determination of that question after fresh or further inquiry, then certainly as the learned District Judge has remarked it would be premature for the Court in the application by the successful appellant for restitution to make an order for mesne profits, for the Court would then be determining a question which was sub-judice. That is what was decided in *Sonba v. Parashram* (1) and with respect I agree with the reasoning in that judgment.

Here it was made abundantly clear by the first Appeal Court which reversed the decree and remanded the suit that the character of the plaintiff's possession could not then be determined until and unless the identity of the eighty mango trees claimed was ascertained. It was therefore impossible to say before the ascertainment was complete whether the plaintiff's possession was necessarily wrongful. I am unable to agree with the reasoning that the rule in s. 144 of the Code enunciates the doctrine of restitution in an unqualified form and contemplates a complete and unqualified restitution with all consequential reliefs. As I have already remarked, the language of the section makes a distinction in the Court's powers in placing the parties in the position which they would have occupied but for the decree. The Court has to regard the nature of the claim, the relief granted, the variation introduced in appeal and the manner in which the ultimate decision might affect the rights of the parties to the subject-matter in dispute. These considerations have necessarily to be borne in mind in exercising the discretion vested in the Court in determining the claim to ancillary relief by way of refund of costs, payment of interests, damages or compensation and mesne profits. I would therefore maintain the order of the lower Appellate Court and dismiss this appeal with costs.

S.

*Appeal dismissed.***CALCUTTA HIGH COURT**

Application in Suit No. 1177 of 1938

April 6, 1939

SEN, J.

ALI MOHAMED EBRAHIM

SHAKOOR—APPLICANT

versus

ADAM HAJEE PEER MD. ESSACK

AND OTHERS—DEFENDANTS

—OPPOSITE PARTY

Letters Patent (Cal.), cl. 12—Leave under, to sue—Application for revocation of—Considerations—Firm register, kept according to terms of Partnership Act showing Calcutta as principal place of business—Suit for dissolution of partnership in Calcutta High Court—Leave to sue there, if can be revoked.

In an interlocutory application for revocation of leave to sue granted under cl. 12, Letters Patent matters of difficulty and importance which require a meticulous consideration of facts and law and which are best determined upon the evidence of witnesses who have been subjected to cross-examination should be decided at the trial of the suit and not in the application. [p. 358, col. 1.]

Where a firm register kept in accordance with the terms of the Partnership Act shows that the principal place of business of the firm in Calcutta and a person brings a suit for dissolution of partnership in Calcutta High Court relying upon the entry in the firm register, the High Court has jurisdiction to try the suit and leave to sue in the Calcutta High Court under cl. 12, Letters Patent (Cal.) cannot be revoked on the ground that jurisdiction of that Court is being attracted by adoption of a device. *Radha Bibee v. Mucksoodum Dass* (1), 163 Ind. Cas. 167 (2) and 162 Ind. Cas. 287 (3), distinguished [p. 358, col. 1; p. 359, col. 1.]

Messrs. S. N. Banerjee and N. C. Chatterjee, for the Applicant.

Sir A. Roy (Advocate-General) and Mr S. B. Sinha, for the Opposite Party (Defendant).

Messrs. S. M. Bose, B. C. Ghose, S. C. Bose, S. N. Banerjee, H. N. Sanyal and A. C. Ganguly, for the other Defendants.

Judgment.—This is an application by defendant No. 6, Hajee Adam Abdul Shakoor, for an order that the leave granted under cl. 12 of the Letters Patent of this Court to the plaintiff to institute this suit in this Court be revoked, in the alternative for an order staying the suit. There was a prayer for security for costs; that was abandoned by learned Counsel for the petitioner. This motion arises out of a suit instituted by the plaintiff Ali Mohamed Ebrahim Shakoor against six defendants. They are (1) Adam Hajee Peer Mohamed Essack, for self, (2) Adam Hajee Peer Mohamed Essack, as manager of Peer Mohamedi Fund, (3) Ahmed Hajee Peer Mohamed, (4) Abdul Karim Adam, (5) Taiyub Ali Mohamed, and (6)

Hajee Adam Abdul Shakoor. It will be more convenient, I think, to refer to the defendants by their respective numbers and not by their names which are confusing by reason of the fact that the names of the different defendants are very similar and seem to be a permutation and combination of one another's names. Defendant No. 1 is the same person as defendant No. 2. Defendant No. 3 is the brother of defendant No. 1 and defendant No. 4 is the son of defendant No. 1. Defendant No. 5 is the plaintiff's son, and defendant No. 6 is the manager of defendant No. 1. It is clear from this statement that defendants Nos. 1, 3 and 4 are closely related as brothers and son, and defendant No. 6 is the manager of defendant No. 1.

The plaintiff's suit is one for the dissolution of a partnership alleged to be existing between him and the five defendants and for accounts. There is a further prayer for a declaration that the document executed by the plaintiff on February 3, 1936 in favour of defendant No. 1 is void on the ground of fraud, undue influence and similar grounds. It is alleged that the partnership business was carried on at Calcutta.

The suit was instituted on June 27, 1938. The written statement of defendant No. 1 was filed on August 10, 1938 and the written statements of the other defendants were filed on November 7, 1938. On August 22, 1938, defendant No. 1 applied to this Court for a stay of the suit and for security for costs. In fact that application was similar to the present one in all respects except that there was no prayer for an order to revoke the leave granted under cl. 12 of the Letters Patent. The other defendants did not join in that application, nor were they served with notice of that application. On December 6, 1938, by consent an order was passed. The plaintiff consented to furnish security. While that application was pending the other defendants were written to by the solicitors of the plaintiff asking them to state their attitude with respect to the application, but no reply was given to this letter. Thirteen days after that consent order, that is on December 19, 1938, the present application has been made by defendant No. 6, who, as I have said, is the servant of defendant No. 1. In this application it is worthy of notice that defendant No. 3, who is the brother of defendant No. 1, has not been served with notice.

On behalf of the petitioner the allegations

are briefly as follows: He says that there was no partnership between defendant No. 1 and the other defendants. He claims that the business belonged to defendant No. 1 alone and that the plaintiff and the others were servants, who had a share in the profits of the business. His contention is that under the peculiar law prevailing in the Bantva State where the agreement between the parties was entered into and where all the parties reside, the agreement did not constitute a partnership. This agreement is dated December 15, 1934. It is stated that the head office of the business is at Bantva and not at Calcutta and it is pointed out that there is a term in the agreement whereby the plaintiff agreed that all disputes would be settled at Bantva or Rajkot and that he would not be permitted to institute legal proceedings elsewhere. The next important allegation of the petitioner is that all accounts between the plaintiff and defendant No. 1 have already been settled and that on February 3, 1936, the plaintiff executed a document evidencing this settlement of account and terminating the agreement. This document it was alleged was executed at Bantva. This is the document which was challenged on the ground of fraud and undue influence. The petitioner alleges that no fraud or undue influence was exercised, and that the circumstances all indicate that the plaintiff willingly and with full knowledge of all the facts executed this document. It is said that pursuant to this document the plaintiff was given a sum of over Rs. 3,00,000 which he accepted. The contentions of the petitioner are: *firstly*, that the entire cause of action in this suit arises outside the jurisdiction of this Court; *secondly*, that the plaintiff contracted that he would not be entitled to bring any suit except in the Bantva and Rajkot Courts. On these grounds it is contended that this Court has no jurisdiction to entertain this suit. *Thirdly*, it is said that, even if this Court has jurisdiction to entertain this suit on the footing that part of the cause of action has arisen here, the leave granted should be revoked or the suit should be stayed inasmuch as the suit has been brought here with intent to make it impossible for the defendants to defend the suit. It is pointed out that all the books are at Bantva, all the witnesses reside there, and that the suit could be most conveniently tried at Bantva or Rajkot. The contention is that this suit has been brought here deliberately with

the object of making it impossible for the defendants to carry on their defence.

On behalf of the plaintiff-respondent the contention is that there was a partnership and that the partnership was registered at Calcutta. It was further pointed out that Calcutta was the principal place of business of the partnership. On this ground it is argued that this Court has jurisdiction to try this suit. It is contended further that the deed of partnership does not contain any clause which precludes the plaintiff from suing in this Court. Lastly, it is said that this suit can be conveniently tried here and that this application is a *mala fide* one made for the purpose of harassing the plaintiff. The first thing to remember in an interlocutory application like this is that matters of difficulty and importance, which require a meticulous consideration of facts and law and which are best determined upon the evidence of witnesses who have been subjected to cross-examination should be decided at the trial of the suit and not in the application. I do not consider that it is necessary to go into the facts in detail or to decide finally whether the plaintiff's allegations of fraud are justified or whether they are themselves fraudulent. What has to be decided on this application is whether any part of the cause of action has arisen within the jurisdiction of this Court and if so whether the leave granted under cl. 12 of the Letters Patent, should remain. Upon the materials before me and as at present advised, I have no hesitation in coming to the conclusion that the plaintiff has shown that a part of the cause of action has arisen within the jurisdiction of this Court. There is a register which is kept in accordance with the terms of the Partnership Act. In that register it is stated that all the parties are partners and that the principal place of business of the partnership firm is at No. 1, Amratolla Lane, Calcutta. Under s. 68, Partnership Act, it is laid down that the statements contained in the register of firms shall as against any person by whom or on whose behalf such statements have been made be conclusive proof of any fact therein stated. The defendants say that this entry was made merely to enable the plaintiff to file suits in the Small Cause Court at Calcutta and to deal with certain income-tax matters and that it does not represent the real state of things. I am extremely doubtful whether the defendants can be allowed to say this in view of the provisions of s. 68, Partnership Act. In any

case for the purposes of this application the register of firms is sufficient evidence to establish that there was a partnership business, that the plaintiff and the defendants were all partners in this business and that the principal place of business of the firm was at Calcutta. This suit is for a dissolution of this partnership, therefore this Court has jurisdiction to try this suit.

On behalf of the petitioner it is said that the plaintiff has already, by a document of February 3, 1936, given up his rights. The plaintiff says that this document was brought about by fraud. This question must be decided in the suit and cannot be decided upon affidavits on an application of this nature. Next the petitioner relies upon the clause in the partnership agreement of December 15, 1934, which he says debars the plaintiff from suing in any other Court except the Courts at Bantva and Rajkot. The translation of this document furnished by the petitioner is not on affidavit. On behalf of the plaintiff there is a translation which is supported by an affidavit. After perusing this translation I cannot say that by this document the plaintiff has divested himself of his right to bring a suit of the nature of the present one in this Court. I shall now deal with the next contention urged on behalf of the petitioner, namely, that even if this Court has jurisdiction to try this suit leave should be refused on the ground of balance of inconvenience or on the ground that the plaintiff has brought this suit *mala fide* in this Court merely to harass the defendant. Certain cases were cited in support of this contention. They are *Radha Bibee v. Mucksoodum Doss* (1); *Kalooram Agarwalla v. Jonistha Lal* (2) and *Daulatram Rawatmull v. Maharajlal* (3). In my opinion these decisions can be distinguished from the circumstances of the present application. In the case reported in *Radha Bibee v. Mucksoodum Doss* (1) a widow was suing for maintenance. The entire cause of action arose outside the jurisdiction of this Court. The widow sought to invoke the jurisdiction of this Court by praying for an order that a charge may be declared upon certain Calcutta property for her maintenance in the cases reported in *Kalooram Agarwalla v. Jonistha Lal* (2) and *Daulatram Rawatmull v.*

(1) 21 W R 204.

(2) 40 O W N 161; 163 Ind. Cas. 167; A I R 1936 Cal. 349; 63 O 435; 63 O L J 199; 8 R O 720.

(3) 40 O W N 164; 162 Ind. Cas. 287; A I R 1936 Cal. 219; 63 O 526; 8 R O 587.

Maharajlal (3) the suits were on promissory notes. The entire cause of action was outside Calcutta. The plaintiff brought the suits in this Court depending upon assignments of the promissory notes made within the jurisdiction of this Court obviously for the purpose of creating jurisdiction. In all these cases it will be seen that the jurisdiction of this Court was sought to be attracted by a device and it was held that when the subject-matter of a suit is outside the jurisdiction of this Court the plaintiff should not be allowed to bring a suit in this Court by the adoption of such devices. The decisions reported in *Kalooram Agarwalla v. Jonistha Lal* (2) and *Daulatram Rawatmull v. Maharajlal* (3) were not followed in another case reported in *Rai Radhika Mohan Roy v. Bhubani Prosanna Lahiri* (4) on the ground that if the view of the earlier cases were adopted it would strike at the root of negotiability. I am not concerned with the question of negotiability in this case. It is quite clear however that in all these cases jurisdiction did not exist until jurisdiction was attracted by the adoption of a device for the express purpose of conferring jurisdiction on this Court.

In this case the position is quite different. The plaintiff relies not upon any device; he relies upon facts which were in existence long before this suit was ever contemplated. He relies upon the entry in the register kept under the Partnership Act. It cannot be said that this entry was made with the object of giving the plaintiff an opportunity of bringing the suit in this Court. I am of opinion therefore that the cases cited by learned Counsel on behalf of the petitioner do not help him. Learned Counsel for the petitioner then relied upon a case reported in *Jethabhai Versey & Co. v. Amarchand Madhavji & Co.* (5). In that case certain principles were laid down upon which the Court would be justified in ordering a stay of the suit. In my opinion, the facts of the present case do not fall within the scope of those principles. It was said there:

"If the Court taking all the facts into consideration comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then apart from any question as to expense or inconvenience, in my opinion, not only has the Court jurisdiction, but it is its duty to stay the proceedings."

(4) 40 O W N 717; 164 Ind. Cas. 904; 63 O 908; 9 R O 295.

(5) 25 Bom. L R 713; 82 Ind. Cas 852; A I R 1924 Bom. 90.

Again there is the following passage:

"As I have already pointed out in order to justify a stay it is as a rule necessary that something more should exist than a mere balance of convenience in favour of proceeding in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done in this sense, that it will be very difficult or practically impossible for the litigant who is applying for stay to get justice in this country."

It may be that in this case many of the witnesses are residents of Bantva. It may also be true that some documents are at Bantva. But I do not think that it can be said that if the suit were tried here it would be so inconvenient for the defendant as to result in injustice being done. I shall next take up the contention of the respondent that this application is *mala fide*. In my opinion this contention is not groundless. As I have said before, there was an application by defendant No. 1 a very few days before the present one which was almost in identical terms. The only substantial difference between that application and the present one is that there was no prayer for revoking the leave granted under cl. 12 of the Letters Patent. It is curious that the other defendants did not join in that application. It is also curious that this prayer for revocation of leave was not made then although all the facts which are now relied upon were well-known to defendant No. 1 at that time. It is also curious that the other defendants, although they were written to by the plaintiff did not care to disclose what their attitude was in respect to that application. A further fact which raises a suspicion in my mind is that defendant No. 3, who is a brother of defendant No. 1, has not been given notice of this application, nor has he joined in this application. The suggestion made by the petitioner that this has been done deliberately so that defendant No. 3 may come up with another application is not without foundation. In these circumstances I consider that this application should be refused. I accordingly dismiss it with costs. The costs will be as of a defended action. There will be only one set of costs.

s.

Application dismissed.

BOMBAY HIGH COURT

Second Appeal No. 527 of 1937

August 11, 1939

BROOMFIELD AND SBN, JJ.

RUDRAPPA YELLAPPA SATTEN-

NANAVAR—PLAINTIFF—APPELLANT

versus

MALLAPPA MALLESHAPPA—DEFENDANT

RESPONDENT

Hindu Law—Adoption—Last surviving co-parcener's widow taking boy in adoption—Vesting of estate in him—Adoption by widow of predeceased co-parcener, if can divest.

Where after the death of the last surviving male co-parcener his mother takes a boy in adoption, the adopted son divests his mother of the property inherited by her. But there is a termination of the co-parcenary and the adoption by the widow of any other predeceased co-parcener does not divest the property from the son adopted by the mother of the last surviving co-parcener. 170 Ind. Cas. 393 (1), explained. F. A. No. 182 of 1935 and F. A. No. 247 of 1936, relied on.

S. A. from the decision of the District Judge, Dharwar, in Appeal No. 11 of 1936.

Messrs. G. P. Murdeshwar and R. A. Mundkur, for the Appellant.

Mr. S. R. Parulekar, for the Respondent.

Broomfield, J.—This is a second appeal from the decree of the District Judge of Dharwar dismissing the plaintiff-appellants' suit for a half share of property in the possession of the defendant-respondent. The material facts are these. Yellappa and Mallappa were joint brothers. Yellappa died first leaving a widow Bandewa. Mallappa died leaving a widow Basava and a son Virappa. Virappa, the last surviving co-parcener, died unmarried. Basava adopted the defendant and a few months afterwards Bandewa adopted the plaintiff who claimed a half share in the family property in the possession of the defendant-respondent. The District Judge dismissed the claim relying on *Balu Saktharam v. Lahoo Sambhaji* (1). The facts in the Full Bench case were that the estate of the last surviving co-parcener passed to his widow who remarried and left the family whereupon his sister became the owner. The contest was between a purchaser from the sister and a son adopted by the widow of a deceased co-parcener before the widow of the last surviving co-parcener remarried. The Full Bench decided in favour of the former and laid down certain general propositions of which those material for the present case are

Nos. 3 and 4 (p. 543*) :

"3.....where a co-parcenary exists at the date of the adoption, the adopted son becomes a member of the co-parcenary, and takes his share in the joint property accordingly, and this principle applies although the co-parcenary is a *samindari* having the peculiar feature of being governed by the rule of lineal primogeniture."

"4 where the adoption takes place after the termination of the co-parcenary by the death, actually or fictionally, of the last surviving co-parcener, the adoption by a widow of a deceased co-parcener has not the effect of reviving the co-parcenary, and does not divest property from the heir of the last surviving co-parcener (other than the widow) or those claiming through him or her."

Mr. Murdeshwar has attempted by a very ingenious argument to show that in the present case the co-parcenary has not terminated at all and that it is the third of the propositions laid down in the Full Bench case and not the fourth which really applies to the facts. His argument is this if the co-parcenary terminated on Virappa's death, his mother Basava became the owner of the property, having a widow's limited estate, and logically her adoption of a son to her husband should not have divested, the estate which she derived not from her husband but from her son. But it is settled law *Vellanki Venkata Krishna Row v. Venkata Rama Lakshmi Narsayya* (2), and *Jamnabai v. Raychand Nahalchand* (3), that when a woman who has succeeded as heir to her son makes an adoption, the estate she has inherited from her son is divested and the adopted son becomes the owner. That is to say, the adopted son succeeds the natural born son. In this case the defendant succeeded Virappa and Mr. Murdeshwar argues, applying the language used by the Privy Council in a somewhat similar connection in *Madana Mohana v. Purushothama* (4), that the adoption must relate back to the death of Virappa and Basava's entering on the property should be regarded as a temporary interruption, operating merely to prevent the ownership of the estate being in abeyance. It is contended that on this view there has been fictionally no hiatus in the co-parcenary.

The argument is, as I say, an ingenious one. There certainly does seem to be something to be said for the view that the

(2) 4 I A 1; 1 M 174; 26 W R 21; 3 Sar. 669; 3 Suther 353 (P O).

(3) 7 B 225.

(4) 45 I A 156; 46 Ind. Cas. 481; A I R 1918 PC 74; 41 M 855; 5 P L W 179; 8 L W 167; 16 A L J 725; (1918) M W N 621; 24 M L T 231; 28 O L J 403; 20 Bom. L R 1041; 23 O W N 177 (P O).

(1) I L R (1937) Bom. 508; 170 Ind. Cas. 393; A I R 1937 Pcm. 279; 39 Ecm. I R 382; 10 R E 13 (F B).

co-parcenary comes to an end when the estate of the last surviving co-parcener passes on his death to a collateral heir or to an heir like a sister who takes an absolute estate, but does not necessarily come to an end when it passes to his widow or mother who may adopt a son to succeed the last male-holder. It is clear that the last surviving co-parcener and the widows of deceased co-parceners together form a co-parcenary. For instance Virappa, Basava and Bandewa were a co-parcenary, and under the third proposition in *Balu Sakharan v. Lahoo Sambhaji* (1), Bandewa could have adopted a son while Virappa was alive who would have come into the family as a co-parcener. The position now that Basava has adopted a son who takes the place of Virappa may be regarded as at least analogous. On the other hand, Mr. Parulekar for the respondent argues that it is not sufficient to say that the defendant succeeded Virappa and divested the estate of his mother, for at any rate the death of Virappa as the last surviving co-parcener put an end to the connection between the two branches of the family. After that no person introduced by adoption into Yellappa's branch could have any claim to the property which though formerly joint has passed completely to those who can base a claim on their connection with the last surviving co-parcener. That also is a possible view. There are several ways in which the divesting of the mother's estate may be explained. See Mayne's Hindu Law, p. 266, para. 297, Sastri's Hindu Law, p. 277. Mr. Murdeshwar's postulate of a continuance of a co-parcenary bond embracing both branches of the family does not appear to be essential. The principal difficulty in the appellants' way is however that both in *Chandra v. Gojarabai* (5), which was affirmed in *Balu Sakharan v. Lahoo Sambhaji* (1), and in the latter case also the estate of the last surviving co-parcener passed in the first instance to his widow, and it was held nevertheless that the co-parcenary terminated on his death. The Full Bench case went further and said that it could not afterwards be revived. Under the circumstances it seems to be impossible to say that Mr. Murdeshwar has been successful in distinguishing these cases. The most that can be said is that the Court had not actually before it the case of an adoption by the widow or mother of the last surviving co-parcener.

Moreover this very point has been dealt,

(5) 14 B 463.

with in two unreported cases, *Yellappa gouda v. Basangouda*, First Appeal No. 182 of 1935, decided on March 3, 1938 by Ragnekar and N. J. Wadia, JJ. and *Ramarao Bindurao Desai v. Annarao Bapurao*, First Appeal No. 247 of 1936, decided on September 21, 1938 by N. J. Wadia and Norman, JJ. In those cases no doubt it was the widow of a last surviving co-parcener and not his mother who had made an adoption, but it is not suggested that that makes any difference. It was held in both cases that the claim of a son adopted by the widow of another co-parcener was barred by the ruling in *Balu Sakharan v. Lahoo Sambhaji* (1). It does not appear from the judgments whether the case for the claimants was argued on quite the same lines as in the present case, but it does appear that the construction which this Court placed on the Full Bench ruling would have negated the argument in any case. We cannot distinguish these cases and we are not at all disposed to refer the matter to a Full Bench. The law of adoption is in a somewhat uncertain condition at present and is likely to remain so until the highest tribunal determines the real effect of the principles enunciated in *Amarendraman Singh v. Sanatan Singh* (6), upon the law of devolution of property. In the meantime, it seems desirable that this Court should maintain consistency as far as possible. The appeal is therefore dismissed with costs.

D.

Appeal dismissed.

(6) 35 Bom. L R 859; 143 Ind. Cas. 441; A I R 1933 P C 155; 12 Pat. 642; 60 I A 242; Ind. Rul. (1933) P C 168; 37 O W N 938; (1933) M W N 769; 38 L W 1; 65 M L J 203; 14 P L T 399; (1933) A L J 710; 57 C L J 593 (P C).

PATNA HIGH COURT.

Criminal Revision No. 5 of 1940

February 8, 1940

VARMA AND MEREDITH, JJ.

NATHU CHAUDHURY

AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 239 (d), 537—Joint trial—Tests—Common object—Infringement of s. 239 (d)—Defect, if curable.

The question of joinder and misjoinder depends on the form of the accusation made rather than on the facts actually proved at the trial. The nature of the charge is really the crucial point. Before a joint trial can be held to be permissible or justifiable it must be established that each one of the accused was so connected with the other accused that the act done by one of them may be said to have

been done conjointly with the other. 174 Ind. Cas. 1 (1), relied on.

The fact that the accused are all servants of the same master and so connected with the same person, does not necessarily involve connection with each other for the purposes of the offences charged. Similarly common purpose would not be enough to make offences part of the same transaction, if the offenders act independently. Where the accusation does not involve anything from which it could be said that the accused are charged with different offences as forming part of the same transaction joint trial cannot be held.

The infringement of the provisions of s. 239 (d), would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed; and that s. 537 can be of no avail to remedy the defect. 174 Ind. Cas. 1 (1), relied on.

Cr. R. against an order of the Sessions Judge, Darbhanga, dated December 12, 1939.

Sir Sultan Ahmad and Mr. Hainarayan Prasad, for the Petitioners.

The Govt. Pleader, for the Crown.

Meredith, J.—The four petitioners have been convicted under s. 506 of the I. P. C. and have been sentenced to undergo rigorous imprisonment for one year each. Their appeal has been dismissed by the learned Sessions Judge.

The facts of the case are that the motor car of a certain Magistrate was damaged by the elephant of a rich *zamindar*, Janki Raman Misser, and a case was thereafter run against the *zamindar*, as master of the elephant, under s. 209 of the I. P. C. This case was eventually withdrawn after a transfer to another district, an apology having been made for the incident.

On July 10, 1939, while the case was pending, ten witnesses came to the Court at Laheriasarai to be examined, and the same day a joint petition was filed by all ten before the Sub-Divisional Officer in the following terms:—

"The facts for submission are that we are witnesses in the case *Emperor v. Janki Raman Misser*. One Nathu Chaudhury, servant of Janki Raman Misser, was saying in presence of Sheikh Tabarak of village Rajkha, Jumrati of village Anar, Bisu Mistry, Badri Mistry, Khubi Sahu of village Rajkha, Gulzar of village Anar and Dahaur Chaukidar of village Rajkha and Nathu Mallah, that I will also be killed in the same way as Mahendra Singh, clerk of Anar Factory, was killed and that he was the person who got him killed. Rijhan Misser, Rajnarain Singh and Satruhan Singh and others, his servants are always threatening us and asking us not to depose in the case. It is therefore, prayed before your honour that investigation be made so that I may not be put in danger of my life. The names of witnesses and their thumb marks are on the reverse."

This petition was sent to the Police with instructions to treat it as a First Infor-

mation. It will be observed that in the petition the only specific charge made is of criminal intimidation on July 24, 1939, against one person, Nathu Chaudhury, the petitioner No. 1. The Police, however, eventually submitted charge-sheet against all four petitioners—against Nathu Chaudhury and Rijhan Misser for criminal intimidation at Laheriasarai on the 24th, and against the other two petitioners, Rajnarain Singh and Satruhan Singh, for a different incident, namely, criminal intimidation of the witnesses said to have taken place on July 10, at Anar Kothi, the village of the *zamin-dar*.

The charge framed, upon which the petitioners were convicted was as follows:

"That you Rajnarain Singh and Satruhan Singh on or about July 10, 1939, and you Nathu Chaudhury and Rijhan Misser on July 24, 1939, at Anar Kothi and Laheriasarai, respectively, committed criminal intimidation by threatening Madhusudan Lal Das, Sheikh Tabarak and others with injury to his person with intent to cause alarm to the said Madhusudan Lal Das and others and thereby committed an offence punishable under s. 506 of the I. P. C."

The evidence led in Court, which consisted only of the testimony of five of the persons who had joined in the petition, and of the investigating Sub-Inspector, was to the effect that on July 10 the witnesses had met together to come to Court on foot at a place near the elephants' stable of Janki Raman Misser. Rajnarain Singh and Satruhan Singh (the petitioners Nos. 3 and 4), servants of Janki Raman Misser, tried to persuade the witnesses not to depose for the Crown, and finally, threatened them that they would be killed as a certain Mahender Prasad had been killed. On July 10 the case was adjourned without hearing. The next date fixed was July 24, and the evidence was that on that date the other two petitioners, Nathu Chaudhury and Rijhan, who are also servants of Janki Raman Misser, met the witnesses in the Court compound and again asked them not to depose. Finally, they threatened the witnesses that they would be murdered like Mahender Prasad. In the afternoon, when the witnesses had been examined, they again met Rijhan and Nathu in the Court compound, who told them that they should now prepare themselves to die as Mahender Prasad had died. On this the witnesses filed their joint petition, to which I have already referred.

The principal point taken for the petitioners is that the charge and the joint trial of all the petitioners upon that charge

were illegal, as the occurrences were quite separate and were not part of the same transaction. This point was taken in the lower Appellate Court; but the learned Judge was of opinion that the case was covered by s. 239 (d) of the Criminal P. C. which provides that persons accused of different offences committed in the course of the same transaction may be charged and tried together.

In my opinion, the case was not one which falls within the terms of s. 239 (d) and the joint trial of the petitioners was, therefore, illegal. There are many rulings upon the question of the exact significance of s. 239 (d); but it is necessary to refer only to one—the Privy Council case, *Babulal Chaukhani v. Emperor* (1). It is of course well-settled that the infringement of the provisions of s. 239 (d) would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed, and that s. 537 can be of no avail to remedy the defect. That has been reiterated in the ruling which I have just referred to. And we get it also from this ruling of the Privy Council, that the question of joinder and misjoinder depends on the form of the accusation made rather than on the facts actually proved at the trial. This being so, the nature of the charge is really the crucial point. The learned Judge in the Appellate Court below has observed, and rightly observed, that the phrase “same transaction”, used in s. 239 (d), suggests in particular continuity of action and purpose. But can it be said, having regard to the terms of the charge which I have quoted, that the accusation in the present case makes out any continuity of action and purpose? Can it be said that the petitioners have all been charged in this charge with offences of criminal intimidation committed as part of the same transaction? In my view it certainly cannot. There is nothing at all in the charge from which it can be said that the alleged incidents of July 10 and of July 24 form part of the same transaction. The learned Judge has commented on the fact that all the petitioners are servants of the same master. That may be; but the fact that they are all servants of

the same master and so connected with the same person, does not necessarily involve connection with each other for the purposes of the offences charged. It seems to me perfectly possible that the petitioners’ master, who is a big *zamindar*, might be above conduct of this sort, while his underlings through excess of zeal on his behalf might independently resort to action of this kind at different places on different occasions. Such acts would certainly not be part of the same transaction. It has been pointed out that there is no evidence at all in the case of any conspiracy between the petitioners for the purpose of intimidation, nor was there any charge of conspiracy. It has been urged for the Crown that in matters like this each case must depend upon its own facts, and whether offences are or are not part of the same transaction is more a question of fact than of law. We must, however, as I have said, depend more on the nature of the accusation than on the facts proved; and the accusation in the present case does not involve anything from which it could be said that the accused are charged with different offences as forming part of the same transaction. No doubt it may be possible to infer a common purpose in the various acts alleged; but common purpose would not be enough to make offences part of the same transaction, if the offenders act independently. The petitioners in the present case might all be under the orders of the same master, but that in itself would not justify the inference that they were in conspiracy with each other.

In my view this is a clear case of misjoinder, and the joint trial of the petitioners Nos. 1 and 2 with the petitioners Nos. 3 and 4 was illegal and involved, moreover, a clear possibility of prejudice. This being so, the convictions and sentences must be set aside.

There remains the question whether a re-trial should be ordered. Our attention has been drawn to the harassment which the petitioners have undergone, to the long period that has elapsed, to the fact that the sole evidence is that of five of the complainants, even though the offence is said to have taken place actually in the Court compound. These are circumstances to which we must attach great weight. But we must also attach weight to the fact that the petitioner Nathuni at least was charged then and there without any delay, and that both the Courts below were very favourably impressed by the evidence of

(1) 42 O W N 621; 174 Ind. Cas. 1; A I R 1938 P O 130; 1938 A L R 309; (1938) A L J 382; 10 R P C 250; 19 P L T 343; (1938) I M L J 647; 39 Cr. L J 452; 1938 O W N 416; 1938 O L R 189; (1938) M W N 505; 4 B R 490; 67 O L J 161; 40 Bom. L R 787; 65 I A 158; 32 S L R 476; I L R (1938) 2 Cal. 295 (P O).

the witnesses. The learned Sessions Judge has observed "the trying Magistrate was obviously impressed by the prosecution witnesses and on reading through their deposition I am also impressed". Later he says "the prosecution evidence in the present case carries conviction". He also observes that after the occurrence Nathu absconded for 12 days and the other petitioners for 26 days.

I have already noticed the fact that the petition of complaint makes a specific charge only for the incident of July 24 and only against the petitioner Nathu Chaudhury. This being so, I am of opinion that a re-trial of the other three petitioners, against whom nothing specific was alleged in the complaint, is not necessary or desirable; but, in the case of the petitioner Nathu Chaudhury there was an accusation then and there, and there was the evidence of five witnesses upon which I do not desire to express any personal opinion, but with which, as I have said, the Courts below were much impressed. This being so, unless the Crown does not consider it necessary to proceed against him, Nathu Chaudhury, should be re-tried for the alleged offence of July 24.

In the result, therefore, I would set aside the convictions and sentences and direct that the petitioners Rijban Misser, Rajnarain Singh and Satruhan Singh be acquitted and discharged from their bail and that the petitioner Nathu Chaudhury be re-tried unless the executive authorities do not desire to proceed against him.

Varma J.—I agree.

I should like to say a few words on the question of misjoinder of charges and misjoinder of trial. The lower Appellate Court has come to the conclusion that the offences of July 10, 1939, and July 24, 1939, were committed in the course of the same transaction although the time and the place of occurrence were different. An argument was advanced in the Court below that the accused may have acted independently in an excess of zeal for the cause of their master. But the learned Judge says—

"In my opinion the circumstances definitely indicate otherwise. The witnesses were approached on two successive dates of hearing, and twice on the second day, by the servants on the same man in respect of the same case. These servants had no personal interest in the verdict in that case. The conclusion is obvious that either their master or some connection of his was behind them in an attempt to intimidate the witnesses. The difference of dates and of place is immaterial."

When the learned Judge says that the

conclusion was obvious that either their master or some connection of his was behind them in an attempt to intimidate the witnesses, he may be perfectly right. Each of these accused may have been influenced by the master or some person connected with the master; but before a joint trial can be held to be permissible or justifiable it must be established that each one of the accused was so connected with the other accused that the act done by one of them may be said to have been done conjointly with the others. It is this aspect of the law which has been dealt with in the decision of the Privy Council in *Babulal Chaukhani v. Emperor* (1). Evidently the learned Judge was thinking that perhaps a case of conspiracy was made out; but as there was no charge of conspiracy in this case the joint trial must be held to be illegal.

Order accordingly.

CALCUTTA HIGH COURT

Appeals Nos. 255 and 256 of 1937

August 3, 1939

NASIM ALI AND NARSING RAU, JJ.

SECRETARY OF STATE—APPELLANT

versus

SHYAMAPADA BANERJEE—

RESPONDENT.

Land Acquisition Act (I of 1894), ss. 18, 21, 20—Reference only on question of amount of compensation—Question of title to land acquired, relevancy—Reference to tribunal on amount of compensation—Declaration that claimant K was entitled to enhanced compensation based on compromise between claimants—Secretary of State held necessary party.

The jurisdiction of the Court on a reference by the Collector is a special jurisdiction. If the only objection is to the amount of compensation, that alone is the matter referred to, and the Court has no power to determine or consider anything beyond what is referred. The question of title to the land acquired is, therefore, not relevant in a reference on the question of the amount of compensation only. In an inquiry as to the amount of compensation only, the question is how much more the claimant is to get and how much more is the Govt. to pay. The only question is the additional amount of compensation. It does not involve the determination of question of the right to claim or the liability to pay any additional compensation. 121 Ind. Cas. 536 (1), relied on.

On a reference by Collector as to the amount of compensation, the tribunal made a declaration that the claimant K was entitled to enhanced amount of compensation, on the basis of settlements between the claimants to the property. The terms of these settlements were embodied in two petitions of compromise filed before tribunal. By these settlements the compensation awarded by the Collector was divided between K and the other claimants and K was given the right to get the excess amount of

compensation, if any, to be awarded by the tribunal. There were certain admissions about K's or his representative's title to the lands acquired by the other claimants in these petitions of compromise:

Held, that the Secretary of State for India was not only a proper party but was a necessary party as he was the only person interested in opposing K's claim to enhanced compensation.

Messrs. *Bireswar Bagchi* and *Abdul Bari*, for the Appellant.

Messrs. *Surendra Madhab Mullick*, *R. N. Ray* and *Nagendra Kumar Dutt*, for the Respondent.

Nasim Ali, J.—Premises Nos. 13/1 and 13/3 Lake Road were acquired in connexion with Scheme No. 33, Southern Avenue Section by declaration No. 3481-L. A., dated March 7, 1932, which was published in the *Calcutta Gazette* on March 10, 1932. Five persons including one Kalipada Banerjee claimed interest in No. 13/1 Lake Road. He and a minor named Sunil Kumar Chatterjee through his guardian claimed interest in the other premises, namely 13/3, Lake Road. The Collector gave his award under s. 11, Land Acquisition Act, on August 21, 1933, in respect of premises No. 13/1. He found the area to be 2 cottas, 9 chittacks and 10 square feet which he valued at the rate of Rs. 800 per cotta. He further found that out of the five claimants only two, namely, Tara Sundari Dasi and Aswini Kumar Mukherjee, were entitled to compensation. Of these two persons in whose favour the award was made by the Collector only Tara Sundari Dasi accepted the award. The Collector published his award in respect of premises No. 13/3 Lake Road on June 17, 1933. He found the area to be 3 cottas, 9 chittacks, 9 square feet and valued it at the rate of Rs. 1,350 per cotta. He found that the minor Sunil Kumar Chatterjee was alone entitled to get the whole compensation. The award was accepted by the guardian of the minor on behalf of the minor, Kalipada Banerjee then applied to the Collector under s. 18, Land Acquisition Act, for reference to the tribunal for determination by the tribunal of his objections to the two awards. His grounds of objection to both the awards so far as they are relevant for the purposes of the present appeals were: (1) to the amount of compensation and (2) to the person to whom the compensation is payable. The Collector accordingly made two references to the tribunal. The reference in respect of premises No. 13/1 Lake Road was registered

in the tribunal as Valuation Case No. 162 of 1933, while the reference in respect of the other premises was registered as Valuation Case No. 108 of 1933. Kalipada died during the pendency of the proceedings before the tribunal and the present respondent as executor to his estate was substituted in his place.

On April 23, 1937, the tribunal arrived at the following conclusions: (1) that the market value of premises No. 13/1 Lake Road is Rs. 918-8-0 per cotta and that of premises No. 13/3 Lake Road is Rs. 1,550 per cotta and, consequently, the award of the Collector in respect of premises No. 13/1 Lake Road should be enhanced by Rs. 351-1-6 while the other award of the Collector should be enhanced by Rs. 822-4-0; and (2) that the respondent is entitled to receive enhanced amounts in the two cases. The Province of Bengal appeals to this Court against this decision with a certificate from the President of the tribunal under s. 3 (1) (b) (i), Calcutta Improvement (Appeals) Act, 1911, that the case is a fit one for appeal to this Court. First Appeal No. 255 of 1937 arises out of Valuation Case No. 108 of 1933 and First Appeal No. 256 of 1937 arises out of Valuation Case No. 162 of 1933.

The first contention of the appellant is that the decision of the tribunal on the amount of compensation is bad in law inasmuch as the tribunal has not come to any finding on the issue raised by the appellant, namely, whether Kalipada could maintain the valuation references, which involves the question whether Kalipada had any title to the lands acquired. In other words, the contention is that the issue about the title of Kalipada is germane to the question of the amount of compensation. I am unable to accept this contention. The jurisdiction of the Court on a reference by the Collector is a special jurisdiction. If the only objection is to the amount of compensation, that alone is the matter referred to, and the Court has no power to determine or consider anything beyond what is referred: see *Pramatha Nath v. Secretary of State* (1). The question of title to the land acquired is therefore not relevant in a reference on the question of the amount of compensation only. Much reliance was placed by the appellant upon s. 21,

(1) 57 I A 100; 121 Ind. Cas. 536; A I R 1930 P O 63; 57 O 1148; Ind. Rul. (1930) P O 72; (1930) A L J 126; 31 L W 431; 34 O W N 289; 32 Bom. L R 523; 51 O L J 154; 58 M L J 223; (1930) M W N 577 (P O).

Land Acquisition Act, which provides:

"The scope of the inquiry in every such proceeding shall be restricted to a consideration of the interest of the persons affected by the objection."

The dictionary meaning of the word "affect" is to produce material effect. In an inquiry as to the amount of compensation only the question is how much more the claimant is to get and how much more is the Govt. to pay. The only question is the additional amount of compensation. It does not involve the determination of question of the right to claim or the liability to pay any additional compensation. I therefore overrule this contention. The second contention of the appellant is that the decision of the tribunal on the amount of compensation is bad in law inasmuch as it is based on the award of the tribunal on the market value of No. 13/1 Lake Road which has been set aside by this Court in appeal. There is no material before us to show that this award has been set aside by this Court. This contention therefore fails. I therefore affirm the decision of the tribunal on the question of the amount of compensation.

The next contention of the appellant is that the tribunal was wrong in declaring that the respondent is entitled to receive the enhanced amounts, namely, Rs. 822-4-0 and Rs. 351-1-6 from the appellant. The tribunal has made the declaration on the basis of settlements between the claimants of this property. The terms of these settlements are embodied in two petitions of compromise filed before tribunal. By these settlements the compensation awarded by the Collector was divided between Kalipada and the other claimants and Kalipada was given the right to get the excess amount of compensation, if any, to be awarded by the tribunal. There are certain admissions about Kalipada's or his representative's title to the lands acquired by the other claimants in these petitions of compromise. The President sitting alone recorded the terms so far as the apportionment of the compensation awarded by the Collector is concerned. The terms of compromise so far as they relate to the right of Kalipada or the respondent to get the enhanced amounts were not recorded by him. He also did not declare the title of Kalipada or the respondent to the lands acquired on the basis of the admissions contained in the petitions of compromise. The tribunal therefore declared the right of the respondent to the enhanced amounts not on any previous decision on the question by the

President (apparently he was authorized to decide the question by virtue of s. 77, Calcutta Improvement Tribunal Act) but on the petitions of compromise filed by the claimants before the President. It is a decision relating to objections referred by the Collector to the tribunal as regards persons to whom the compensation is payable. The tribunal therefore has given this decision on the footing that the references so far as they related to the question as to whom enhanced amounts were payable, remained undisposed of by the President sitting alone.

The point for determination therefore is whether this decision of the tribunal is wrong. The contention of the appellant is that the decision of the tribunal on this point is wrong and should be set aside inasmuch as (1) the tribunal has refused to take into consideration the evidence adduced by the appellant; (2) that the petitions of compromise on which the decision is based are no evidence against the appellant; and (3) that in any view of the case the petitions of compromise on which the tribunal have relied to declare the respondent's title to the enhanced amounts do not establish the respondent's title. These points involve the question whether the appellant is a necessary party in the proceeding relating to the determination of the question about the claimants' title to the enhanced amounts. The claimants other than Kalipada are not entitled to claim the enhanced amounts as they accepted the award of the Collector as to the amount of compensation and did not apply for reference on this ground. If the respondent claims the enhanced amounts on the basis of any title derived from the other claimants by the compromise after the latter had accepted the awards, he is not in a better position and cannot claim them. If his claim to the enhanced amounts is based upon Kalipada's title to the lands acquired the tribunal will have to determine that claim.

The question then is in whose presence this determination is to be made. The only person who will be affected by this determination is the appellant because he will have to pay the enhanced amounts. In the determination of this question in view of the facts of the present case the persons interested are the respondent who claims the money and the appellant against whom the money is claimed. The appellant is the only person interested in opposing the respondent's claim. In the events

that have happened in this case the appellant is not only a proper party but is also a necessary party. There is nothing in s. 20, Land Acquisition Act which militates against this view. If the dispute about the title of the property is decided in the presence of the appellant it would not in any way enlarge the scope of the inquiry on the basis of the references. The tribunal has declared the respondent's title to the enhanced amount on the basis of the two petitions of compromise to which the appellant is not a party and which the appellant characterizes as illegal and void under the provisions of s. 23, Contract Act. The fraud alleged by the appellant is that the respondent has no title and that admissions about the respondent's title were made in the petition of compromise in order to saddle the appellant with the liability to pay additional compensation which the claimants who are the real owners precluded themselves by their conduct from claiming. From whatever point of view the matter be looked at it is clear that the respondent is bound to prove his right to claim enhanced amount in the presence of the appellant.

The result therefore is that the decision of the tribunal, so far as it relates to the amount of compensation, is affirmed. The decision of the tribunal, so far as it declared that the respondent is entitled to get enhanced amounts from the appellant, is set aside and the cases are sent back to the tribunal. The tribunal is directed to determine the question as to whom the enhanced amounts are payable in the presence of the appellants. The appellant and the respondent and the other persons who were parties to the reference will be entitled to adduce such evidence in support of their respective cases as they may choose to adduce before the tribunal. The tribunal is directed to take that evidence into consideration and to dispose of the question as to whom the enhanced amounts are payable according to law. Costs in these two appeals will abide the result, the hearing-fee for the two appeals being assessed at 10 gold mohurs.

Narsing Rau, J.—I agree.

s.

Order accordingly.

NAGPUR HIGH COURT

Second Appeal No. 688 of 1937

September 29, 1939

GRILLE, J.

MAHADEO TUKARAM MAHAJAN—

DEFENDANT—APPELLANT

versus

RAMCHANDRA DEOYYA

YELAMI DHOKI—PLAINTIFF—

RESPONDENT

Promissory note—Insufficiently stamped—Claim for debt, if can be based on separate contemporaneous agreement—Such note, whether operates as acknowledgment.

Where a promissory note evidencing debt is invalid, not being sufficiently stamped, the creditor can base his claim on the contemporaneous oral agreement between the parties and such agreement can be proved. 134 Ind. Cas. 283 (2), 137 Ind. Cas. 33 (3) and 144 Ind. Cas. 745 (4), relied on. *Thaji Beebi v. Tirumalaiappa Pillai* (5), distinguished.

An insufficiently stamped promissory note cannot operate as an acknowledgment or be used for any purpose whatever.

S. A. from the appellate decree of the Court of the Additional District Judge, Yeotmal, dated July 15, 1937.

Mr. T. L. Sheole, for the Appellant.

Mr. V. V. Kelkar, for the Respondent.

Judgment.—This is a second appeal by the defendant, the plaintiff having succeeded in both the Courts below. The suit was for a sum due which had been lent to the defendant. It is not disputed that the amount had been lent and the money received, and a plea which was raised that old accounts should be opened was later withdrawn and the sum claimed not disputed. The only ground on which the suit was resisted was that the claim was barred by limitation. Transactions have been going on between the parties for some time, and it is admitted that in December 1930 and June 1931 promissory notes were executed and also some cash passed. A further promissory note was executed on January 19, 1933. This, however, was executed on an insufficient stamp, and the plaint was not filed until January 13, 1936. The plaint stated that consequently the promissory note executed in January 1933 would not be a valid document as a promissory note, but the plaintiff claimed that he was entitled to claim the amount found due on that date independent of the promissory note. The defendant insisted that the claim was time-barred as it was based on the promissory notes of 1930 and 1931 and there was no direct acknowledgment within that time. The plaintiff then asked to be allowed to

amend the plaint by pleading explicitly his cause of action apart from the promissory note itself. This application was put in on April 8, 1936, more than three years after the infructuous promissory note and indeed more than three years after the contemporaneous agreement on which the plaintiff relied. The trial Court allowed the amendment subject to an objection on the question of limitation by the other side. The plaint was not actually amended, but nevertheless judgment was given in the plaintiff's favour by the same Judge who had recorded the pleadings and was in charge throughout, and it is clear therefore that the trial Court decided that the application for amendment was not barred by limitation. In addition to this question there were two other points for consideration before the trial Court. One was whether the insufficiently stamped promissory note could be used as an acknowledgment of liability for the debt. This was held in the negative on the authority of *Govinda v. Haribhau* (1). The other point, which was whether a separate contemporaneous agreement to pay could be proved despite the fact of the existence of a document, was held in the plaintiff's favour. In appeal no question was raised as to the correctness of the decision in the Court below that the infructuous promissory note could not operate as an acknowledgment. On the other points the lower Appellate Court agreed with the trial Court except that it did not consider the trial Court correct in stating that the claim to sue on an independent promise could be seen in para. 1 of the plaint, but held that the rule that the promise could be proved independently on failure of the operation of the promissory note was so well-known that it was unnecessary to cite authorities.

In second appeal a good deal of time has been taken up by an attack by the learned Counsel for the appellant on the proposition that an invalid promissory note could be used as an acknowledgment, if sufficiently stamped for that purpose. The findings of both the Courts below were in the appellant's favour on this point, and I am at a loss to understand why the learned Counsel should have supported them. This has naturally invoked reference to rulings to the contrary on behalf of the respondent. I shall not refer to this question as it is not necessary for a decision of the appeal, which can be decided on

(1) A.I.R. 1933 Nag. 391; 147 Ind. Cas. 981; 16 N.L.J. 241; 6 R.N. 150.

exactly the same grounds as in the lower Appellate Court where it was held tacitly that such document could not operate as an acknowledgment or be used for any purpose whatever. It is contended on the next point that the decision of the Courts below has left it open to this Court to decide the question whether the plaintiff's suit is barred by limitation or no by reason of the late date of the amendment. I am perfectly satisfied that the suit is within time and that the plaint very clearly embodies the alternative cause of action apart from the infructuous promissory note itself. I agree with the lower Appellate Court that this is not to be found in para. 1 of the plaint, but to my mind it is very clearly apparent in para. 2, of which the first sentence runs:

"The pro-note executed by the defendant on January 19, 1933 not being sufficiently stamped is not a valid document as a promissory note, but the plaintiff can claim the amount found due on that date independently of the promissory note due on the previous promissory notes. And the promissory note can be used as an acknowledgment of debt due on that date."

To my mind this is perfectly clear, and the subsequent amendment is no more than a particular amplification of a claim already made. That the agreement existed and has been proved must be taken as a finding of fact, and I agree with the lower Appellate Court that the denial of a separate oral agreement by the defendant in an oral statement had reference only to the supposition that the agreement referred to was not contemporaneous with the execution of the promissory note, and when it was pleaded, again in oral statements, that they were contemporaneous, there was a tacit admission of its existence by a pleading that it was inadmissible as the contract was in writing. I may add that it would indeed be surprising if the plaintiff, admitting from the first that the promissory note was not valid as such, should not have indicated in his plaint that he was entitled to sue on the basis of a contemporaneous agreement to repay as well as urging the point that the promissory note might be admissible to prove an acknowledgment.

That such a contemporaneous agreement, if established, can be proved is beyond dispute and is the view which has always been taken in this Court. The only answer that has been afforded to the authorities quoted is that they do not help the plaintiff. The authorities are, to my mind, very definitely and decidedly in point. These

are *Mohan v. Ramji* (2), *Gulabgir v. Nathmal* (3) where all the earlier authorities are collected, and the decision of a Divisional Bench in *Raja Lal Bahadur Singh v. Sheikh Ghulam Yasin* (4). No decision in this Court to the contrary has been cited; and indeed the only case which appears to go contrary to the principle on which these decisions are based appears to be *Thaji Beebi v. Tirumalaiappa Pillai* (5) which is not strictly in point as the matter there in question was the permissibility of oral evidence to prove a mortgage which had been executed under an unstamped instrument.

The decision in the Courts below is correct and the appeal fails and is dismissed with costs.

S.

Appeal dismissed.

(2) 27 N L R 56; 134 Ind. Cas. 283; A I R 1931 Nag. 113; Ind. Rul. (1931) Nag. 155.

(3) 27 N L R 327; 137 Ind. Cas. 33; A I R 1932 Nag. 23; Ind. Rul. (1932) Nag. 53.

(4) 29 N L R 131; 144 Ind. Cas. 745; A I R 1933 Nag. 57; 6 R N 21.

(5) 30 M 386.

ALLAHABAD HIGH COURT

Second Appeal No. 183 of 1937

September 15, 1939

BENNET AND VERMA, JJ.

GHASITOO MAL—PLAINTIFF—APPELLANT
versus

ASA RAM—DEFENDANT—RESPONDENT

Co-sharer—One of two co-sharers of ex-proprietary tenancy accepting whole of ex-proprietary rent in lieu of profits—Whether estopped from subsequently claiming profits.

Where in a suit for arrears of rent on the ex-proprietary holding, one of two co-sharers of the *khewat* number, accepts the whole of the ex-proprietary rent from the other co-sharers who is the ex-proprietary tenant in lieu of his share of the profits, he is estopped from subsequently claiming a share of profits in the remaining portion of the *sir* land.

S. A. from the decision of the Additional District Judge, Meerut, dated October 14, 1936.

Mr. Jagnandan Lal, for the Appellant.

Mr. B. Mukerji, for the Respondent.

Bennet, J.—This is a second appeal by the plaintiff who has been granted a decree for profits by the Revenue Court and who appealed in regard to a claim of his for a share of the profits of the *sir* land and the learned District Judge dismissed that appeal. The circumstances are that in a particular *khewat* number the defendant Asa

Ram was the sole owner and he had 32 *bighas* of *sir* in his possession. He executed a sale-deed for one-sixth share of the *zamindari* rights in this *khewat* number to the plaintiff. Proceedings were taken under s. 36, Land Revenue Act, for assessing the rent on the ex-proprietary holding. For the years in suit the plaintiff brought a suit for arrears of ex-proprietary rent against defendant. In that suit the plaintiff claimed the whole of the ex-proprietary rent. Actually, in accordance with the various rulings of this Court the plaintiff was only entitled to one-sixth of the ex-proprietary rent because in accordance with those rulings the ex-proprietary tenant is not the ex-proprietary tenant merely of the vendee but of the whole coparcenary body. Apparently in the rent suit the parties each accepted the proposition that this rule of law which is intended for general purposes would not apply in this special case. No doubt this was more convenient for the purpose because there are only two co-sharers in the *khewat* number, the plaintiff and the defendant, and there would be no point in the defendant paying a share of ex-proprietary rent to himself. Therefore it was doubtless intended that he should pay the whole of his ex-proprietary rent to the plaintiff and that the plaintiff would accept this as his share of the profits of that portion of the *khewat* number which had been originally represented by 32 *bighas* of *sir*. Having obtained a decree for the whole amount of the ex-proprietary rent the plaintiff now claims in appeal and in second appeal that he should receive one-sixth share of the remaining amount of the 32 *bighas* which is represented by approximately 26 *bighas* of *sir*. If we acceded to his request this would mean that he would obtain a larger share of the profits of the *khewat* number than is equitable; that is, he is entitled to one-sixth share of the total profits and if his claims were allowed he would receive appreciably more as he has already obtained the whole instead of one-sixth of the ex-proprietary rent.

Some rulings were referred to in regard to cases where a co-sharer had collected more than this share of the ex-proprietary rent of a tenant, but those cases were different from the present case, because in this case the ex-proprietary tenant was not a co-sharer. In the present case the ex-proprietary tenant is not only a co-sharer but he is the sole remaining co-sharer and the sole defendant in the present case. The decree in the rent suit therefore was a decree be-

tween the present parties. Some point is raised for appellant that in that decree the defendant was sued in his capacity of a tenant and not in his capacity of a co-sharer. We do not think that makes any difference. We may also note that under s. 206 (4), Tenancy Act, it was only because the defendant had the capacity of a co-sharer and also of an ex-proprietary tenant that the plaintiff alone was entitled to sue for arrears of rent in the Revenue Court. It appears to us that the plaintiff is estopped by s. 115, Evi. Act, from altering the position which he took up in the Revenue Court in regard to the profits for the years in suit in that suit, and he claimed and obtained the whole of the *sir* rent from the defendant. Having obtained the decree on the theory that he alone was entitled to the whole of the *ex-proprietary* rent we cannot now allow him to change the allegations that he made in that suit. We therefore consider that we must hold that the plaintiff is not entitled to any share of the remainder of the original 32 *bighas sir*. Accordingly we dismiss this appeal with costs.

D.

Appeal dismissed.

RANGOON HIGH COURT

First Appeals Nos. 33 and 34 of 1939

July 28, 1939

ROBERTS, C.J.

MRS. SARAB SAUL SOFAER—APPELLANT

versus

W. M. EZEKIEL AND ANOTHER—

RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 52—Property of deceased in hands of his widow as executrix and not in her personal capacity—If can be attached in execution of decree against deceased—Decree-holder, whether must file administrative suit.

Where the widow of the deceased has property of her husband in her hands as executrix and not in her personal capacity, the property may be attached in execution of a decree against the deceased. A decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an administration suit when he desires to attach property *prima facie* in the hands of the judgment-debtor as such may not appeal to him. He may not therefore file an administrative suit.

F. A. against the orders of the High Court, in Civil Execution Cases Nos. 148 and 305 of 1937, dated March 1, 1939.

Messrs. R. Clark and C. K. Ray, for the Appellant.

Mr. E. C. N. Foucar, for the Respondents.

Judgment.—This appeal is brought

against a decree upon the Original Side of this Court holding that a house known as Murrayfields in Rangoon was attachable in execution proceedings, as forming part of the estate of the late Saul Sofaer who died in 1933, at the instance of a creditor who had obtained a decree against his widow, the present appellant, as his executrix. The short question was whether Murrayfields was part of the estate of the deceased. Mrs. Sofaer, the appellant, says it is not part of his estate now, although at the time of his death it belonged to him subject to a mortgage in favour of the Chartered Bank of India for Rs. 40,000. She called two valuers who said (and their evidence was uncontradicted) that it was worth from Rs. 30,000 to Rs. 35,000 only; and she says she sold Murrayfields for Rs. 33,000 and with a further Rs. 7,000 of her own money, she paid off the Bank. It is true that the Bank received these sums. Murrayfields does not belong to the purchaser, Mr. Meyer, any more. It belongs to Mrs. Sofaer, so she says, in her personal capacity, but she declares she has "duly applied such property of the deceased as is proved to have come into her possession" within the meaning of s. 52, Civil P. C. It does not remain any longer in the possession of the judgment-debtor, that is, in her possession as executrix; but it is in her personal possession. When she sold it to Mr. Meyer there was a covenant for re-purchase by her in her personal capacity. She says that it is no part of her husband's estate but is her own property, because she re-purchased it from Mr. Meyer and because the Chartered Bank was paid off.

Now the simple question is whether this is true. Was the bank paid off out of the proceeds of the sale of Murrayfields by her as executrix? And to decide this it is necessary to see what account is given by her. She says she sold Murrayfields to Mr. Meyer for Rs. 33,000. She had to raise Rs. 20,000 by mortgaging the property to a Mr. Jamnadas and he paid altogether Rs. 13,000 out of his own pocket in addition. Rupees 2,000 was paid by way of earnest, and the remainder was drawn by him from his account with the Imperial Bank, and the cheque for Rs. 11,000 is produced, showing that he did draw such a sum just prior to the date. Some criticism has been directed to the estate of Mr. Meyer's bank account and it has been said that the operations upon it do not lend conviction to the assurance that he really paid this money as part of a genuine transaction with Mrs. Sofaer:

In *Weir v. McVicar & Co.* (5) it was held: "Where in an action against a firm, a person who has been served as a partner enters an appearance under protest, denying the partnership, under O. XLVIII (a), r. 7, such person cannot also deny the liability of the firm, and therefore the Court has no jurisdiction to direct an issue to try the question of partnership before the trial of the action."

In *International Caoutchouc Compagnie v. Mehta & Co.* (6), Buckland, J. held that:

"In a suit against a firm a person who, being served as a partner, enters appearance under protest denying that he is a partner in accordance with the provisions of O. XXX, r. 8, Civil P. O., is not entitled to file a written statement on his own behalf denying that he is a partner."

Reliance was placed by the learned Judge on the decisions in *Ellis v. Wadeson* (3) and *Weir v. McVicar & Co.* (5) and the decision of the Bombay High Court in the case of *Cherry v. Pohoomal Bros.* (7). Mr. Lulla next proceeded to deal with the application of O. XXXVII, Civil P. O., on the provisions with regard to suits against firms in O. XXX, Civil P. O. He contended that the provisions of the Summary Chapter do not in fact affect the provisions of O. XXX dealing with suits against firms. If in a suit against a firm under O. XXXVII leave to defend was refused the decree would be against the firm. If several partners were served and leave to defend was refused to them all the only decree that could be passed would be one against the firm. When the only defence which it was open to partners served in a suit against a firm was a defence by the firm against the action, it would be seldom that leave could be granted to one and refused to another. But even if such were the case no decree could be passed against the individual partner to whom leave had been refused. The decree after the plaintiff had beaten down all defences would still be a decree against the firm. An individual served as a partner denying that he was a partner could not be heard and could not be given leave to defend, the question of whether he was or was not a partner being one to be determined in execution proceedings under O. XXI, r. 50, Civil P. O. The learned Advocate relied on the case in *Cherry v. Pohoomal Bros.* (7), where Macleod, O. J. states:

"A difficulty however arises where a suit is filed against a firm under the provisions of O. XXXVII, which differ from the provisions in the rules of the supreme Court relating to summary suit

(5) (1925) 2 K B 127; 94 L J K B 786; 133 L T 428.

(6) 54 O 1057; 105 Ind. Cas. 356; A I R 1927 Cal. 758; 31 O W N 1004.

(7) 50 B 665; 99 Ind. Cas. 495; A I R 1926 Bom. 585; 28 Bom. L R 1275.

when the applicant took out the summons in this case (for leave to appear and defend, or, in the alternative for leave to appear and contest the allegation that he was a partner), it was probably necessary for him to apply for leave under O. XXXVII, r. 2, before his appearance under protest could be filed, and that could be the only question for the Judge to decide. The plaintiff might have allowed the appearance to be filed and then disregarded it as I have already pointed out or he might have asked the Judge to direct the trial of an issue as to whether the applicant was or was not a partner at the time the cause of action accrued. If that issue were decided against him, there would be no good service against the firm. If he succeeded then his summons would have been properly served and it would be only after that question had been settled that it would be possible to consider the question whether leave to defend should be granted. In any event the defendant entering an appearance under protest could not be entitled to ask for the trial of an issue whether he was a partner."

He also relied on the case in *Satya Charan Dey v. Calcutta Hardware and Engineering Co.* (8), where it was held that:

"Ordinarily in a suit against a firm each partner has a right to come in and defend. He has an individual right to come in and defend although he defends on behalf of the firm. Each partner may file separate defences, one admitting and the other denying the claim."

Amir Ali, J., has in this case relied on the case in *Ellis v. Wadeson* (3) and the case in *International Caoutchouc Compagnie v. Mehta & Co.* (6). It was held further by Amir Ali, J. in this case that:

"In a suit brought against a firm under O. XXXVII, Civil P. O., each partner has a right to apply for leave to defend."

Finally Mr. Lulla referred to the judgment of a single Judge of this Court in *Chotumal Bulchand v. Alibhoy Mamooji* (9) and to the case in *Topanmal Somjimal v. Asudamal Fatehchand* (10). He contended that the view of Taybji, A. J. O. in *Chotumal Bulchand v. Alibhoy Mamooji* (9) was erroneous. This would appear to be so from the judgment of the Bombay High Court in *Cherry v. Pohoomal Bros.* (7) and *Topanmal Somjimal v. Asudamal Fatehchand* (10) was of no assistance to the other side because the ground on which the High Court did not interfere with the decision of Rupchand, J. was that the appeal before them was a matter of form rather than of substance; a certain procedure had rightly or wrongly been adopted by the trial Court, but substantial justice had been done, and there was no reason to invalidate proceedings on what was more a matter of form than of substance.

(8) 42 O W N 820.

(9) A I R 1926 Sind 154; 93 Ind. Cas. 380.

(10) 30 S L R 296; 165 Ind. Cas. 907; A I R 1936 Sind 208; 9 R S 111.

In my opinion the legal position set out by the learned Advocate is fully supported by authority. But valuable though his arguments may be in a suit brought in proper form against a firm under the provisions of the Summary Chapter, and though these arguments will be a useful guide in suits of that nature, in the present case the arguments have in my opinion largely an academic interest, for, I am definitely of the view that this is not a suit brought against a firm simpliciter in the manner contemplated by O. XXX, Civil P. C. It is a suit brought against the firm and the individual partners in the firm of the National Tiles Co. Individual partners may be sued personally along with the firm as was held in *Taylor v. Collier & Co.* (11). I have sufficiently indicated my reasons for this view in the earlier part of this order. The plaint is not in the form prescribed in Appendix A to the Civil P. C. for a suit under the provisions of O. XXX, Civil P. C. The individual partners are mentioned and described in the heading of the plaint. The summonses issued were to the individual partners, as defendants Nos. 1, 2 and 3 individually the applications for leave to defend put in by Sugnichand, Fatehchand and Kanayalal were put in as applications by defendants Nos. 1, 2 and 3. None of the arguments which have now been addressed to me were placed before me on December 8, or appear to have at all been in the minds of the learned Advocates who represent the defendants. I feel myself therefore justified in holding that this is not a suit filed against a firm only in the manner prescribed by O. XXX, Civil P. C. I have been referred to the case in *Premchand Ganomal v. Newandmal Bherumal* (12). All that was decided in that case was that where a suit is brought against a firm "by its managing partner" it cannot be said to be against the managing partner personally. The proposition of law may be perfectly sound and I have no quarrel with it. But a case very much more in point is that in *Ajitsing Manibhai v. Grunning & Co.* (13) where Macleod, C. J. indicates what is the proper heading of a plaint in a suit against a firm under the provisions of O. XXX, Civil P. C.

"To such a case the proper title of the defendants

(11) (1882) 51 L J Ch. 853; 30 W R 701.

(12) A I R 1931 Sind 121; 134 Ind. Cas. 397; 25 S L R 104; Ind. Rul. (1931) Sind 141.

(13) A I R 1925 Bom. 494; 24 Ind. Cas. 969; 27 Bom. L R 998.

is: A B a firm carrying on business in partnership at"

The pleadings and procedure adopted in that case were very similar to what we have in the present case. A decree had been passed against the firm and against an individual partner. The High Court refused to interfere and merely pointed out the correct procedure to be adopted if a plaintiff seeks to sue partners in the name of their firm under the provisions of O. XXX, Civil P. C. In this view of the case I think that my order of December 8, 1938, needs reconsideration in one respect only. A decree has rightly been passed against Fatehchand Asudomal, and a similar decree must now be passed against Kanayalal Talreja. But as both Fatehchand and Kanayalal were admittedly partners in the firm of the National Tiles and the firm was a defendant in the suit and had been properly served, there must be a decree against the firm as well. I accordingly order that the decree passed against Fatehchand Asudomal and dated December 8, 1938 be amended so as to be a decree against the firm of the National Tiles and against Fatehchand Asudomal and Kanayalal Talreja bearing to-day's date. Sugnichand Dayaram has been granted leave to defend and there appears to be no reason to disturb the order in that regard.

S.

Decree amended.

MADRAS HIGH COURT

Second Appeal No. 512 of 1936

August 2, 1939

PATANJALI SASTRI, J.

ALAGIRI CHETTY AND ANOTHER—

APPELLANTS

versus

MUTHUSWAMI CHETTY AND OTHERS—

RESPONDENTS

Limitation Act (IX of 1908), Art. 141— On death of widow, person having no title to property obtaining possession — Person subsequently becoming entitled to share in property along with reversioner— Character of possession, if changes — Suit by reversioner for possession more than 12 years from widow's death is barred — License — Nature of—If elapses with death of licensor.

Where on the death of a widow, a person who has no title to the property has been in possession thereof, the character of his possession is not changed by his subsequently becoming entitled to a share in the property along with the reversioner. His accrual of a right to a share in the property does not affect the previous possession and arrest the course of limitation under Art. 141. A suit therefore, by the reversioner for possession, brought more than 12 years after the death of the widow is barred under Art. 141. [p. 380, col. 2.]

[Case-law discussed.]

A license does not create an interest in the land as it is merely leave to do a thing lawfully which otherwise would be unlawful and it is thus a matter purely personal between the grantor and the grantee of the license. Such license must be held to have elapsed with the death of the licensor. 131 Ind. Cas. 175 (9), relied on. [p. 380, col. 1.]

S. A. against the decree of the Sub-Judge, Salem, dated December 7, 1935.

Mr. B. Sitarama Rao, for the Appellants.
Mr. K. Desikachari, for the Respondents.

Judgment—The suit out of which this appeal arises was brought for partition and separate possession of the appellant's share of a certain house in Salem Town of which this appeal is concerned only with the eastern portion measuring 10 *ankanams* which is hereinafter referred to as the house. The facts so far as they are material for the determination of this appeal are briefly these: The house belonged to one Servaraya Chetti who died some time before 1891 leaving him surviving his widow Minakshi who died in that year. At the time of her death the nearest reversionary heir was one Alagiri Chetti who was the elder brother of Servaraya Chetti and the paternal grandfather of the present appellants. Alagiri Chetti died in 1900 leaving behind five sons of whom respondent No. 1 herein who has throughout been in occupation of the house is one.

The appellant's case was that Minakshi left a registered will by which she devised the house to the five sons of Alagiri Chetti in equal shares of which the appellants claim two shares in the right of their deceased fathers Annaswami and Kandaswami. As already stated, respondent No. 1 is one of the sons of Alagiri Chetti and respondents Nos. 2 to 8 are his descendants. The case of these respondents was that Servaraya Chetti having no issue brought up respondent No. 1's wife as his foster-daughter and made an oral gift of the house to her on the occasion of her marriage and that since then respondent No. 1 and his wife and their descendants have been in continuous possession and enjoyment of the house. Both the Courts below have found that the gift alleged by the respondents was not proved and that the will set up by the appellants was inoperative as Minakshi had no power under the Hindu Law to effect any testamentary disposition of her husband's property. These findings are clearly right and are not attacked in this appeal. But

the trial Court further held that, notwithstanding the failure of their title under the will, the appellants, as representing two of the sons of Alagiri Chetti who succeeded to the house on the death of Minakshi, were entitled to two out of the five shares in which the house devolved on his sons at his death and that the long possession and enjoyment pleaded by respondent No. 1 and his descendants was of no avail to them, as it could not have been adverse to the appellants, respondent No. 1 having been a co-owner of the house with the other sons of Alagiri Chetti after the latter's death.

The learned Subordinate Judge disagreed with this view. He found that respondents Nos. 1 to 8 had been in possession of the house for over 40 years and that such possession and enjoyment existed even during the lifetime of Alagiri Chetti when respondent No. 1 had no title whatever to the property. He held that the fact that respondent No. 1 became a co-owner along with his brothers after Alagiri's death could not change the nature of his possession and that therefore the respondents had acquired title to the house by adverse possession and the appellants' suit was barred by limitation.

Mr. Sitarama Rao, the learned Counsel for the appellants, attacked this finding before me and contended that the gift put forward by the respondents having been found against their possession and enjoyment of the house till Minakshi's death must be deemed to have been only permissive, and the respondents not having shown that they were in possession after her death in assertion of a right inconsistent with that of Alagiri, the permissive character of their possession must be deemed to have continued throughout, with the result that there could be no acquisition of title by the respondents by adverse possession. I cannot accede to this contention. It is no doubt true that the lower Appellate Court based its decision upon the "adverse possession" of the respondents during the long period they had been occupying the house, thus presumably applying Art. 144, Lim. Act, to the facts of this case; but the proper Article applicable is clearly Art. 141 and not Art. 144, and therefore it seems to me, no question of adverse possession really arises. Minakshi having died in 1891 and there being nothing to show that Alagiri Chetti who was then entitled to succeed to the property ever took possession or assumed any kind of dominion or control of the house or permitted respondent No. 1 and

his descendants to continue in occupation thereof, time commenced to run in 1891 under Art. 141, and a suit brought by Alagiri or his heirs more than 12 years thereafter would stand barred and their title would, by the operation of s. 23 of the Act, be extinguished. Mr. Sitarama Rao indeed conceded at a later stage of his argument, that the proper Article applicable was Art. 141 and that no question of adverse possession really arose. But he somewhat changed his ground and contended that once the gift put forward by the respondents was found against, they must be regarded as having lived in the house as mere guests, at any rate till Minakshi died, and thereafter their occupation cannot be regarded as legal possession at all so as to put Alagiri and his heirs to their action. In other words, time did not commence to run against Alagiri, for though he was not in actual occupation, he was in legal possession and there was no one against whom he could bring an action. For this contention, Mr. Sitarama Rao strongly relied on *Trustees Executors and Agency Ltd. v. Short* (1). Alternatively, Mr. Sitarama Rao also urged that even assuming that time commenced to run against Alagiri under Art. 141, on Alagiri's death in 1900 before the expiry of the period of 12 years limited by that Article, respondent No. 1 became a co-owner of the house with his brothers including the fathers of the appellants, and this changed the character of the respondent's possession which must thereafter be ascribed to such co-ownership. In support of this contention, reliance was placed upon a decision of this Court in *Velayutham v. Subbaroya Pillai* (2).

I find it difficult to accede to either of these contentions. In the first place, it is highly doubtful whether respondent No. 1 could be said to have been in permissive possession during the lifetime of Servaraya or his widow Minakshi for these were living in the same house. Respondent No. 1 was in the house as a mere guest and it cannot be said that he was in any sense of the term in possession of the house even permissively. It was only after Minakshi's death in 1891 that respondent No. 1's possession of the house could be said to have begun and there is absolutely nothing in the case to show that such

possession arose with the consent or permission of Alagiri who then succeeded to the property. Mr. Sitarama Rao urged that this was a natural inference having regard to the relationship of respondent No. 1 to Alagiri. But the lower Appellate Court has, in all the circumstances refused to draw that inference of fact and indeed went further and found that respondent No. 1's possession was even adverse to Alagiri. It seems to me therefore that there is no scope here for the application of the proposition contended for by Mr. Sitarama Rao that occupation with the consent or permission of the owner does not amount to any legal possession at all. In this connection the English case in *Mayor of Brighton v. Guardians of Brighton* (3), is instructive. There to an action in ejectment brought in 1879 on behalf of the Brighton Corporation the defendants who had been allowed in 1853 by the predecessors-in-title of the Corporation to occupy some of their buildings pleaded the Statute of Limitations. The Court upheld the plea and observed at p. 374*:

"It was contended that the defendants were mere licensees and had no possession of the premises, the possession remaining in the plaintiffs. We cannot accede to that contention and think that it is disproved by the facts. It is admitted that the defendants had the exclusive use of the offices and that they never paid any rent nor gave any acknowledgment in writing. How it can be said in these circumstances that the possession remained in the plaintiffs we are at a loss to understand."

These observations aptly apply to the contention of the learned Counsel for the appellants. It is no doubt true that the plaintiffs in that case asked for an acknowledgment in 1863 and it was refused but it is significant that the defendants were considered to have been in possession ever since 1853 (see the concluding passage at p. 375*). As stated already, Mr. Sitarama Rao placed reliance upon *Trustees Executors and Agency Ltd. v. Short* (1). The principle laid down there was that it is not sufficient for the purpose of the Statute of Limitations that the rightful owner has been out of possession but it is also necessary actual possession should have been held by a stranger in favour of whom the statute can operate. If respondent No. 1 is to be treated as, in my view, he should be, as having held possession throughout, the decision can obviously have no application here. On the other hand, the quotation from the judgment of Baron Parke in *Smith*

(1) (1888) 13 A C 793; 58 L J P C 4; 59 LT 677; 53 J P 132; 37 WR 433.

(2) 39 M 879; 31 Ind. Cas. 398; A I R 1916 Mad. 139; 2 L W 289; 18 MLT 424; (1915) M W N 873.

(3) 5 O P D 368.

*Pages of 5 O. P. D.—[Ed.]

v. Lloyd (4) at p. 793* tends to support the respondent's contention that no adverse possession is necessary in such cases. That learned Judge observed :

"There must be both absence of possession by the person who has the right, and actual possession by another, *whether adverse or not*, to be protected to bring the case within the statute, (the italics are mine.)"

It is worthy of note that the starting point under the English statute is the accrual of the right of action, the same as under Art. 141, Lim. Act, though differently expressed. The decision of the Privy Council reported in *Lim. Charlie v. Official Receiver* (5) was also relied on. There one Lim Chin Tsong bought a house and allowed his mistress to live therein for more than 12 years during his lifetime. A gift to her was put forward but was found against. Lim Chin Tsong himself had all along been paying the rents and taxes and also making the necessary repairs. In a suit brought by the Receiver of his estate about three years after his death to recover possession of the house, the question arose whether the possession of the mistress was adverse to Lim Chin Tsong, and their Lordships held that there was no evidence on which it could properly be held that she was possessing the property in a manner adverse to the continuance of the title in Lim Chin Tsong. I do not see how this decision supports the contention of the appellant in this case where, as already stated, there is nothing to show that Alagiri ever did any proprietary act in respect of the house, and, *ex concessi*, no question of adverse possession arises.

Mr. Sitarama Rao also cited *Gobind Lal Seal v. Debendranath Mullick* (6). There one Hira Lal Seal who was the owner of a house and the predecessor-in-title of the plaintiff allowed the defendant's predecessor to occupy the house and the question arose whether Art. 142 or Art. 144 governed the suit brought to recover possession of it. The learned Judges held that Art. 144 applied to the case, Garth, C. J. observing :

"But where the owner in the exercise of his own proprietary right permits some other person to occupy his land or to receive his rents then, whether the relation of landlord and tenant exists between the parties or not, I consider that the possession of the owner is not discontinued because

(4) (1853) 9 Ex. 562; 2 O L R 100^c; 23 L J Ex. 194; 22 LT (O S) 289; 96 RR 837.

(5) 12 R 238; 147 Ind. Cas. 328; A I R 1934 P O 67; 6-R P O 45; 11 O W N 131; 66 M L J 144; 39 L W 318; 36 Bom. L R 235; 59 O L J 91 (P O).

(6) 6 O 311; 7 O L R 181.

* Page of (1868) 13 A. C.—[Ed.]

under such circumstances the possession of the occupier is the possession of the owner."

Mr. Sitarama Rao particularly stressed the last sentence of this passage as showing that Alagiri must in this case be regarded as having been in possession of the house but, as already observed, he is not shown to have permitted respondent No. 1 to occupy the house after he became entitled to the property on Minakshi's death. This decision therefore does not support his contention. Mr. Sitarama Rao then referred me to the well-known case in *Lyell v. Kennedy* (7). There the agent of a proprietor of an estate continued to receive the rents and profits even after the death of his principal in the same manner as he did before, *i.e.* not as for himself but as agent and Receiver for the heirs of the deceased though they had not been ascertained, and the question was whether such receipt of rents dispossessed the true heirs of the deceased who brought the suit to recover the estate and for an account of the rents and profits and after the expiry of the statutory period, and it was held that there was no dispossession of the heirs under those circumstances. The Earl of Selborne observed at p. 457* :

"Lord Coke's doctrine as to the effect of entry by an unauthorized stranger on behalf of the true owner, seems to me applicable, in reason and principle, to such a receipt of rents as that of the respondent in this case down to 1880: 'If an infant, or any man of full age, have a right of entry into any lands, any stranger, in the name and to the use of the infant or man of full age, may enter into the lands; and this regularly shall vest the lands in them without any commandment precedent or agreement subsequent'."

But this doctrine on which that decision was founded cannot obviously apply to the facts of this case as respondent No. 1 is not shown to have entered into or continued in possession of the lands in the name and to the use of Alagiri and the decision therefore does not help the appellant. Mr. Sitarama Rao also placed reliance upon the decision of the Privy Council in *Ambu Nayar v. Secretary of State* (8) and particularly the passage at p. 582 of the report where their Lordships observe :

"Their Lordships think that a licensee cannot claim title only from possession however long unless it is proved that the possession was adverse to that of the licensor, to his knowledge and with his acquiescence."

(7) (1889) 14 A O 437; 59 L J Q B 268; 62 L T 77; 38 WR 353.

(8) 47 M 572 (582); 80 Ind. Cas. 635; A I R 1924 P O 150; 51 I A 257; 26 Bom. L R 639; 47 M L J 35; 20 L W 49; 35 M L T 128; (1924) M W N 572; 29 O W N 365 (P O).

* Page of (1889) 14 A O.—[Ed.]

In the first place, that was a case where the plaintiff claimed to have acquired title against the Govt. by adverse possession whereas, as already observed, there is no question of adverse possession in this case. Secondly for the reasons stated before respondent No. 1's exclusive possession of the house can be considered to have arisen only on Minakshi's death in 1891 and he is not shown to have entered under a license from Alagiri Chetti. In the third place, even assuming that defendant No. 1 had been in possession even earlier under a license from Servaraya and Minakshi, it seems to me that such license must be held to have elapsed with the death of Minakshi. A license does not create an interest in the land as it is merely leave to do a thing lawfully which otherwise would be unlawful and it is thus a matter purely personal between the grantor and the grantee of the license: see *Chinnan v. Ranjithammal* (9) where the possession after the death of a licensee by his successors was held not to be permissive but adverse.

Turning next to the alternative contention of Mr. Sitarama Rao he strongly relied in support of it upon the decision in *Velayutham v. Subbaraya Pillai* (2). That case arose out of a suit for redemption to which the contesting defendant pleaded the bar of limitation under Art. 134, Lim. Act, by reason of his having been in possession for more than 12 years before the suit under a sale from the mortgagee. It was however found that within 12 years from the date of the purchase, the plaintiff and the contesting defendant became entitled to the property as co-heirs of the mortgagor and it was held that the defendant's possession thereafter was not adverse to the plaintiff "unless and until the latter was excluded notoriously." With all respect, it is somewhat difficult to understand how any question of adverse possession could arise under Art. 134, Lim. Act, or how the accrual of a right to the defendant in co-ownership with the plaintiff before the expiry of the period would arrest the running of time under that Article. In any case I cannot regard this decision as a binding precedent in view of the later decision of the Privy Council in *Varada Pillai v. Jeevarathnammal* (10). Where

(9) 54 M 554; 131 Ind. Cas. 175; A I R 1931 Mad. 216; 60 M L J 709; (1930) M W N 1242; 33 L W 455; Ind. Rul. (1931) Mad. 511.

(10) 43 M 244; 53 Ind. Cas. 201; A I R 1919 P C 44; 46 I A 285; (1919) M W N 724; 10 L W 679; 24 C W N 346; 38 M L J 313; 18 A L J 274 (P C).

their Lordships definitely held that the adverse character of the possession held by a person was not changed by reason of that person subsequently becoming entitled to a share in the property. Mr. Sitarama Rao sought to distinguish that case by pointing out that the question of adverse possession did not arise in that case with reference to the possession of the share to which the person in adverse possession of the whole property became entitled as co-owner. I am however unable to see how that circumstance makes any difference in the principle of the decision or excludes the application of that principle to the present case. The person in possession there had been in enjoyment of the whole property like respondent No. 1 here. Later on, she became entitled to an undivided half-share in that property under a right of succession and their Lordships held that there was no reason for holding that when she became legally entitled to a moiety of the property the character of her possession in respect of the other moiety was changed. The position, in my judgment, is essentially the same in the present case. Respondent No. 1 having been in possession of the whole house became legally entitled to an undivided fifth share thereof. In both the cases, the person in possession without a title became entitled to an undivided share in the property and if the accrual of a right to a moiety in the case before their Lordships could not change the character of the possession held and stop the running of time in its favour under Art. 144, why should the accrual of a right to a fifth share in the suit house to respondent No. 1 on Alagiri's death affect his previous possession and arrest the course of limitation under Art. 141? Following this decision of the Privy Council I disallow this contention also. In the result the appeal fails and should be dismissed with costs. Leave granted.

N.-s.

Appeal dismissed.

RANGOON HIGH COURT

First Appeal No. 46 of 1939

July 12, 1939

DUNKLEY AND WRIGHT, J.J.

MAUNG PO SEIK—APPELLANT

versus

MA PWA TIN—RESPONDENT

Civil Procedure Code (Act V of 1908), O. II, r. 2—
Two suits for divorce one by husband against wife on ground of her adultery and other by wife against husband on ground of cruelty—Court without going

into merits and without going into alleged misconduct of wife decreeing both suits, with a note that this would not prejudice parties regarding subsequent suit in connection with marriage property—Subsequent suit by wife for partition and possession of joint property of marriage—Note by Judge in divorce suit, effect of—Husband, if debarred from proving misconduct on part of wife.

Husband instituted a suit against his wife for divorce on the ground of her adultery. The wife brought a suit for divorce in the same Court against her husband on the ground of cruelty. The Judge without going into the merits gave two decrees for divorce. He made a note to the effect that this would not prejudice the parties with regard to anything that they might desire to establish in a subsequent suit in connection with the property of the marriage. Subsequently the wife brought a suit against her husband for partition and separate possession of the joint property of the marriage:

Held, that the note of the Judge in the divorce suit would be of no effect on the rights of the parties regarding marriage property. 91 Ind. Cas. 20 (2), relied on.

Held, also that in the divorce suit although the husband did not insist upon proving his wife's guilt to obtain a divorce, he was not debarred from raising this point in a subsequent suit where the property of the marriage was involved. It was open to him to prove misconduct on the wife's part which would disentitle her from obtaining any of the joint property. 11 Ind. Cas. 497 (3), relied on.

F. A. against the decree of the District Court, Henzada, dated January 12, 1939.

Mr. U E Maung, for the Appellant.

Mr. U Hla Tun Pru, for the Respondent.

Wright, J.—Maung Po Seik and Ma Pwa Tin, the parties to this appeal were husband and wife. In 1936 Maung Po Seik prosecuted one Maung Shwe Hla for committing adultery with his wife Ma Pwa Tin and Maung Shwe Hla was convicted. On January 9, 1937, Maung Po Seik instituted Civil Regular Suit No. 1 of 1937 in the Township Court of Kyangin against his wife Ma Pwa Tin for divorce on the ground of her adultery with Maung Shwe Hla. On February 17, 1937 Ma Pwa Tin, in Civil Regular Suit No. 9 of 1937 of the Township Court of Kyangin, brought a suit for divorce against Maung Po Seik on the ground of cruelty. The Township Judge without going into the merits gave two decrees for divorce. He wrote a very short judgment in Civil Regular Suit No. 1 of 1937 stating that both parties wanted a divorce, the one party alleging misconduct and the other party cruelty, and so he stated that it would be a mere waste of time to enquire into the alleged misconduct. He therefore decreed both suits. He made a note to the effect that this would not prejudice the parties with regard to anything that they might desire to establish in a sub-

sequent suit in connection with the property of the marriage. No appeals were filed against either of these decrees. On April 7, 1937 Maung Po Seik, in Civil Regular Suit No. 3 of 1937 of the District Court of Henzada, brought a suit against Ma Pwa Tin for a declaration that he was entitled to certain properties, the properties of the marriage, which were in his possession. Various defences were raised in that suit but it was dismissed as being unmaintainable because it was based upon allegations of adultery and not upon the decrees for divorce. No appeal was filed against this decree. Ma Pwa Tin, on April 7, 1938, in Civil Regular No. 3 of 1938 of the District Court of Henzada, instituted the suit out of which this appeal arises against Maung Seik (Maung Po Seik) for partition and separate possession of the joint property of the marriage. She based her suit upon the two decrees for divorce which were passed in Civil Regular Suits Nos. 1 and 9 of 1937 of the Township Court of Kyangin. She contended that these decrees were decrees for divorce "as by mutual consent" and that she was entitled to a half share in the property jointly owned and acquired by her husband and herself during their marriage. Maung Po Seik in his written statement took various defences including those raised in paras. 2 and 3 reproduced below:

"(2) That regarding para. 2 of the plaint, the defendant submits that the decree passed by the Township Judge, Kyangin, in Civil Regular Suit Nos. 1 and 9 of 1937 is not a decree for divorce by mutual consent. That each party made counter-allegations of matrimonial misconduct and cruelty in seeking for divorce so as to forfeit his or her right in the properties but the Court passed a judgment for divorce without prejudice to what each party may have to prove in the suit that may be filed for recovery of properties. That plaintiff being the consenting party is bound by the terms of the judgment. (3) That regarding para. 3 of the plaint, defendant submits that according to the express terms of the judgment plaintiff's right in the properties remained to be determined by legal proof in this suit for partition and that plaintiff having committed adultery she is not entitled to any share in the properties owned and possessed by the defendant."

The plaintiff in her rejoinder contended that any issue with regard to matrimonial misconduct would be immaterial and irrelevant because a divorce had already been decreed between the parties. A further contention was raised in her rejoinder that a defence of this kind was *res judicata* by reason of the decision in Civil Regular No. 3 of 1937 of the District Court. The learned District Judge held that the suit was not barred by *res judicata*,

but that the decrees for divorce which had been granted to the parties must be deemed to be "as by mutual consent" as it was not open to the defendant to raise the contention that Ma Pwa Tin was not entitled to any property on the ground of her misconduct. After going into the facts on other points the District Court proceeded to pass a preliminary decree for partition and accounts. Against this decree Po Seik appeals. U E Maung, on behalf of the appellant, contends that the decrees of the Township Court in Civil Regular Nos. 1 and 9 of 1937 should not be deemed to have granted divorce as by mutual consent and in fact this point was left open. He states further that the appellant should be allowed to prove the misconduct of Ma Pwa Tin and that no bar of *res judicata* arises by reason of the decision in Civil Regular Suit No. 3 of 1937 of the District Court. U Hla Tun Pru, on behalf of the respondent, urges that the decisions of the Township Court are final and that the decrees must be deemed to have granted divorce "as by mutual consent" because only three kinds of divorce are known to Burmese Buddhist Law and the only one which could possibly be applicable would be "as by mutual consent." He argues that the nature of the divorce cannot now be questioned and that in any case the point sought to be raised is barred by *res judicata* by virtue of the decision in Civil Regular No. 3 of 1937 of the District Court.

It is abundantly clear from the judgment of the Township Judge in Civil Regular No. 1 of 1937 that he did not consider the alleged misconduct and did not intend to grant a divorce on this ground. He granted a divorce because he thought that both the parties wished to put an end to the relationship of husband and wife. If the decrees themselves are to be strictly construed with reference to the pleadings, it would seem that in Civil Regular No. 1 of 1937 he decreed the divorce on the ground of misconduct alleged by Maung Seik and in Suit No. 9 decreed that divorce on the ground of cruelty alleged by Ma Pwa Tin. If such a view is taken then the decrees appear to be contradictory. We are of opinion from the judgments and decrees of the Township Court that the Court merely decreed a divorce, without any determination as to the allegations of misconduct or cruelty made by the parties. U Hla Tun Pru on behalf of the respondent strenuously contends that the divorce must be deemed to have been one "as by

mutual consent." He draws our attention to the case in *Maung Nga v. Ma Pyu* (1) where the various kinds of divorce are set out. The learned Judicial Commissioner stated that there were three kinds of divorce *firstly* for gross misconduct; *secondly* by mutual consent or as by mutual consent; and *thirdly* on the petition of one party without any grounds except the desire of the petitioner for divorce and without any fault or consent on the part of the other party. U Hla Tun Pru urges that as this divorce was certainly not of the first or third kind it must be deemed to have been of the second kind. In view of what we have stated above this argument does not commend itself to us, as it is clear that the divorce was not in fact founded on mutual consent and the Township Judge did not say that the divorce was "as by mutual consent". The learned Advocate for the respondent contends that the portion of the Township Judge's judgment where he says that the suit is decreed without prejudice to what each party may have to prove in a subsequent case will be of no effect and he relies upon the case in *Fateh Singh v. Jagannath Bakhsh Singh* (2). It is rightly conceded by the other side that what the Township Judge may have stated in this connexion will not affect the actual legal position.

The next question is whether the appellant can, in view of the previous litigation, be allowed to prove the misconduct, which he alleges on the part of Ma Pwa Tin, which would disentitle her from obtaining any of the joint property. We think that this point must be decided in accordance with the principles laid down by their Lordships of the Privy Council in *Maung Pe v. Ma Lon Ma Gale* (3). There the facts appear to have been as follows: Maung Pe had originally sued for a decree for divorce on the ground that his wife had committed an offence which entitled him to divorce her. Lon Ma Gale denied that she had committed any matrimonial or other offence, but said that as the plaintiff claimed only a divorce she was willing to be divorced and a decree was passed granting Maung Pe a divorce with costs. In a subsequent

(1) 3 U B R (1920) 251; 59 Ind. Cas. 1005; A I R 1920 U B 25.

(2) 52 I A 100; 91 Ind. Cas. 280; A I R 1925 P O 55; 47 A 158; 27 O O 33; 48 M L J 64; 2 O W N 25; 12 O L J 117; L R 6 A (P O) 50; 27 Bom. L R 725; 29 C W N 749; 23 A L J 739; 25 L W 58.

(3) 6 L B R 18; 11 Ind. Cas. 497; 38 O 629; 38 I A 140; 15 O W N 766; 8 A L J 739; 13 Bom. L R 464; 14 O L J 15; (1911) 2 M W N 397; 4 Bur. L T 153; 10 M L T 479 (P O).

suit between the parties in connexion with the property of the marriage the District Judge, in appeal, found that the divorce was not by mutual consent, but that the plaintiff had obtained a divorce from the defendant in the Township Court in a suit based on fault. Lon Ma Gale filed an appeal in the Chief Court of Lower Burma and in appeal, *Lon Ma Gale v. Maung Pe* (4) a Bench decided that the second suit was barred by the provisions of s. 43, Civil P. O. of 1882, and allowed the appeal. The case was taken up on appeal to the Privy Council. Their Lordships set aside the judgment of the Bench of the Chief Court of Lower Burma and restored the decree of the District Court. The following passages appear in their Lordships' judgment:

"The first point in dispute is whether the divorce was by mutual consent, or was granted on the fault of the wife. The husband filed his claim in January 1907. In it he set forth the respondent's alleged offence and he prayed for his decree on that ground alone. That respondent thereupon filed her defence denying the allegations as to her misconduct and asking that the suit be dismissed with costs. Witnesses were summoned, but on the day fixed for hearing the respondent abandoned her defence and, although continuing to deny her guilt, consented to a divorce judgment, was thereupon given on June 6, 1907 for a decree 'as prayed for.'"

"Afterwards, in August 1907, the appellant brought the present action for the recovery of his property which he alleged his divorced wife still fraudulently kept in her possession, and for a partition of their joint property. The shares to which the parties would be respectively entitled under the partition would vary according to whether the divorce had been granted on the ground of a matrimonial offence or had been arranged by consent, and the respondent contended that under the circumstances above stated the divorce had been by consent and had not been granted by reason of her fault. The District Judge found in favour of the appellant on this point, but the Chief Court has cast some doubt upon that finding, although in view of their decision on another point in the case which is dealt with later on, they did not think it necessary to discuss it fully. Their Lordships however think it desirable to state that they agree with the judgment of the District Judge on this point. Although the respondent at the last moment abandoned her defence and consented to the decree, she certainly ought not to be put in the position of an innocent wife who has contracted for a divorce on an equal footing with her husband. If she had invited her husband to enter into such an agreement before he began his action he would have been at liberty to refuse and to have insisted upon a decree establishing her guilt, in order to determine the basis upon which the subsequent partition took place, and he was certainly placed in no worse a position by the fact that he was obliged to bring the action in order to secure relief.

The proceedings at law disclose not an agreement between husband and wife, but a claim by the

husband on a specific ground to which the wife in effect submitted."

It will be seen therefore that the facts of the case before us are extremely similar to the facts of the case before their Lordships of the Privy Council and, in view of their judgment, we are bound to hold that, although Maung Po Seik did not insist upon proving his wife's guilt to obtain a divorce, he is not now debarred from raising this point in a subsequent suit where the property of the marriage is involved. U Hla Tun Pru on behalf of the respondent suggests—although he does not elaborate the point—that the suit out of which the present appeal arises is in fact barred by *res judicata* by reason of the decision in Civil Regular No. 3 of 1937 of the District Court. The learned District Judge was of the opinion that the present suit was not barred by reason of Civil Regular No. 3 of 1937, because in the former suit the decision in connexion with the divorce being deemed to be "as by mutual consent" was *obiter*. It seems to us that this decision was correct because Civil Regular No. 3 of 1937 was dismissed on the ground that it was not maintainable because it was based upon the acts of adultery and not upon divorce. For these reasons, this appeal must be allowed. We set aside the judgment and decree of the District Court, and under O. XLI, r. 23 direct that the suit be re-admitted under its original number and determined upon its merits; the defence of the defendant as to his wife's misconduct being considered. Costs of this appeal, Advocate's fee ten gold *mohurs*, to be costs in the suit as ultimately decided. The usual certificate for the refund of court-fees paid in this appeal will issue under s. 13, Court Fees Act.

D.

Appeal allowed.

ALLAHABAD HIGH COURT

First Appeal No. 129 of 1938

September 19, 1939

ISMAIL, J.

MOHAMMAD ASGAR ALI AND OTHERS—
DEFENDANTS—APPELLANTS

versus

Sh. MOHAMMAD ISHAQ ALI AND

ANOTHER—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Suit, under, by creditor for declaration that property was attachable and saleable in execution of his decree and that sale by judgment-debtor was void—Whether must be in form of representative suit.

There is no statutory provision to prevent a creditor from instituting, a suit under O. XXI, r. 63, Civil P. C., only on his own behalf for a

(4) 5 L B R 114; 4 Ind. Cas. 306.

declaration that the property in suit was attachable and saleable in execution of his decree and that the sale-deeds executed by judgment-debtor were ineffectual and void as far as the decrees in favour of the plaintiff were concerned. It is not necessary for the plaintiff to bring a representative suit on behalf of or for the benefit of all the creditors. [Case-law relied on.]

F. A. from an order of the Civil Judge, Budaun, dated January 21, 1938.

Mr. Baleshwari Prasad, for the Appellants.

Mr. Inam-ullah, for the Respondents.

Judgment.— This is a defendant's appeal arising out of a suit brought for a declaration that the property described in the plaint was attachable and saleable in execution of decree No. 252 of 1928 and that the plaintiff was entitled to get rateable distribution out of the sale proceeds under other decrees in his favour. A declaration was prayed for that the two sale-deeds of February 22, 1934 executed by Hamid Ali in favour of Asgar Ali and others were ineffectual and void as far as the decrees in favour of the plaintiff were concerned. The suit was resisted by the defendant *inter alia* on the ground that the suit as framed was not maintainable inasmuch as it was not a representative suit on behalf of or for the benefit of all the creditors. The trial Court dismissed the suit on the preliminary ground that the suit as framed was not maintainable. The lower Appellate Court however took a contrary view and held that this was a suit under O. XXI, r. 63, Civil P. C., and the reliefs claimed could be given in the present suit. Learned Counsel for the appellant has reiterated the objection taken on behalf of his client in the Courts below. It is contended that if the suit were limited to the relief that the sale-deeds in question were fictitious the plaintiff alone could bring the suit on his own behalf. On the other hand if the plaintiff pleaded that the sale-deed was fraudulent and was executed with the intention to defeat and delay the creditors it would come within the purview of s. 53, T. P. Act, and a representative suit would have to be instituted. It is contended that on the allegations in the plaint the present suit comes within the purview of s. 53, T. P. Act, and was rightly dismissed by the trial Court.

In the body of the plaint the plaintiff has set out the facts on which the suit is founded. In para. 6 it is stated that

the plaintiff had warned defendants Nos. 1-8 (vendees) that the defendant No. 9 (vendor) was liable under several decrees in favour of the plaintiff; that the defendants (vendees) dishonestly and with full knowledge of facts obtained two sale-deeds in their favour. There is no mention whatsoever in the body of the judgment that the transfers are null and void as against other creditors. Rule 63, O. XXI of the Code provides that:

"Where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute...."

This suit, as the plaint discloses, is instituted merely to establish the right of the plaintiff and has no concern whatsoever with the possible claims which other creditors may have against the judgment-debtor. I fail to see why the suit as framed is not maintainable. In my judgment it was not necessary for the plaintiff on the facts alleged to bring a representative suit on behalf of or for the benefit of all the creditors. Learned Counsel has referred to the case in *Chidambaram Chettiar v. R. M. A. R. S. Firm* (1) in which Dunkley, J. held:

"When a suit is brought under the provisions of O. XXI, r. 63 by an attaching creditor to establish his right to attach and bring to sale certain property and in order to succeed it is necessary to avoid a transfer of property on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor the suit must be brought in the form of a representative suit on behalf of or for the benefit of all the creditors of the transferor as provided for in s. 53, T. P. Act."

A similar view was expressed by the same learned Judge in *Maung Tun Thein v. Maung Sin* (2). In an earlier case reported in *U Maung Nge v. P. L. S. P. Chettiar Firm* (3) a Bench of that Court of which Dunkley, J. was a member held:

"A creditor whose attachment has been raised and who avails himself of the right given by O. XXI, r. 63, can sue on his own behalf alone for having the alienation declared void, without mention of any other creditors or other debts."

In that case the plaintiff alleged that the deed of transfer was a bogus one and was brought about for the purpose of defeating or delaying the creditors. In that case an earlier ruling in *R. R. O. O. Chettiar Firm v. Ma Sein Yin* (4) was followed. The same question came up for consideration before the Bombay High Court in *Guljar*

(1) A I R 1934 Rang. 302, 152 Ind. Cas. 555; 12 R 686; 7 R Rang. 172.

(2) A I R 1934 Rang. 3.2; 153 Ind. Cas. 942; 12 R 670; 7 R Rang. 238.

(3) A I R 1934 Rang. 200; 152 Ind. Cas. 506; 7 R Rang. 161.

(4) A I R 1928 Rang. 1; 105 Ind. Cas. 982; 5 R 588.

khan v. Husen Khan Vaidkhan (5). A learned Single Judge held:

"A suit brought under O. XXI, r. 63, Civil P. C., by a judgment-creditor need not in all cases be filed on behalf of the plaintiff and all other creditors. There is no reason why the creditor should be compelled to prove that the document was made with intent to defeat and delay creditors generally if he only wants a declaration in a limited form that the transfer is void as against him....."

In *Shrimal Kasturchand v. Hira Lal Hansraj* (6) it was held:

"A judgment-creditor who has been defeated at the instance of an intervener in proceedings taken in execution of his decree need not necessarily file a representative suit under s. 53, T. P. Act."

This question was lately considered in two unreported cases in this Court. In S. A. No. 1178 of 1935 decided on December 1, 1938, the plaintiff prayed for a declaration that the suit property was attachable and saleable for the recovery of amounts due under the decree in his favour. The plaintiff's case was that the sale-deed set up by the defendant was a mere paper transaction and that no money had passed from the transferor to the transferee and that the sale-deed was entirely fictitious. It was further stated that the plaintiff was entitled to bring a suit for his own benefit and for the benefit of other creditors. The learned Judges quoted with approval the case in *Guljarkhan v. Husen Khan Vaidkhan* (5) and held that in the circumstances of the case the suit was maintainable. This case was followed in S. A. No. 1980 of 1936. In my judgment there is no statutory provision to prevent the plaintiff from instituting the present suit on his own behalf. In the result I affirm the order of the Court below and dismiss this appeal with costs.

S.

Appeal dismissed.

(5) A I R 1937 Bom. 476; 172 Ind. Cas. 165; 39 Bom. L R 917; 10 R B 253 (1).

(6) A I R 1938 Bom. 289; 175 Ind. Cas. 843; 11 R. (1938) Bom. 445; 40 Bom L R 371; 11 R B 7.

LAHORE HIGH COURT

First Appeal No. 434 of 1938

November 23, 1939

YOUNG, C. J. AND TEK CHAND, J.
BEOPAR SAHAYAK BANK LTD.,
MEERUT—DEFENDANT—APPELLANT
versus

Mst. KHILLO—PLAINTIFF AND ANOTHER—
DEFENDANTS—RESPONDENTS

Hindu Law—Joint family business—Business carried on by member in partnership with stranger—Presumption that it is joint family business—Maintenance—Mother, right of—Priority over personal debts of her sons.

Under Hindu Law, there is no presumption that a business carried on by a member of a joint family in partnership with a stranger is joint family business. The presumption of Hindu Law that, where a nucleus is proved, all properties standing in the name of its members, were acquired out of the family funds and belong to the family, cannot be extended to cases of partnership with strangers. 118 Ind. Cas. 145 (1), *Vadilal v. Khushal* (2) and 43 Ind. Cas. 9 (3), relied on.

The mother has got a right of maintenance over the joint family property and it must have priority over the personal debts of her sons or step-sons.

F. A. from the decree of the Additional Sub-Judge, First Class, Ferozepore, dated September 1, 1938.

Messrs. *Durga Das Jain* and *Balmokand Gupta*, for the Appellant.

Messrs. *Shamair Chand* and *Parkash Chand Jain*, for the Respondent (Plaintiff).

Young, C. J.—In execution of a money decree obtained by the Beopur Sahayak Bank Ltd., Meerut (defendant No. 1) against Rup Chand (defendant No. 2), bungalow No. 105, situate in Ferozepore Cantonment, was attached. Mst. Khillo (plaintiff), step-mother of the judgment-debtor objected, alleging that the bungalow was her exclusive property and that Rup Chand had no interest in it. The execution Court dismissed the objection. Mst. Khillo then instituted the present suit, under O. XXI, r. 63, Civil P. C., against the Bank and Rup Chand, for a declaration that the bungalow was owned and possessed by her for her lifetime and was not liable to attachment and sale in execution of the aforesaid decree. She based her claim on two alternative grounds. *Firstly*, she alleged that in 1919 arbitrators were appointed to partition the family property between her sons and step-sons, Hira Lal, Rup Chand, Phool Chand, Lakshmi Chand, Mehr Chand and Dip Chand, sons of Chiranji Lal; and in the award, this bungalow was allotted to her for her lifetime, in lieu of maintenance, and it was directed that after her death it would devolve on her sons in equal shares, subject to the condition that Rup Chand could become its exclusive owner on payment of Rs. 30,000 for distribution among the various sons of Chiranji Lal. She maintained that the award had been given effect to and that she was the owner of the bungalow for her life. In the alternative, she claimed that under Hindu Law she was entitled to maintenance out of the family estate, and there being no other joint

property now in existence, there was a charge for her maintenance on the bungalow, and that this charge had priority over the debt in question, which had been raised by Rup Chand from the Bank for his personal purposes and not for the benefit of the joint family.

The Bank traversed these allegations and averred that there had been no partition in 1919, nor had the bungalow been allotted to the plaintiff and that the loan had been raised by Rup Chand for the benefit of the joint Hindu family and therefore it had precedence over the plaintiff's right of maintenance. At the trial, the plaintiff attempted to prove the partition of 1919 by producing a copy of an award, alleged to have been delivered by the arbitrators on September 19, 1919. The original award was stated to have been lost. The copy showed however that the original award had not been registered and proper stamp duty had not been paid on it. The learned Judge therefore held that the copy was inadmissible in evidence, and that oral evidence could not be led to prove its terms. He accordingly rejected the plaintiff's claim based on the alleged partition.

On the alternative claim, he found that the Bank had failed to prove that the debt in question had been raised by Rup Chand for the benefit of the family and therefore the plaintiff had a charge for her maintenance on the bungalow. He held that having regard to the status of the family Rs. 100 per mensem would be the proper maintenance payable to the plaintiff. He therefore passed a decree in favour of the plaintiff for a declaration that the bungalow carried a charge of Rs. 100 per mensem, till the plaintiff's death, on account of her claim for maintenance and that it could be sold subject to reservation of this charge in execution of the decree obtained by defendant No. 1 against defendant No. 2. From this decree the Bank has appealed, and the first contention raised on its behalf is that it had been proved that the loan in question was raised by Rup Chand from the Bank for joint Hindu family business. It appears that the family was in affluent circumstances in the lifetime of Chiranji Lal and for some years after his death, when it carried on a prosperous business at Ferozepore and Hapur in the United Provinces. Chiranji Lal died in 1911 and his sons continued to live jointly till at least 1919. During this period Rup Chand managed the ginning factory and other

business at Hapur. In 1918, he entered into partnership with two strangers, Banarsi Das and Nathu Lal, to do business in Bombay under the name and style of Banarsi Das-Rup Chand. Rup Chand's share in the capital of this firm was Rs. 10,000 half of which (i. e. Rs. 5,000) he raised from the defendant Bank on July 3, 1918.

The Bank contends that Rup Chand entered into the partnership on behalf of the joint Hindu family. It is common ground that if this fact is proved, the Bank's debt and the decree passed thereon would be binding upon all the members of the quondam joint family, including the plaintiff, and her right of maintenance would have no priority over the decree. If, however, Rup Chand had joined the Bombay firm in his personal capacity, then the other members of the family, or the joint family property, would not be liable and *Mst. Khillo's* right of maintenance would take precedence over it. The onus to prove that Rup Chand entered into the partnership with the strangers, on behalf of the family, is clearly on the Bank. Under Hindu Law, there is no presumption that a business carried on by a member of a joint family in partnership with a stranger is joint family business. It is well-settled that the presumption of Hindu Law that, where a nucleus is proved, all properties standing in the name of its members, were acquired out of the family funds and belong to the family, cannot be extended to cases of partnership with strangers: see *Mulla's Hindu Law*, para. 234 (4) and *Mirzamal Bhagwan Das v. Rameshar* (1), *Vadilal v. Khushal* (2) and *Gangayya v. Venkataramiah* (3). It therefore lay on the Bank to prove that the partnership was entered into on behalf of the family or that the loan was otherwise applied for family purposes. The learned Judge has held that the Bank has failed to discharge the onus, and after hearing Counsel and examining the record we agree with this conclusion. The only evidence produced by the Bank is that of its *mukhtar-i-am*, Raghubar Dayal (D. W. No. 2) who deposed that at the time when the loan was raised Rup Chand told him that he was borrowing on behalf of the family firm. But the books of the

(1) 51 A 827; 118 Ind. Cas. 145; A I R 1929 All. 536; (1929) A L J 641; Ind. Rul. (1929) All. 753.

(2) 27 B 157; 4 Bom. L R 968.

(3) 41 M 454; 43 Ind. Cas. 9; A I R 1918 Mad 37; 34 M L J 271; 6 L W 708; (1917) M W N 805; 22 M L T 527.

Bank do not support this statement. If what this witness is now saying is true, there is no reason why the account should have been opened in Rup Chand's personal name and not that of Ohiranji Lal Rup Chand or the joint family. Further, we find that no demand for the principal or for interest was ever made by the Bank from the other members of the family. It is admitted that interest was paid by Rup Chand alone. The pro-note was renewed from time to time and all the renewals were by Rup Chand and none else. It is also significant that when the account was not adjusted, the Bank instituted the suit against Rup Chand only: no other brother was impleaded as a defendant, and the decree also was passed against him. There is, therefore, nothing to indicate that the loan had been raised for the benefit of the family.

The most valuable piece of evidence relating to this point would be the books of the joint family at Ferozepore and Hapur for the year 1918. Rup Chand stated that these books were with his elder brother Hira Lal. Hira Lal, when examined as a witness for the plaintiff, admitted that he had those books. But the Bank did not ask him to produce them. Nor was any effort made to get the books of the Bombay firm Banarsi Das-Rup Chand, from the heirs of Banarsi Das, in whose possession they were stated to be. In these circumstances, the Bank cannot be held to have discharged the onus of proving that the loan in question had been raised by Rup Chand on behalf, or for the benefit, of the joint Hindu family, or that the share in the Bombay business was ever regarded as an asset of all the brothers. This being so, there can be no doubt that the plaintiff has got a right of maintenance over whatever is now left of the joint property and that it must have priority over the personal debts of her sons or step-sons. The bungalow in question, therefore, cannot be sold in execution of the decree obtained by the Bank against Rup Chand, without reservation of her rights. The next question for consideration is what is the proper amount of maintenance for which Mst. Khillo has a charge on the bungalow. The learned Judge has fixed it at Rs. 100 per mensem. But after considering the evidence produced by the parties, and having regard to the circumstances of the family, we think that this is excessive. In our opinion Rs. 50 per mensem is the proper charge for her maintenance. We therefore reduce the

amount to Rs. 50 per mensem. We accordingly, accept this appeal in part and, in lieu of the decree of the lower Court, grant the plaintiff a declaration that she has got a charge of Rs. 50 per mensem for her maintenance on bungalow No. 105 at Ferozepore Cantonment, and that it shall be sold in execution of the decree obtained by the Bank against Rup Chand, subject to this charge. Having regard to all the circumstances, we leave the parties to bear their own costs in both Courts.

s. *Appeal partly allowed.*

PATNA HIGH COURT

Jury Reference No. 1 of 1940

February 9, 1940

VARMA AND MEREDITH, JJ.

EMPEROR—PROSECUTOR

versus

DULLU KUER AND ANOTHER—

ACCUSED

Criminal Procedure Code (Act V of 1898), s. 307—Reference under—High Court, if can go into evidence irrespective of whether there was any misdirection or misunderstanding of law.

The Court in a reference under s. 307, Criminal P. C. is entitled to go into the evidence irrespective of whether there was any misdirection or misunderstanding of the law or not. 108 Ind. Cas. 225 (1), relied on. 117 Ind. Cas. 173 (2), explained and distinguished. 139 Ind. Cas. 885 (3), referred to.

J. Ref. made by the Sessions Judge of Saran, in his letter No. 19-Cr., dated Chapra, January 3, 1940.

The Govt. Pleader, In support of the Reference.

Mr. S. C. Chakravarty, Against the Reference.

Meredith, J.—This is a reference under s. 307 of the Criminal P. C. by the learned Sessions Judge of Saran. Two persons Dullu Kuer and Rachheya Teli, were tried before him with the aid of a jury—Dullu Kuer upon a charge under s. 457 of the I. P. C. and Rachheya Teli upon charges under ss. 457 and 380 of the I. P. C. The jury after retiring for twenty minutes, returned a unanimous verdict of not guilty in the case of both accused persons. The learned Sessions Judge was not prepared to accept this verdict, and remarked that he considered it perverse and unreasonable, and that he was clearly of opinion that it was necessary for the ends of justice to submit the case in respect of both the accused persons to the Hon'ble High Court.

After the verdict of the jury, in accord-

ance with the provisions of s. 310 of the Criminal P. O. a previous conviction for an offence under s. 396 of the I. P. O. in the year 1931, upon which he had been sentenced to undergo eight years' rigorous imprisonment, was proved against the accused Dullu Kuer, and was admitted by him.

At the opening of this case a preliminary point was taken by Mr. Chakravarty on behalf of the accused persons. He argued that the Court in hearing a reference against the verdict of a jury under s. 307 of the Criminal P. O. has only the same powers that it would have in hearing an appeal from the decision of a jury and, therefore, the Court cannot go into the evidence at all, having regard to the provisions of s. 423 (2) of the Criminal P. O. unless it is first shown that there has been a misdirection, or that, the jury has misunderstood the law as laid down by the Judge. This argument is based on the wording of s. 307, cl. (3), which provides that :

"In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto, it shall, after considering the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session."

It is urged that the use of the words "subject thereto" indicates that the direction to consider the entire evidence and so on only can have effect in a case where that could be done in exercise of the ordinary appellate powers, which are limited in the case of jury trials by the provisions of s. 423 (2) of the Criminal P. O.

This view, in my opinion, ignores the specific character of the directions laid down in the latter part of the clause, but I do not consider it necessary to examine this question in detail, because that has been already done by a Full Bench of the Allahabad High Court in the case of *Emperor v. Shera* (1). This precise point was the subject of the reference to the Full Bench, and after a full discussion of the matter the Full Bench decided that the Court in a reference under s. 307 was not limited in the way suggested, and was entitled to go into the evidence irrespective of whether there was any misdirection or

misunderstanding of the law or not. If I may say so with respect, the view taken in that case appears to me the sensible view of the section and the reasoning entirely sound. There is nothing I could usefully add to it. Mr. Chakravarty drew our attention to a ruling of this High Court, *Ramdas Rai v. King Emperor* (2) but this ruling does not really support the proposition which he has attempted to put forward. It was not a case of a reference under s. 307, but a case where the Judge had refused to make a reference, and where the Court was merely hearing an appeal from the decision of the jury. In such a case it was laid down very rightly that the Court would not consider the evidence in the absence of misdirection or misunderstanding of the law by the jury. The Court refused to treat the appeal as a reference by the Judge, merely because the Judge, though he had not made a reference, had observed that he disagreed with the verdict of the jury, and considered that the accused ought not to have been convicted. The implication was that had the Court found it advisable or possible to treat the matter as a reference, then it might have gone into the evidence and come to its own finding, but that was not the case. The ruling, therefore, provides no support for Mr. Chakravarty's contention. On the other hand, another ruling of this High Court, *King-Emperor v. Rafi Mian* (3) is directly against him. That is all that it is necessary to say with regard to this preliminary objection, which cannot succeed. (The learned Judge then discussed the facts and the evidence and then proceeded).

It appears to me that the verdict of the jury in this case was, having regard to the state of the evidence, a wholly unreasonable one, and I am somewhat at a loss to understand it. It is true that Ganesh admitted that he had once undergone four years' rigorous imprisonment for dacoity, and Budhu Kuar admitted that he had been eight years in jail for an offence under s. 304 of the I. P. O. but, as the learned Judge rightly observed, this was merely a reason for treating the evidence of these witnesses with caution and seeking corroboration; it could be no reason for

(2) 8 Pat. 344; 117 Ind. Cas. 173; 10 P L T 409; 30 Cr. L J 721; A I R 1929 Pat. 313; Ind. Rul. (1929) Pat. 381.

(3) 11 Pat. 669; 139 Ind. Cas. 885; 13 P L T 418; A I R 193. Pat. 246; (1932) Cr. Cas. 643; Ind. Rul. (1932) Pat. 269; 33 Cr. L J 877.

(1) 50 A 625; 108 Ind. Cas. 225; 26 A L J 321; L R 9 A 54 Cr.; 29 Cr. L J 353; A I R 1928 All. 207; 9 A I Cr. R 362; 11 L T 40 All. 94 (F B).

rejecting it altogether out of hand. Actually there was ample corroboration. There is no reason at all for not believing the evidence of the various villagers. As I have noticed, the first information was lodged without any delay at all and the witnesses had gone to the *thana*, and were also examined then and there, so that there was no real opportunity for concocting a case. Moreover, the injuries found on the persons of the accused and Ganesh were entirely consistent with the prosecution story, while the defence version left the injuries upon Ganesh at least entirely unexplained. The traces of trampling in Ganesh's courtyard, which were found by the Assistant Sub-Inspector, also corroborated Ganesh's story. In short, the evidence in the case was overwhelming and left no doubt at all that these two accused persons were actually caught red-handed while committing theft at night in the house of Ganesh.

In these circumstances I would accept this reference, set aside the verdict of acquittal of the jury, and convict Dullu Kuar under s. 457 read with s. 75 of the I. P. O. and Rachbeya Teli under ss. 457 and 380 of the I. P. O. It is not alleged that Rachbeya Teli has any previous conviction. The theft was a petty one, and in the circumstances I would sentence him under each section to undergo one year's rigorous imprisonment, these terms to run concurrently. I would sentence Dullu Kuar under s. 457/75 of the I. P. O. to undergo three years' rigorous imprisonment.

Varma, J.—I agree.

D.

Reference accepted.

BOMBAY HIGH COURT Full Bench

Suit No. 1742 of 1936

September 21, 1939

BEAUMONT, C. J., BROOMFIELD AND KANIA, JJ.

BAI LALITA RATANOHAND

KHIMOHAND—PLAINTIFF

versus

TATA IRON AND STEEL Co., LTD.—

DEFENDANT

Income Tax Act (XI of 1922), ss. 19, 20, 51, 14 (2) (c)—Income-tax paid by company, whether on behalf of share-holders—Certificate under s. 20, when no income-tax is payable, if necessary—S. 51, if applies—Tax by company on profits distributed—Tax, if can be deducted from dividends—Words "assessed to income-tax" in s. 14 (2) (a), meaning explained—Company—Dividend—Arrears of dividend and interest thereon are not debt—Company's obligation to pay them, nature of—Second preference

share declared "subject to income-tax"—"Subject to tax" in declaration; meaning of—Limitation Act (IX of 1908), Arts. 116, 120—Claim for dividend duly declared and made payable but in part withheld—Article applicable—Cause of action—Running of time—Expression, "writing registered" in Art. 116, if includes document registered under Companies Act (VII of 1913).

In the case of a company the tax has to be paid by the company direct and not on behalf of the share-holders, and this is rendered clearer by the provisions as to return of income and assessment of companies contained in ss. 22 and 23 of the Income Tax Act. [p. 392, col. 2.]

The provisions of s. 20 are no doubt mandatory but they only apply where the company is liable to tax. A certificate to the share-holders under s. 20 is not necessary where no income-tax is payable by the company. The penalty imposed by s. 51 on a failure to furnish a certificate under s. 20 only arises where the failure is without reasonable cause or excuse, and the fact that the certificate would be untrue as no income-tax was payable by the company would provide reasonable cause for not issuing it. [*ibid.*]

Section 20 clearly recognizes a right in the company to deduct tax where tax has been or will be paid on the profits distributed. Income-tax has to be discharged out of profits before any distribution can be made, and where tax has been paid, the company must apportion the burden amongst the different classes of share-holders, according to their legal rights. No doubt deduction of tax at the standard rate is a rough and ready method of apportionment, but to pay dividends in full to the preference share-holders would be to give them a tax free share and throw the whole tax onto the ordinary shares. [p. 392, col. 2; p. 393, col. 1.]

Where, however, no income-tax is payable by the company and there is no burden to adjust, there is nothing in the Act to justify the company in making any deduction in respect of income-tax from the dividends paid. *Gimson v. Inland Revenue Commissioners* (14), distinguished. [p. 393, col. 1.]

A company is not assessed to income-tax within the meaning of cl. (a) to s. 14 (2), where it has submitted a return of its total income as required by s. 22 and the return has been dealt with by the Income-tax Officer under s. 23, and the result of the assessment is that nothing is found to be payable by way of income-tax. The words "assessed to income-tax" must be given their ordinary and natural meaning and they do not cover the case where a company is assessed to no income-tax. [p. 393, col. 1.]

There is a distinction between the current dividends on the second preference shares and the arrears of dividend and interest thereon payable under the scheme of arrangement. The arrears of dividend remain arrears of dividend and can only be paid out of profits. Such arrears or the interest thereon do not become a debt due from the company different in character from the obligation to pay current dividends. [p. 391, cols. 1 & 2.]

Where the dividends on the second preference shares are declared "subject to income-tax" it cannot be said that there is no declaration of dividend except after deduction of tax at the standard rate. The words "subject to tax" mean no more than subject to tax properly deductible; and where no tax is properly deductible, the words have no effect on the amount of dividend declared. *Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co.* (2), *Neumann v.*

Inland Revenue Commissioners (3) and *Cull v. I. R. C.* (4), distinguished. [p. 393, col. 2.]

Cause of action for a dividend duly declared and made payable but in part improperly withheld is an action in debt and is governed by Art. 116, *Lim. Act*, or else by Art. 120, and, therefore, the claim for dividends falls under Art. 116 since the whole contract arises under the Articles of the company. Time runs under Art. 116 from the date of the breach of contract and not from the date of the knowledge of the breach. The breach occurs in each year when the Income-tax Authorities inform the company that no income-tax is payable by the company for that year. [p. 393, col. 2; p. 394, col. 2.]

"Writing registered" in Art. 116 includes a document registered with the Registrar of Joint Stock Companies under the Companies Act. In the General Clauses Act "registered" is defined as meaning registered in British India under the law for the time being in force for the registration of documents. The Companies Act, though no doubt not primarily concerned with the registration of documents, is nevertheless the law in force relating to the registration of certain documents affecting companies. Therefore, the claim for dividends falls under Art. 116. Where the whole contract arises under the Articles of the company registered under the Companies Act. 48 Ind. Cas. 803 (6) and 127 Ind. Cas. 305 (7), relied on, 94 Ind. Cas. 515 (9), dissented from, 110 Ind. Cas. 33 (8), doubted. [p. 394, col. 2.]

Mr. M. C. Setalvad (Advocate-General), Sir Chimantlal Setalvad and Mr. G. N. Joshi, for the Plaintiff.

Mr. F. J. Coltman and Sir Jamshedji Kanga, for the Defendant.

Beaumont, C. J.— This suit is brought by the plaintiff on behalf of herself and all other holders of the second preference shares in the Tata Iron and Steel Co. Ltd., against the company claiming in effect to establish that the company were not entitled to deduct from dividends on the second preference shares income-tax for the years 1922-23 to 1934-35 inclusive on the ground that in those years the company's income was assessed at nil and the company was exempted from payment of income-tax. The suit was heard by a Bench of three Judges because it was represented to me that large sums were at stake and that an appeal would almost certainly be preferred to the Privy Council, and that the questions at issue depended on documentary evidence, and raised only matters of law. The plaintiff in para. 21 raises a case of fraudulent misrepresentation but that claim was abandoned at the outset of the case, and thereupon the defendant company abandoned their contention that the suit is not maintainable as a representative suit.

The facts are not in dispute and can be stated shortly. The company was incorporated in the year 1907 with a capital divid-

ed into six per cent. cumulative preference shares, ordinary, and deferred shares. In 1916, the capital was increased by the creation of further ordinary and deferred shares, and in 1918 there was a further increase of capital by the creation of second preference shares. Those second preference shares were created by a special resolution of the company passed on November 7 and 22, 1918, which provided that such shares were to rank next after the existing preference shares and were to confer on the holders thereof the right to a fixed cumulative preferential dividend at the rate of seven and a half per cent. per annum on the capital for the time being paid up on such shares, and, subject only to the right of the holders of the existing preference shares of the company, were to rank in a winding up, both as regards capital and dividends up to the commencement of the winding up, whether declared or not, in priority to the ordinary and deferred shares of the company, but were not to confer any further right to participate in profits or surplus assets. Immediately after the passing of the above special resolution, another special resolution was passed amending Art. 133 of the company's Articles of Association (which dealt with dividends) so as to incorporate the right of the holders of second preference shares to a fixed cumulative preferential dividend at the rate of seven and a half per cent. per annum. The Article as amended did not mention income-tax. On December 23, 1918, the company issued to its share-holders a circular stating (*inter alia*) that income-tax upon the second preference share dividends would be payable by the holders of such shares.

On May 26, 1919, the plaintiff applied for the allotment to her of three second preference shares and these were duly allotted to her and a certificate under the seal of the company was in due course issued to her. In my opinion it is clear from the terms of the special resolution creating them and from the amended Art. 133 that the second preference shares were not issued tax-free. No obligation is cast upon the company as between themselves and the holders to pay the income-tax in respect of the dividends on the shares. Even if the circular of December 23, 1918 can be treated as part of the terms of issue (which I doubt), it does not, in my view, carry the matter any further. As from April 1, 1922, down to March 31, 1926, the dividends on the second preference shares

fell into arrear and the accumulated arrears of such dividends amounted on the last mentioned date to a sum of Rs. 29-12-4 on each second preference share. In the year 1926 a scheme of arrangement was arrived at relating to the arrears of dividend on the second preference shares which scheme was subsequently sanctioned by the Court. The effect of the scheme was that a sum of Rs. 3-12-4 for each second preference share was to be paid in respect of arrears of dividend up to March 31, 1926, and that the balance of the said arrears, viz. Rs. 26 per share, together with simple interest at the rate of four per cent. per annum from April 1, 1926, on the said amount or balance thereof from time to time was to be paid out of the fifty per cent. of the surplus profits remaining in each year after paying the fixed cumulative preferential dividend at the rate of six per cent. per annum on the first preferential shares and also after paying the fixed cumulative preferential dividend at the rate of seven and a half per cent. per annum calculated from April 1, 1926, on the second preference shares until the whole of such arrears should have been paid off, the remaining fifty per cent. of such surplus profits to be distributed among the holders of ordinary and deferred shares according to their rights under the Memorandum and Articles of Association of the company. In January 1927, Art. 133, was again amended by special resolution so as to incorporate the provisions of the scheme as to dividends.

Subsequently the company made profits out of which the current dividends on the first and second preference shares and the arrears of dividend on the second preference shares were ultimately discharged. But such dividends and arrears of dividend were in all cases paid by the company less income-tax although for the years 1925-26 to 1934-35 inclusive the company was not in fact, liable to pay and did not pay any income-tax, and the question which arises is whether for these years the company was entitled to deduct tax from the dividends payable to the second preference shareholders. It was argued that there might be a distinction between the current dividends on the second preference shares and the arrears of dividend and interest thereon payable under the scheme of arrangement, but in my opinion, no such distinction exists. The arrears of dividend remained arrears of dividend and could only be paid out of profits, and I am not prepared to accept the argument on behalf of the plaintiff

that such arrears or the interest thereon became a debt due from the company different in character from the obligation to pay current dividends. The position with regard to income-tax during the years in question was that the company made substantial profits in a commercial sense out of which dividends could be, and were paid. But owing to the operation of s. 10, Income-tax, as such profits were not liable to income-tax. Section 10, provides :

"(1) The tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him.

(2) Such profits or gains shall be computed after making the following allowances..... :—"
of which (vi) is material, viz. :

"In respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed,"

and under proviso (b) it is enacted :

"Where full effect cannot be given to any such allowance in any year owing to there being no profits or gains chargeable for that year, or owing to the profits or gains chargeable being less than the allowance, the allowance or part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following year and deemed to be part of that allowance, or if there is no such allowance for that year, be deemed to be the allowance for that year, and so on for succeeding years ;"

In making the assessments for the years 1926-27 to 1934-35 the Income-tax Authorities took the commercial profit of the company as appearing in the balance-sheet, and after normal income-tax adjustments, made deductions in respect of depreciation which wiped out the whole of the profit. Accordingly the taxable profit was assessed at "nil" and the company was exempted from payment. Notwithstanding this fact however the company during the years in question declared preference dividends less income-tax and to the dividend warrant in each case they appended a certificate stating :

"We hereby certify that income-tax on the entire (100) per cent. profits and gains of the company, of which this dividend forms a part has been or will be paid by us to the Govt. of India."

The plaintiff contends that the company were not entitled to deduct from her dividend income-tax for a year in which no tax was payable by the company. The company, on the other hand, maintain that they were entitled to deduct tax at the standard rate every year, and that the fact that the company itself was not liable to tax in the particular year is irrelevant, since dividends are frequently payable out of a different fund to that which is assessed to income-

tax. If such deduction was authorized the authority must be sought either in the contract between the company and the second preference share-holders, or under some statute. The only relevant statute appears to be the Income Tax Act, and as that Act is concerned with securing revenue to Govt., one would not expect to find therein authority to a company to retain for itself income-tax in respect of its shares with no obligation to pass the amount on to Govt. However, I will notice what appear to me to be the relevant provisions of the Income Tax Act. Unders. 14 (2) of that Act it is provided that the tax shall not be payable by an assessee in respect of

"(a) any sum which he receives by way of dividends as a share-holder in a company where the profits or gains of the company has been assessed to income-tax."

Mr. Colman for the company has argued that if once the company is assessed to income-tax the share-holder is saved from any assessment on himself in respect of dividends although the income of the company out of which the dividend is paid may not have been subject to income-tax, and for that he relies on a decision of the Privy Council in *Income-tax Commissioner, Bengal v. Hungerford Investment Trust, Ltd.* (1). In that case, however, the company had been assessed to tax in respect of part of its income, and a question arises as to whether the decision would apply to a case in which the company had been assessed to no income-tax; whether, that is to say, the profits or gains to the company can be said to have been assessed to income-tax when they have been assessed to no income-tax. However, that question cannot be determined in this suit since it arises between a share-holder and the revenue authorities who are not parties to the suit.

Section 18 of the Act provides that in the case of salaries and interest on securities (which are described in s. 8) the person responsible for payment shall at the time of payment deduct income-tax, and sub-s. (6) provides that the sum deducted is to be paid to the Central Govt. But there is no provision which entitles a company to deduct income-tax from dividends on shares. Section 19 of the Act provides:

"In the case of income chargeable under any head other than 'salaries' or 'interest on securities,' and in any case where income-tax has not been deduct-

ed in accordance with the provisions of s. 18, the tax shall be payable by the assessee direct."

It is therefore, in my opinion, clear that in the case of a company the tax has to be paid by the company direct and not on behalf of the share-holders, and this is rendered clearer by the provisions as to return of income and assessment of companies contained in ss. 22 and 23 of the Act. Section 20 provides that the principal officer of a company shall, at the time of distribution of dividends furnish to every person receiving a dividend a certificate to the effect that the company has paid or will pay income-tax on the profits which are being distributed, and on such certificate a share-holder may recover a refund of income-tax under s. 48 where the company has been charged at a rate greater than that applicable to his total income for the year. The provisions of s. 20 are no doubt mandatory but in my opinion they only apply where the company is liable to tax, and I cannot think that the officers of the company in this case were justified, as against their preference share-holders, in giving year after year a certificate that income-tax had been or would be paid on the profits being distributed when in fact no income-tax was being charged on such profits. The penalty imposed by s. 51 on a failure to furnish a certificate under s. 20 only arises where the failure is without reasonable cause or excuse, and the fact that the certificate would be untrue would seem to provide reasonable cause for not issuing it.

In my opinion the scheme of the Income Tax Act is that a company is assessed to income-tax on its profits and pays the tax direct. There is no express provision enabling a company which has paid tax to deduct from dividends the amount of such tax, and the Advocate-General, for the plaintiff, has argued that even in such a case no deduction is permissible. I am not prepared to agree with his argument. Income-tax has to be discharged out of profits before any distribution can be made, and where tax has been paid, the company must apportion the burden amongst the different classes of share-holders, according to their legal rights. No doubt deduction of tax at the standard rate is a rough and ready method of apportionment, but to pay dividends in full to the preference share-holders would be to give them a tax-free share and throw the whole tax on to the ordinary shares. Section 20 clearly recognizes a right in the company to deduct tax where

(1) 63 I A 359; 163 Ind. Cas. 430; A I R 1936 P C 219; 11 L R (1937) 1 Cal. 237; 1936 O L R 362; 1936 A I R 654; 9 R P C 40; 2 B R 683; 40 C W N 1157; 44 L W 274; (1936) A L J 927; 71 M I J 405; 38 Bom. L J 1104; (1936) M W N 1522 (P C).

tax has been or will be paid on the profits distributed. However, in the present case no income-tax was payable by the company and there was no burden to adjust, and I can see nothing in the Act to justify the company in making any deduction in respect of income-tax from the dividends paid.

I now turn to a consideration of the contract between the company and the second preference share-holders to see if such deduction is authorized thereby. The material contract is embodied in Art. 133 of the Articles of Association as amended to incorporate the provisions of the special resolutions creating the second preference shares and the scheme of arrangement to which I have referred. The Article does not mention income tax, and Mr. Coltman argues that as the second preference shares are not to be tax-free the company is only bound to pay $7\frac{1}{2}$ per cent. in each year less income-tax at the standard rate. His contention is that the company was assessed to income-tax for the years in question, though no tax was payable, and that therefore under s. 14 (2) (a) the preference share-holders cannot be assessed in respect of their dividends, and if no deduction is made by the company the holders will get their dividends free of tax. In my opinion this argument is unsound. The contract is that the company is not to be liable for income-tax on preference dividends, but there is no contract by the preference share-holders with the company for payment of the tax. There is no justification for reading into Art. 133 any such words as "less income-tax at the standard rate." To do so would impose serious hardship on the preference share-holders in the event of s. 14 (2) (a) of the Act being amended so as to throw upon share-holders direct liability for payment of the whole or part of the tax on their dividends. Moreover if a company escapes liability for income-tax in any year I do not see why the preference share-holders should not be entitled to share in the company's good fortune. In my opinion their contract with the second preference share-holders requires the company to pay a full dividend of $7\frac{1}{2}$ per cent. in every year when profits permit, but in any year in which the company is liable to income-tax, it can deduct tax at the standard rate, leaving the share-holder to claim a refund from Govt. in a proper case; but when no tax is payable by the company, there is no right to deduct.

I would notice one other argument of

Mr. Coltman. The dividends on the second preference shares were declared "subject to income-tax" and it is argued that there was no declaration of dividend except after deduction of tax at the standard rate, and that a share-holder has no cause of action for part of a dividend which has not been declared. In my opinion there is no substance in this argument. I think that the words "subject to tax" mean no more than subject to tax properly deductible, and as in this case no tax was properly deductible, the words have no effect on the amount of dividend declared. Mr. Coltman has referred us to a good many English cases, particularly *Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co.* (2), *Neumann v. Inland Revenue Commissioners* (3) and *Cull v. I. R. C.* (4). Those cases contain some valuable observations upon the applicability of English income-tax to dividends on shares and to that extent are helpful, but the actual decisions have no bearing on the case before us. The last two cases related to what is known as "grossing up" for purposes of sur-tax, and involved the construction of r. 20 of the All Schedules Rules and s. 7, Finance Act, 1931, which have no counterpart in India. *Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co.* (2), related to the right of a company to deduct from dividends on its preference stock income-tax at the full rate applicable to the United Kingdom although it had obtained a refund in respect of colonial income-tax under s. 43, Finance Act, 1916. The case turned on the construction of the latter section, which has no application to India. In my opinion no useful purpose would be served by discussing the English cases in detail.

There remains for consideration the question of limitation. In my opinion the plaintiff's cause of action is for a dividend duly declared and made payable but in part improperly withheld. That is an action in debt. The Advocate-General has argued that the amount of tax retained by the company was held by it as an agent and that Art. 89 applies, but in my opinion this is not so. The company did not hold the dividend in a fiduciary capacity: *In re*

(2) (1921) 1 A C 172; 89 L J P O 220; 65 S J 24; 36 T L R 830; (1920) H L O 187; 124 L T 225.

(3) (1934) A C 215; 103 L J K B 210; 18 Tax Cas. 332; 150 L T 481; 78 S J 121; 50 T L R 246.

(4) (1939) 3 All E R 761, 133

Severn and Wye and Severn Bridge Railway Co. (5). There is in the Indian Lim. Act no Article barring generally an action in debt though many particular actions in debt are covered, and it is suggested by the Advocate General as an alternative argument that the residuary Art. 120 applies. Mr. Ooltman however relied on Art. 115 which covers a suit for compensation for the breach of any contract express or implied not in writing registered. On the other hand the Advocate-General contends that if the suit is one for compensation for breach of contract, the contract is one "in writing registered" and Art. 116 applies. The only direct authorities upon the question to which we have been referred are two conflicting decisions of the Madras High Court. In *Ripon Press and Sugar Mill Co. Ltd. v. Venkatarama Chetty* (6), it was held that a suit for a dividend fell under Art. 116, since the contract was contained in the articles which had been registered with the Registrar of Joint Stock Companies, a view with which Sir Amberson Marten, C. J. in *Govind Narayan v. Ranganath Gopal* (7), agreed but with which Crump, J., in *Maneklal Mansukhbai v. Suryapur Mills Co.* (8), disagreed. In *Venkata Gurunatha Rama Seshayya v. Sri Tripurasundari Cotton Press, Bezwada* (9), it was held that "writing registered" in Art. 116, referred to registration under the Indian Regis. Act only, and that a suit for a dividend fell under Art. 120, since the words of Art. 115, were not applicable to such a suit.

In the absence of any authority, I should have thought that neither Art. 115, nor Art. 116, was applicable to a suit for an ascertained debt, and that Art. 120, applied. But the Privy Council in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (10), following a long line of Indian cases and having regard particularly to the consideration always shown to registered documents by

the Indian Legislature, held that a suit for rent due under a registered lease fell under Art. 116. Whether this Court was right in *Maneklal Mansukhbai v. Suryapur Mills Co. Ltd.* (8), in holding that it followed from the Privy Council's decision that all actions for debt under an unregistered contract not otherwise provided for in the Lim. Act fell under Art. 115, I doubt. But the Privy Council's decision certainly shows that a suit for a debt under a registered contract falls under Art. 116. Upon the whole, though with some hesitation, I think that "writing registered" in Art. 116, includes a document registered with the Registrar of Joint Stock Companies under the Companies Act. In the General Clauses Act "registered" is defined as meaning registered in British India under the law for the time being in force for the registration of documents. The Indian Companies Act, though no doubt not primarily concerned with the registration of documents, is nevertheless the law in force relating to the registration of certain documents affecting companies. In my view, therefore, the plaintiff's claim falls under Art. 116, since I think that the whole contract arises under the Articles. If Art. 116, is not applicable, I would say that Art. 120, applies and the period is the same under both articles.

Time runs under Art. 116, from the date of the breach of contract. In my opinion, the breach occurred in each year when the Income-tax Authorities informed the company that no income-tax was payable by the company for that year. It is true that there is no evidence that this fact was communicated by the company to the plaintiff, as it should have been under Art. 138 (b) of the Articles of Association, but as there is no case of fraudulent concealment, this omission does not in my opinion affect the date from which time runs. The suit was filed on October 1, 1935 and from the agreed statement, Ex. H the plaintiff's suit is barred except for the years of assessment 1931-32, 1932-33, 1933-34, and 1934-35. There was no dividend for the year 1930-31.

Broomfield, J.—In praying for a declaration "that the holders of second preference shares in the defendant company are entitled to a fixed cumulative preferential dividend at the rate of seven and a half per cent. per annum without any deduction therefrom in respect of income-tax," irrespective of whether the company pays income-tax, the plaintiff is obviously putting the case too high. It is true that the special

(5) (1896) 1 Ch. 559; 65 L J Ch. 400; 74 L T 219; 44 W R 347; 3 Manson 80.

(6) 42 M 33; 48 Ind. Cas. 903; A I R 1919 Mad. 646; 35 M L J 256; 8 L W 354; 24 M L T 246.

(7) 54 B 226; 127 Ind. Cas. 305; A I R 1930 Bom. 572; 32 Bom. L R 232; Ind. Rul. (1930) Bom. 529.

(8) 52 B 477; 110 Ind. Cas. 33; A I R 1928 Bom. 252; 30 Bom. L R 549.

(9) 49 M 468; 94 Ind. Cas. 515; A I R 1926 Mad. 615; 50 M L J 520; 24 L W 102; (1926) M W N 450 (F B).

(10) 44 I A 65; 39 Ind. Cas. 156; A I R 1916 P O 182; 44 O 759; 1 P L J 262; 15 A L J 217; 25 O L J 279; 32 M L J 357; 21 M L T 262; 21 O W N 577; (1917) M W N 363; 5 L W 654; 19 Bom. L R 450 (P O).

but the only evidence before us is the state of his account on the material date. A sum of Rs. 5,500 was paid into it from some source through another bank just before he drew this cheque and the bank clerk who gave evidence as to the cheque for Rs. 11,000 said he would return and show where this sum of Rs. 5,500 came from. He never did return, and the matter was allowed to rest there.

Mrs. Sofaer, however, says this, that it was partly with this Rs. 11,000 that the Chartered Bank's claim against the estate was paid off. After the transaction, Murrayfields belonged to Mr. Meyer subject to the mortgage held by Mr. Jamnadas. Then she says that in about a year and in pursuance of the agreement she repurchased it from Mr. Meyer, on her own behalf entirely, and not as executrix. She took two mortgages with Mr. Jamnadas as mortgagor for Rs. 17,000 with the house as security and for Rs. 4,000 with some other property as security, as part of the purchase price of Rs. 38,000; the balance of Rs. 17,000 she found in cash and paid to Mr. Meyer. Now Murrayfields belongs to her, subject to these mortgages, and no one who has obtained a decree against her late husband's estate can attach it. Of course, it is necessary to test this story. We have only very scanty evidence of what the estate was worth, but it was no doubt heavily indebted to the bank. In a recital to a deed dated July 14, 1933, it is stated that Mr. Sofaer was

"possessed of considerable property (part from his share and interest in the said firms of Monook and Cohen and of Saul Sofaer and Company) situate in Rangoon,"

and it is said on behalf of the appellants that it is not true at all. Still it is plain that if the estate was a valuable one the Chartered Bank may have been paid off by Mrs. Sofaer having recourse to estate properties, in addition to paying something from her own pocket, and adding to the total the sum of Rs. 20,000 paid by Mr. Meyer which he had borrowed from Mr. Jamnadas. The learned trial Judge observed that there was no proof that the sum of Rs. 11,000 paid to Mr. Meyer from his account in the Imperial Bank found its way into the hands of Mrs. Sofaer or of the Chartered Bank, and Mr. Meyer was not called as a witness. We do know that Mr. Jamnadas advanced Rs. 20,000 and that Mrs. Sofaer received this sum. Where she obtained the rest of the money wherewith to pay off the Chartered Bank,

in the opinion of the learned Judge; had not been proved.

And then he asked, where did she get the money to buy Murrayfields back again? As regards the cash payments to Mr. Meyer she was quite unable to show how she had made them. She has certainly been involved in most elaborate business transactions connected with this house, but when pressed to explain them professed her inability to fill in any details. Her story may be summarized by saying that she was very well to do. She had extensive house rents coming from Bassein, and she had paid a debt of Rs. 26,000 paid to her personally by Monook and Cohen in which her late husband was a partner. Her husband made her generous gifts and though he died a poor man she was by no means without resources. She was penniless when she married him in 1915, but her estate had increased substantially through his gifts whereas he died on the verge of insolvency.

This naturally became the subject of inquiry. It was not an easy inquiry, because Mrs. Sofaer, who gave evidence, assured the Court of her ignorance of accounts and business matters. So far as her duties as executrix of her husband's estate were concerned she repeatedly referred Counsel to her brothers, two gentlemen named Mordecai, who were partners with her late husband. They were sitting in Court, but they did not see fit to give evidence in these proceedings. It is not too much to say that she gave no satisfactory answers as to the efforts made to realize the estate; but her correspondence with Mr. E. S. Meyer of Bassein, her late husband's manager, shows that she was by no means unacquainted with accounts and business affairs. She was cross-examined on a number of matters. A sum of Rs. 8,000 paid to Mr. Sofaer during his last illness, was, according to her, presented to her by her husband. A further sum of Rs. 10,000 was paid to her personally by Mr. Meyer's brother, she declared, as moneys due from the collection of her rents in Bassein. No account was furnished, and the matter was dismissed in the vaguest way. When the learned Judge discovered that this Mr. Meyer had been the manager of a branch of the business of Saul Sofaer and Company, in which the Mordecais and the late Mr. Sofaer were partners, and that a criminal prosecution had been filed against him for misappropriation and withdrawn by the brothers Mordecai at just about the time when he

had paid Mrs. Sofaer personally this sum of Rs. 10,000, I am not surprised that he remarked that it was curious. Mrs. Sofaer protested that there was no connection between the two matters, but she never proved to the satisfaction of the Court how this ex-manager owed her personally Rs. 10,000.

Then the business of the Mandalay Branch of Saul Sofaer and Company was sold. Mrs. Sofaer simply could not tell what had happened to the money given for it, or what share of it if any found its way into the estate. She asked the Court to believe that the estate was practically valueless, and she assessed its value for probate at about Rs. 9,000. She continually suggested that her brothers were looking after the estate, though she was the executrix. They were in Court, but furnished no sort of explanation. A number of other matters were raised in cross-examination, Mrs. Sofaer always declaring that she had a good deal of property and that various assets, which it was suggested belonged to the estate, were hers, and hers alone. The learned Judge did not believe her. He thought that the evidence adduced to show that Murrayfields was now her property was unconvincing. What the respondents say is that it has never been shown that she paid off the Bank so far as Rs. 20,000 (that half of the debt which was not advanced by Mr. Jamnadas on the security of the property by way of Mr. Meyer) out of her own moneys at all, though there is some evidence that Rs. 7,000 was paid by her, out of what moneys it is difficult to say with certainty. As for her re-purchase, they say that Mr. Jamnadas in effect was taken security for a debt of Rs. 21,000 and that payment of the remainder to Mr. Meyer by Mrs. Sofaer has not been proved. If this is correct, what is the position? Mrs. Sofaer as executrix, on this showing, parted with Murrayfields for Rs. 20,000 and paid off the Bank with this sum and other sums which may have been drawn largely from the estate. Then she had the house re-transferred to her in her own name, not as executrix, by simply extending Mr. Jamnadas's security. In that way she believed herself able to defy the creditors of her late husband's estate.

Her learned Counsel said that the case against her was based on conjecture and surmise, and on the assumption that suggestions put to her in cross-examination and denied were true. I cannot see that is so. The burden of proof lay upon her to show that this property had been duly ap-

plied by her in the satisfaction of other claims. The question is whether the story she told stood the test of cross-examination in the absence of corroborative evidence such as might have been supplied by her brothers and by Mr. Meyer. Then it is objected that the question of whether Mrs. Sofaer administered the estate properly ought to have been tested by an administration suit. The case in *Saratmani Debee v. Bala Krishna* (1), was cited in this connection. There Maclean, C. J. said: "Section 234" (which is the present s. 50)

"no doubt enables the Court to call for an account of the property which has come into the hands of the executor: but that section only applies to an account of the property which has actually come to the hands of the executor."

And *Khushkrohai Nasarvanji v. Hormesha Phirozsha* (2), was a similar case in which it was held that a representative was liable only in respect of property actually received by him or taken into his disposition. Murrayfields did come into Mrs. Sofaer's hand as executrix. And the learned Judge does not hold that she has proved it is now in her personal capacity. It must not be forgotten that a decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an administration suit when he desires to attach property *prima facie* in the hands of the judgment-debtor as such may not appeal to him. The case in *V. Zollikofer and Co. v. Chettyar Firm* (3), has been cited as authority for the proposition that the respondents cannot avoid the mortgage to Mr. Jamnadas. Was it then effected for the benefit of the estate? The learned Judge came to the conclusion that Mrs. Sofaer being desirous of ultimately residing herself at Murrayfields put it out of her possession as executrix, and obtained Rs. 20,000 indirectly from Mr. Jamnadas, as soon as she knew she could get the property back in her own name substantially free from any other encumbrance and that she has not shown she re-purchased it with her own money to make up the balance. In my opinion, the evidence given is by no means inconsistent with this inference, and I cannot say that the learned Judge was wrong in failing to be satisfied that the mortgage was effected for the benefit of the estate or that the transactions between the appellant and Mr. Meyer were genuine. This means that

(1) 35 C 1100; 12 C W N 614.

(2) 11 B 727.

(3) 9 R 34; 131 Ind. Cas. 73; A I R 1931 Rang. 277; Ind. Rul. (1931) Rang. 154.

Murrayfields is liable to attachment and that these appeals must be dismissed, Advocate's fee 40 gold mohurs.

s.

Appeals dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Suit No. 355 of 1938

May 8, 1939

LOBO, J.

MESSRS. FATEHCHAND KHUBCHAND—
PLAINTIFFS

versus

FIRM NATIONAL TILES Co.—

DEFENDANTS

Partnership—Summary suit against firm—Partners served individually—Leave to defend granted to some only—Decree, if can be passed against those to whom leave is refused and against firm also—Individual partners, if can be sued along with firm.

In a summary suit against a firm where several partners have been served individually and leave to defend is granted to some and not to others, a decree can be passed against those partners to whom leave is refused, and also against the firm. [p. 374, col. 1.]

[Case-law referred to.]

Individual partners may be sued personally along with the firm and a decree can be passed against the firm and against an individual partner. *Taylor v. Collier & Co.* (11), relied on. [p. 376, col. 1.]

Mr. Fatehchand Assudomal, for the Plaintiffs.

Messrs. Kimatrai Bhojraj, Srikrishindas H. Lulla and Dipchand Chandumal, for Defendants Nos. 1, 2 and 3 respectively.

Judgment—This is a suit under the Summary Chapter filed by the firm of Fatehchand Khubchand against "Firm of National Tiles Co., by their partners: (1) Seth Sugnichand Dayaram, (2) Seth Fatehchand Asudomal, (3) Seth Kanayalal, T. Talreja, all Hindus, adults, merchants, residing in Karachi," for recovery of a sum of Rs. 4,353-2-9 being the amount of three *hundis* with interest thereon. Along with the plaint the plaintiffs filed an application purporting to be under O. XXX, r. 3, Civil P. O., praying that the summonses be served on three persons as partners those specified in the heading of the plaint. On being served, the three alleged partners applied under O. XXXVII, r. 3, Civil P. O., for leave to defend. The matter was heard and disposed of by me on December 8, last. Sugnichand Dayaram who denied partnership and pleaded *inter alia* that he was only a sub-partner of Fatehchand Asudomal for a time was granted leave to defend. The application by Fatehchand Asudomal was disposed of thus:

"No ground has been made out by him for leave

to defend. The application for leave by him is dismissed. There will therefore be a decree against defendant No. 2 for Rs. 4,353-2-9, costs of the suit and interest at 6 per cent. from date of suit till payment."

To Kanayalal Talreja leave to defend was granted subject to his furnishing security in a certain amount within a fortnight. The security was not furnished and thus he came to be in the same position as Fatehchand Asudomal, but no decree has so far been passed against him. The wording of the summons served on each of these parties is to be noted; two copies of the one served on Sugnichand Dayaram are on the record. The summons reads:

To defendant No. 1 aforesaid.,

"Whereas the plaintiffs abovenamed have instituted a suit against you under Chap. XXXVII, Civil P. O., for Rs. 4,353-2-9 principal and interest You are hereby summoned to obtain leave from the Court

There is no reason to suppose that the summonses on Fatehchand and Kanayalal were in any way different. It is also to be noted that in their applications for leave to defend and their affidavits in support thereof Sugnichand, Fatehchand and Kanayalal describe themselves throughout as defendants Nos. 1, 2 and 3; they have been so described and dealt with in my order of December 8, last after I had heard the learned Advocates at great length. In short in the whole record as it stands to-day the only reference to O. XXX, Civil P. O., and the provisions thereof is that in the heading of the application filed with the plaint to which I have referred above.

Now on December 8, 1938 while I was dictating my order or just as I had concluded my dictation it was suggested by one or other of the learned Advocates that no decree could be passed against Fatehchand to whom leave was being refused, any decree to be passed should be against the firm of National Tiles Co. I told the stenographer to make a note of the point on the margin of the transcript when submitted to me for correction. The transcript when I saw it needed little or no correction and so I signed it without observing the marginal note made by the stenographer which read "Perhaps decree may be ordered against the firm the National Tiles Co." A few days later the office prepared and submitted a decree in accordance with my order of December 8, in respect of defendant Fatehchand Asudomal and this I signed as a matter of routine.

The case was next called in Court on December 22, 1938 and again on January

18, 1939 and at one or other of these hearings Messrs. Lulla and Kimatrai, Advocates for Fatehchand and Sugnichand, drew my attention to the fact that I had not considered the point raised on December 8, whether the decree should be against Fatehchand Asudomal or against the firm of the National Tiles Co. I then agreed to hear arguments on the point and if necessary to reconsider my order of December 8, 1938 in the light of the arguments. The points now argued before me have by consent been put in the following form: (1) in a summary suit against a firm where several partners have been served individually and leave to defend is granted to some and not to others, can a decree be passed against those partners to whom leave is refused, or must the decree be against the firm and (2) what is the effect of any of the partners served individually denying that he is a partner. In Mulla's Civil P. O. Edn. 10 at p. 936, the following passage occurs:

"Where a suit is brought against a firm in the firm name, the decree must be against the firm in the firm name. From this it follows that if one of the partners fails to appear, no decree can be passed against him separately for want of appearance; and if any one partner does appear, no decree can be passed against the firm for want of appearance, the appearance of one partner being the appearance of the firm, it can never be said that a decree against a firm is *ex parte* against one of the partners because he has not appeared. As soon as a decree is passed against a firm the assets of the firm are liable to satisfy it. The firm name is only a compendious way of describing in the writ the partners who compose the firm and a plaintiff who sues a firm sues the partners. But though the decree against the firm makes them all liable as to the partnership property, it can only be decided in execution proceedings whether a particular partner is personally liable to satisfy the decree."

In *Naraindas & Co. v. S. M. Qureshi* (1), Rupchand, A. J. C. dealing with the description of the parties in the title of the plaint in a suit against a firm held:

"Where a suit is against a corporation, or a firm, it need not be mentioned in the title of the plaint as to who is to be served with the summons and where and how, but the plaint should be accompanied by a separate application under O. XXIX, r. 2, or O. XXX, r. 3, Civil P. O., as the case may be duly stamped, stating where and in what manner and on whom the plaintiff wishes the summons to be served."

My attention has been drawn to the provisions of O. XXX, rr. 3, 6 and 8, Civil P. O. and Mr. Lulla has argued on the basis thereof and of the passage in Mulla referred to above that where a suit is filed against a firm and several partners therein are individually served they are

(1) 26 S L R 431; 142 Ind. Cas. 361; A I R 1933 Sind 102; Ind. Rul. (1933) Sind 89

each entitled to defend the suit on behalf of the firm; they cannot defend it on behalf of themselves individually. The plaintiff in such a case is not entitled to a decree against any individual partner. He is entitled only to a decree against the firm after he has beaten down all the defences raised by the individual partners on behalf of the firm even though these defences are between themselves contradictory and inconsistent. He has further argued that in the case of a suit against a firm if any partner is served individually the firm has been served. If the partner served comes to Court and denies that he was a partner the plaintiff has two alternatives; either he may ignore the denial of partnership by the person served and apply for service on the firm by a summons on any other party alleged to be a partner or any person having at the time of service, control or management of the partnership business, or he may ask the Court to determine the question whether or not the partner appearing and denying partnership is a partner, not for the purpose of obtaining a decree against him but for the purpose of establishing that the firm has been duly served. In support of his contentions Mr. Lulla has relied on several authorities both English and Indian. In *Jackson v. Litchfield & Sons* (2), it was held that where in a suit against a firm one of the partners who had been served failed to enter an appearance, the plaintiff was not entitled to judgment against that partner individually but must proceed with the action and having obtained judgment against the firm may then under O. XLVII, r. 8 issue execution against such partner. In *Ellis v. Wadeson* (3), it was held in a suit against a firm that a personal defence raised by a partner in the firm who had been served could not be allowed. In *Davies & Co. v. Andra & Co.*, (4), it was held that

"a person who is served with a writ of summons which is issued against a firm must, if he is in fact a partner, enter an appearance in his own name under O. XII, r. 15, but he cannot enter a conditional appearance which states that he does so having been served as a partner, but denies that he is a partner. If the person so served is not in fact a partner, he need not enter an appearance at all, the question whether he is a partner or not only arising when the plaintiff, having obtained judgment against the firm, seeks to issue execution under O. XLII, r. 10, against such person's goods."

(2) (1882) 51 L J Q B 327; 8 Q B D 474; 46 L T 518; 30 W R 531.

(3) (1899) 1 Q B 714; 68 L J Q B 604; 60 L T 508; 47 W R 420; 15 T L R 274.

(4) (1860) 24 Q B D 598; 59 L J Q B 233; 63 L T 151; 38 W R 437.

resolutions of November 7 and November 22, 1918, creating the second preference shares, said nothing about income-tax, and the Memorandum and Articles of the company as amended in consequence of these resolutions are also silent about it. But that does not mean that the dividends were not liable to tax. There is a presumption that dividends, which are payable out of profits, are liable to income-tax, in the absence of express words to the contrary in the contract between the parties. Indeed the learned Advocate-General has conceded that the dividends cannot be regarded as tax-free. What he challenges is the company's right to deduct income-tax from dividends. But if the company pays income-tax and cannot deduct the tax paid from the dividends they would in fact be tax-free, since the company is assessable to income-tax in respect of them and not the share-holders.

Although there is no statutory provision for the deduction of ordinary income-tax from dividends in the Income Tax Act of 1922, ss. 20 and 48 clearly contemplate that deductions will be made in practice and could hardly have been enacted if the practice had not been recognized as legal. Moreover, dividends being payable out of profits, and only out of profits, if the profits in the hands of the company are burdened with a tax the company has not only a right but a duty to distribute the burden fairly and equally between the various classes of share-holders. One way of doing that obviously is to deduct the appropriate amount of income-tax from each dividend before payment. Clear authority on that point, if authority is needed, is to be found in *Purshottamdas Harkisondas v. Central India Spinning, Weaving and Manufacturing Co. Ltd.* (11), where Marten, J. followed and applied the decision of the House of Lords in *Ashton Gas Co. v. Attorney-General* (12). Lord Halsbury pointed out in that case that income-tax is not part of the expenditure by which profits are earned but actually a part of the profits. It follows that each shareholder is entitled to an aliquot part of a fund which includes the income-tax payable by the company and out of which that income-tax has to be paid, and therefore he can only get his dividend less his proportionate share of the tax.

But, though the first claim is untenable,

(11) 42 B 579; 41 Ind. Cas. 968; A I R 1917 Bom. 113; 19 Bom. L R 665.

(12) (1906) A C 10; 75 L J Ch. 1; 93 L T 676; 70 J P 49; 13 Manson 35; 22 T L R 82.

the claim for a refund of the tax deducted in years when the company paid nothing is *prima facie* reasonable, and it obviously cannot be defeated by any plea of distributing the burden, for there was none to distribute. In the written statement the defendant company has relied on the terms of a circular to the share-holders inviting subscriptions for the second preference shares which stated, *inter alia*, that income-tax would be payable by the holder of the shares. This somewhat loose and inaccurate expression presumably meant that income-tax would be deducted before the dividends were paid. Similar statements were made in the resolutions of the Board of Directors sanctioning the issue of the shares, and whenever a dividend was declared it was stated to be "less income-tax." Learned Counsel for the defendant argues that the contract implied between the company and the share-holders was that the latter would be entitled to receive their dividend of seven and a half per cent. "without immunity from income-tax" or "less income-tax." But the question is what is to be understood by these expressions. "Without immunity from income-tax" is meaningless when there is no liability to tax, "less income-tax" is ambiguous. You may infer a contract that the company will pay the dividends less a proportionate amount of the income-tax payable by the company, if any. In fact such a contract must be implied, for the reasons already given. Mr. Coltman however wants us to infer a contract that the company would pay the dividends less income-tax at the standard rate, irrespective of whether the company paid income-tax or not. That means, in effect, that the share-holders would not be entitled to get seven and a half per cent. on their shares but six and a half or six or whatever the sum may work out at.

I can see no good reason for inferring a contract of that kind. It is, to say the least of it, extremely doubtful whether the circular in question or the directors' resolutions can be regarded as forming part of the contract. But in any case statements intimating that income-tax would be deducted are capable of the interpretation that it would be deducted if and when payable and not otherwise, and if that interpretation is possible it must be preferred to one which, as between the second preference share-holders and the company, appears to lead to an inequitable result.

Mr. Coltman devoted a considerable part of his argument to an attempt to show that the deduction of income-tax from the second preference dividends was justified by the scheme of the Income Tax Act of 1922, not directly but inferentially. This Act was concerned with the liability of persons, whether individuals or bodies of persons, corporate or other, to pay tax to Govt. on their incomes. It was not concerned, except incidentally, with any question of the rights and liabilities of share-holders and companies *inter se*. In the present case, however, the dispute is as to the rights of share-holders as against the company. We have not to determine, and cannot determine in the absence of Govt., any question relating to the liability to pay income-tax to Govt. or the right to a refund or anything of that kind. Nor can our decisions on the questions in issue be affected by the fact that some of the second preference share-holders appear to have obtained benefits, by way of refunds from the Income-tax Authorities, which they could not have obtained if no deductions from their dividends had been made.

We were much pressed with arguments based upon s. 14 (2) (a) of the Act, according to which, if a company is assessed to income-tax, the individual share-holder who receives a dividend is not liable to pay tax thereon. According to Mr. Coltman's contention a company is assessed to income-tax within the meaning of this clause if it has submitted a return of its total income as required by s. 22 and the return has been dealt with by the Income-tax Officer under s. 23, whether or not the result of the assessment is that anything is found to be payable by way of income-tax. Section 14 (2) (a) has been construed by the Privy Council in *Income-tax Commissioner, Bengal v. Hungerford Investment Trust Ltd.* (1) and it has been held that the words "assessed to income-tax" must be given their ordinary and natural meaning. In the case before the Board a company had been assessed to tax and had paid tax on a part of its income only, but it was held that it had been assessed to income-tax according to the ordinary and natural meaning of the words and therefore the conclusion followed that the share-holder was not liable to pay tax on dividends received by him. That was so although no tax had been paid by the company on the profits from which those dividends were paid because they had accrued outside British India. But it would not appear to follow

from this that the words 'assessed to income tax' according to their ordinary and natural meaning cover the case where a company is assessed to no income-tax.

Mr. Coltman relied on an observation of Sir George Rankin in the judgment in the case just cited that if a company has been assessed to income-tax at all it has "presumably been assessed upon its total income within the meaning of the Act." But how does that help the argument? Assuming that there is such a presumption, and assuming further that there is a presumption that if a company is assessed to income-tax it pays or will pay income-tax (though Sir George Rankin did not say that), the dictum is obviously no authority for Mr. Coltman's contention, which is that because a company submits a return for the purposes of assessment it is assessed to income-tax within the meaning of s. 14 (2) (a), although the company's assessable income is nil. Moreover, even if that proposition were admitted, it would not be a necessary corollary that under the Indian Act the company has any right to deduct income-tax in such a case. Even if it be conceded for the sake of argument that it makes no difference, from the point of view of the share-holder's liability to the revenue, or freedom from liability, whether the company actually pays income-tax or is merely assessed, why should it follow that the company is entitled to deduct income-tax which it does not pay? The Judicial Committee in *Income-tax Commissioner, Bengal v. Hungerford Investment Trust Ltd.* (1) was not concerned with any question of the company's right to deduct income-tax from dividends, and the case is no authority for the proposition that a company which does not pay income-tax is entitled to make such a deduction for its own purposes.

The English cases cited in support of the defendant company's claim to be entitled to deduct income-tax from dividends, whether the company itself pays income-tax or not, are not in my opinion in *pari materia*; *firstly*, because they are almost all cases between individual share-holders and the revenue relating to the former's liability to taxation, and, *secondly*, because they turn upon the construction of statutory provisions not to be found in the Indian Law. Under the English Law deduction of income-tax from dividends at source is authorized by statutory rules which, as the result of a series of Finance Acts, permit deduction from dividends at the standard rate although the company is not itself liable to

assessment in the particular year. The history and development of the English Law in this respect is explained in detail in the judgment of Lord Tomlin in *Neumann v. Inland Revenue Commissioners* (3). It is possible that the practice followed by the defendant company is permissible by the Law of England. But it has to be justified by the Law of India, which contains no similar provisions. That is to say it has to be justified in this country by showing that it is in accordance with the contractual relations between the parties.

One point sought to be made on behalf of the defendant company was that the company was exempted from payment of income-tax by reason of the accumulation of depreciation allowance, and it was urged that the benefit of this allowance enured to the company and not to the share-holders. In the period of 1923 to 1935 the ordinary share-holders were paid one rupee per share only, whereas the preference share-holders were paid their dividends nearly in full, that is to say after deduction of income-tax. Mr. Coltman argued that if income-tax had not been deducted, or if the preference share holders were to recover the income-tax deducted as the result of these suits, the result would be that they would get the whole benefit of the depreciation allowance (by reason of which the company was exempted from payment of income-tax) to the detriment of the ordinary share-holders. Actually, so far as the period referred to is concerned, it made very little difference to the ordinary share-holders because, in spite of the payment of the dividends to the preference share-holders being made less income-tax, the profits were insufficient to pay the ordinary share-holders anything except one rupee per share in a single year. But of course in the long run it must be true that the more the company has to pay to the preference share-holders the less it will be able to pay to the ordinary share-holders. However, it is difficult to see the relevance of this. No doubt when the question is whether a share-holder is entitled to a refund *vis a vis* the revenue, the fact that an allowance is admissible only to the company and not to the share-holder is very material, and that was the main ground of decision in *Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co.* (2). But that point does not arise here, and the answer to the other part of the argument seems obviously to be that you cannot justify an illegal deduction from

the dividends of one set of share-holders by saying that it will enable you to give another set of share-holders a benefit to which they are not entitled.

As regards limitation, I agree with some hesitation that Art. 116 governs the case. There is direct authority for this in *Ripon Press and Sugar Mill Co. Ltd. v. Venkatarama Chetty* (6), and though that case has been overruled by a Full Bench of the Madras High Court in *Venkata Gurunatha Rama Seshayya v. Sri Trupurasundari Cotton Press Bezvada* (9), the basis of the latter decision, *viz.*, that the contract between the company and its members is not such a contract as is contemplated by Arts. 115 and 116, can hardly, with all deference to the learned Judges who decided the case, be regarded as convincing. As to the effect of the Privy Council decision in *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* (10) I prefer the reasoning in *Maneklal Mansukhbhai v. Suryapur Mills Co. Ltd.* (8). Marten, C. J., then doubted whether the Memorandum and Articles of a company could be said to be a "contract in writing registered" within the meaning of Art. 116, and Crump, J. held that it could not. But Marten, C. J., afterwards changed his opinion on that point: *Govind Narayan v. Rangnath Gopal* (7). The matter is not free from doubt, but on the whole I think that "registered" in this Article need not necessarily mean registered under the Regis. Act. Having regard to s. 21, Companies Act, the Memorandum and Articles may be treated as the whole contract between the parties, and that being "in writing registered" the Privy Council ruling is directly in point.

Under Art. 116 (and it would be the same under Art. 115 or Art. 120) the starting point of limitation is the breach of the contract which gave the right to sue. Then the question is, when did a breach of contract occur? Not at the moment when the company deducted income-tax from the dividends, for it could not assume, or at any rate it was not bound to assume that no income-tax would be payable until the result of the assessment was known. It has been argued on behalf of the plaintiff that time did not begin to run against the preference share-holders even then, because under Art. 13-B of the Articles of Association of the company notice is required to be given when a dividend becomes payable, and the share-holder may prefer a claim within three years of the notice. In this case no notice was

given that the sums deduced on account of income-tax were payable to the shareholders, for the obvious reason that the company did not recognize any such claim. But the absence of such a notice can hardly be said to have prevented the shareholders from claiming what was due to them, and I think the retention of the money became wrongful, i. e., the contract was broken, on the dates when the company was informed of the result of the assessment in each year. Time runs from the date of the breach of contract, not from the date of knowledge of the breach; Halsbury, Vol. XX, para. 758, Edition 2. There is no question of fraudulent concealment, that part of the plaintiff's case having been given up.

Kanla, J.—I agree with the judgment just delivered by the learned Chief Justice. The principal disputes between the parties are on five points. The plaintiff contends that whether the company paid income-tax or not, the holders of the second preference shares are entitled to receive from the company Rs. 7-8 0 per annum, per share, without any deduction whatsoever by way of income-tax. The second contention is that the defendant company is entitled to deduct income-tax only if it was assessed to and paid income-tax in respect of the profits out of which the dividend is declared. The third contention is that in respect of Rs. 26, by reason of the arrangement specially made, it ceased to retain the character of a dividend and became a debt due by the defendant company to the holders of the second preference shares. It is fourthly contended that in any event the interest on the sum of Rs. 26 is a debt and does not bear the character of a dividend. The last contention is about limitation.

In order to determine the rights of the second preference shareholders it is necessary to consider the terms of the resolution passed by the company for the issue of these shares. Apart from the circular issued, the resolution states that the second preference shareholders shall have a right to a fixed cumulative preferential dividend at the rate of seven and a half per cent. on the capital for the time being paid up on such shares. The Articles of Association, which contain the contract between the parties in respect of the payment of dividends, also state that the profits of the company, which it shall from time to time determine to divide in respect of any year or period, shall be applied in paying a

fixed cumulative preferential dividend at the rate of seven and a half per cent. per annum on the capital paid up on such shares to the close of such year or other period. The resolution and the Articles of Association do not refer to any income-tax. The effect of accepting the plaintiff's contention will be that the company should bear the burden of the tax on the dividends paid to the second preference shareholders. The words of the resolution and the Articles of Association do not contain any such obligation. The circular letter issued to the shareholders expressly states that income-tax on the dividends will be payable by the shareholders. Therefore unless words to the effect that the company shall bear the burden of the tax on these dividends (for including which there is no justification) are read into the resolution and Articles of Association the plaintiff's contention cannot be accepted. A similar contention of the shareholder was rejected in *Ashton Gas Co. v. Attorney-General* (12) and in *Purshottamdas Harkisondas v. Central India Spinning, Weaving and Manufacturing Co., Ltd.* (11). In the years in which the company's profits are charged to income-tax and the company pays income-tax the position is clearly stated by Lord Phillimore in *Bradbury v. English Sewing Cotton Co.* (13) in these terms (p. 769):

"A joint stock company is under the Income Tax Act, 1842, treated as a person and is directed to make a return of its profits or gains according to Sch. D upon a conventional figure, arrived at by taking an average of the three preceding years, and is liable to be assessed and taxed thereupon.

If the principle of its being a distinct person, distinct from its shareholders or the aggregate of its shareholders, had been carried to a logical conclusion, there would have been no reason why each shareholder should not, in his turn, have to return as part of his profits or gains under Sch. D, the money received by him in dividends.

Their taxation would seem to be logical, but it would be destructive of joint stock company enterprise, so the Act of 1842 has, apparently proceeded on the idea that for revenue purposes a joint stock company should be treated as a large partnership, so that the payment of income-tax by a company would discharge the quasi-partners. The reason for their discharge may be the avoidance of double taxation, or to speak accurately, the avoidance of increased taxation. But the law is not founded upon the introduction of some equitable principle as modifying the statute; it is founded upon the provisions of the statute itself; and the statute carries the analogy of a partnership further, for it contemplates a company declaring a dividend on the gross gains, and then on the face of the dividend warrant making a proportionate deduction in respect of the duty, so that the shareholder whose total income is so small that he is

(13) (1323) A C 744 (769); 92 L J K B 736; 129 L T 546; 67 S J 678; 39 T L R 590.

exempt from income-tax or pays at a lower rate, can get the income-tax which has been deducted on the dividend warrant returned to him."

These observations explain the scheme under which income-tax paid by a company on its profits enures for the benefit of share-holders in respect of dividends paid out of the profits determined to be distributed. The words of the circular letter negative the contention that the company will bear the burden of the income-tax on dividends paid to the second preference share-holders. The scheme of the Income Tax Act, which is in accordance with the observations quoted above, prevents the share-holder being taxed as an assessee again in respect of the dividends received by him by reason of s. 14 (2) (a). This wider contention of the plaintiff must therefore be rejected. The contention of the plaintiff in respect of Rs. 26 and interest on the same has been fully dealt with by the learned Chief Justice and I have nothing more to add.

The second contention is the principal one on which elaborate arguments were advanced on behalf of the defendant company. The right to deduct income tax rests either on a contract or under an Act of the Legislature. The Income Tax Act, s. 18, permits deductions to be made by certain parties under certain circumstances. It gives the principal officer of a company a right to deduct tax from dividends under certain circumstances only. It is common ground that the right to deduct income-tax, in the ordinary course, from dividends paid to share-holders, is not included under s. 18, Income Tax Act. Section 18 (6) provides that all sums deducted in accordance with the provisions of the section shall be paid within the prescribed time by the person making the deductions to the Govt. of India or as the Central Board of Revenue directs. It is common ground that in the present case the amounts deducted by the company from the dividends in dispute have not been paid to the Govt. of India or according to the directions of the Central Board of Revenue. There is no other section in the Act which permits a company to deduct income-tax from dividends distributed to its share-holders.

It was argued on behalf of the company that the scheme of the Act was such that there was an inferential right to deduct the tax in respect of dividends distributed to the share-holders. For this purpose the company relied on the obligation of the principal officer of the company to

furnish annual returns and also to supply information regarding dividends distributed to the share-holders. Section 20 provides that the principal officer of every company shall at the time of distribution of dividends furnish to every person receiving the dividends a certificate of the fact that the company has paid or will pay income-tax on the profits which are being distributed and specify such other particulars as may be prescribed.

It was pointed out that the words of the section were imperative and under s. 51 a penalty was prescribed if default was committed in furnishing a certificate. It was therefore contended that the company was to be assessed on the profits shown in the return. Once it was assessed it was obliged to issue a certificate under s. 20 and by reason of that, under s. 14 (2) (a) the share-holders were absolved from payment of all income-tax. It was also pointed out that by virtue of the certificate issued, the share-holders would be entitled to get a refund under s. 48 if the rate of tax payable by them was less. It was therefore contended that once the company was assessed to tax the company had a right to deduct income-tax at the standard rate fixed for the company from the dividends payable to the share-holders. In support of this contention reliance was placed on several English decisions. I shall consider them presently.

In my opinion this contention of the defendant company as put forth by them is unsound. Income Tax Act is an Act for the recovery of tax by the Govt. and not by any other person. When amounts are permitted to be deducted by way of income-tax, s. 18, sub-s. (6) provides that the same should be paid to the Govt. Before an absolute right to deduct income from a share-holder is established, a clear and irresistible inference from the scheme of the Act must be deduced. On a consideration of the different sections mentioned above it appears that when a joint stock company pays income-tax on its profits according to the Income Tax Act, and out of the profits determined by the directors to be divisible, dividend is paid, the company has a right to deduct income-tax at the standard rate and issue a certificate under s. 20 of the Act. Where, however, the company does not pay tax on its profits and thus divisible profits which are distributed to the share-holders have not been reduced by the payment of any income-tax in any shape or form, I do not find any justifica-

tion in the words of the Income Tax Act to permit the company to deduct any tax from the dividends distributed to the shareholders. In the words of Lord Philimore the divisible profits which are distributed have not been reduced and the partners are entitled to receive the profits coming to their share without deduction therefrom of any amount. If a portion of the income of a company is exempted from income-tax and the company declares a dividend, it was held in *Income-tax Commissioner, Bengal v. Hungerford Investment Trust Ltd.* (1) that Govt. may lose a certain amount. It was pointed out that while the company's profits were not chargeable to tax to the full extent, the shareholders, by virtue of the certificate issued to them under s. 20 of the Act, would be able to get a refund on the full amount of the dividend received by them, which notionally would include a portion of the profits exempted from charge. According to their Lordships of the Privy Council that was a matter for the Legislature. It may be that by reason of a lacuna, the shareholders may also escape taxation on income to that extent by reason of the provisions of s. 14 (2) (a). But that cannot give the company a right to deduct income-tax when it has paid none. That decision does not support the defendant's contention. Questions between the company and Govt., or between shareholders and the Govt. are not for determination in this suit; Govt. is not a party here and their rights are in no way affected by the discussion contained in this judgment. In dealing with the English cases relied on by the defendant company it should be remembered that in England there is General-Rule 20 which runs in these terms :

"The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto."

Section 7 (1), Finance Act, 1931, runs in the following terms :

"The provisions of r. 20 of the General Rules, which authorize the deduction of the appropriate tax from any dividend paid by a body of persons, shall, in relation to a dividend paid by any body of persons, whether before or after the commencement of this Act, be construed as authorizing the deduction of tax from the full amount paid out of profits and gains of the said body which have been charged to tax or which under the provisions of the Income Tax Acts, would fall to be included in computing the liability of the said body to assessment to tax for any year if the said provi-

sions required the computation to be made by reference to the profits and gains of that year and not by reference to those of any other year or period."

Sub-ss. (2) and (3) also deal with the modes of computation. Having regard to these fundamental distinctions between the English and Indian law the English cases are not helpful in determining the point in issue. I propose to notice them only with a view to find out, if without these additional powers given to the company to deduct income-tax under the English Statute and General Rules, there is anything in those decisions to support the present contention of the defendant company. It should first be observed that all the cases relied on by the defendant company are between the taxing authorities and the assessee and there is not a single case in which their present contention has been upheld.

In *Scottish Union and National Insurance Co. v. New Zealand and Australian Land Co.* (2), the Scottish company incorporated under the Companies Act and carrying on business in the United Kingdom and Colonies having paid United Kingdom income-tax at the rate of 5s. per pound alleged that they had paid 1s. 6d. per pound on that part of their income which was earned in the colonies and obtained a rebate in respect of its colonial profits by a corresponding deduction of the United Kingdom income-tax. It was held that the company in paying the dividend for the then current year on its preference stock was entitled to deduct from that dividend United Kingdom income-tax at the rate of 5s. and was not bound or entitled to deduct at the net-rate to be ascertained by taking into account the amount of tax re-paid to the company under s. 43, Finance Act, 1916. That decision was on the construction of s. 43 of the Act which permitted the assessee who had paid the tax to claim a refund of the United Kingdom tax. The decision is perfectly logical because the company as such had paid the United Kingdom tax of 5s. on the whole profits which included the profits earned on business done in the colonies. These profits of the colonial business were already charged with a tax of 1s. 6d. by the colonial authorities. Under the circumstances that portion of the profits was subject in fact to a charge of the colonial tax of 1s. 6d. and United Kingdom tax of 5s. When the refund of 1s. 6d. was obtained it obviously ensured for the benefit of the company, and the preference shareholders from whose dividends income-tax at the rate

of 5s. only was deducted could not in law or equity be considered entitled to the deduction. The point has nothing to do with the present controversy as it turned on the construction of s. 43, Finance Act, 1916.

In *Ashton Gas Co. v. Attorney-General* (12), the facts were that by s. 17, Gas Companies Act, 1877, it was enacted that except as in the Act provided the profits of the Ashton Gas Co. to be divided amongst the share-holders could not or should not exceed the rate of ten pounds per cent. per annum on the ordinary share capital. The company paid the dividend in full, without deducting the tax, and attached to the dividend warrant a certificate that tax on the profits, of which the dividend formed a part had been or would be paid to the proper officer for receipt of tax. The Attorney-General and the Corporation of Ashton brought an action against the Gas Company and it was held that the profits ought to be calculated as inclusive and not exclusive of the amount payable in respect of the profits proposed to be divided. Lord Halsbury, L. C. in delivering the judgment clearly pointed out that the effect of paying ten per cent. without deduction of income-tax in effect amounted to a payment of ten per cent. plus the amount of income-tax due thereon, but which under the certificate the share-holder was exempted from paying. The result was that instead of ten per cent. he got ten per cent. plus the tax. That was clearly outside the scope of s. 17 of the statute and therefore the action of the company was not justified. That case again has nothing to do with the present case as in that case the company had paid the full tax chargeable on its profits. It was not a case where the company had not paid any tax at all on its profits.

Neumann v. Inland Revenue Commissioners (3) was strongly relied upon by the defendant company. In that case a company owning real property in the City of London was assessed to income-tax under Sch. A. The profits of the company largely exceeded the amount at which it was assessed and on which it paid income-tax. Out of the surplus of rents received over and above the amount of income-tax paid, the company distributed a dividend amounting in case of one individual share-holder to £4,275. It was held that by virtue of r. 20 of the General Rules applicable to Schs. A, B, C, D and E in the Act of 1918 and of s. 38 (2) and s. 39 (2) of the Act of 1927, the share-holder

was obliged to include this sum in his return for the purpose of an assessment to sur-tax, as being part of his income—taxed income—although free from tax under Sch. D. It is obvious that the case has no application to the facts here. It was decided on a construction of General Rule 20, which finds no place in the Income Tax Act. The observations in that case are in respect of the liability of the individual share-holder to the Income-tax Authorities and do not confer on the company itself a right to deduct income-tax when it had paid none. Indeed the facts show that in respect of the amount which was not charged to income-tax the company distributed the amount without deducting any income-tax. I do not see how this case helps the defendant company.

Mr. Coltman on behalf of the company urged that partial assessment of profits as in *Income-tax Commissioner, Bengal v. Hungerford Investment Trust Ltd.* (1) is equivalent to "assessed to income-tax" even though the assessment is that the company has not to pay any income-tax on the profits at all. For this contention there is no authority. On the other hand Lord Tomlin's observations in *Neumann v. Inland Revenue Commissioners* (3) show a distinction when the assessment by reason of the rules, is nil. The point was not further developed in *Neumann v. Inland Revenue Commissioners* (3) as the facts did not require that discussion. In my opinion there is no justification for the extension of the statement found in *Income-tax Commissioner, Bengal v. Hungerford Investment Trust Ltd.* (1) in India so as to include a case where a company on assessment is ordered to pay no tax, i. e., is declared exempted from income-tax. *Income-tax Commissioner, Bengal v. Hungerford Investment Trust Ltd.* (1) is a good answer to the plaintiff's claim in respect of the accounting year 1934-35 (where admittedly a portion of the company's profits came to be taxed) but not to the present contention.

On the other hand in *Gimson v. Inland Revenue Commissioners* (14) an assessment to super tax under the Income Tax Act, 1918, s. 7 was made upon the appellant for a certain year in respect of a dividend paid to him by a limited company in which he was a share-holder; the dividend was paid partly out of capital and partly out of money which was income in the hands of

(14) (1930) 2 K B 246; 99 L J K B 532; 143 L T 704.

the company, but in respect of which income-tax had not been payable by reason of the rules relating to the measurement of income. The revenue authorities claimed super-tax in respect of so much of the dividend as was paid out of income of the company, but in respect of which income-tax had not been payable. It was held that a share-holder in a company was only liable to pay super-tax in respect of a dividend which had been subject to income-tax, and that as the income of the company out of which this dividend was payable had, by reason of the application of the rules relating to the measurement of income not been subject to income-tax, the appellant was equally not liable to super-tax in respect thereof. Kowlatt, J. in the course of his judgment stated as follows (p. 252*):

"Now what has been done in this case in assessing the appellant to super-tax is this: The 35l. received by the appellant in respect of this part of his dividend, which was the appellant's aliquot proportion of what the company had earned from this source or of what they had to divide from this source, was treated as increased by a sum of 9l.; which the Commissioners called the appropriate addition for income-tax, that is to say, that the 35l. really represents 44l. of profits divided by the company on which 9l. has been deducted for income-tax. That is simply stating what is not the fact. There is no evidence to support that. It is a simple statement as to something which is a disputable fact, and the Attorney-General really did not contend to the contrary. What he did contend was, that although the assessment of 44l. could not be maintained, nevertheless the assessment could be maintained if the figure was 35l., and he said that although income-tax had not been charged upon 35l., he would maintain his right to say that it ought to have been charged, either that it ought to have been charged in the hands of the recipient by direct assessment, or that it ought to have been treated as tax bearing income paid by the company out of funds not themselves taxed, so that the company ought to have deducted the tax and ought to have paid it over, and that as they had not done so they were liable to a penalty under s. 33, Finance Act of 1924".

It may be noticed that the last part contains the contention that although the company had not paid and was not liable to pay tax the company ought to have deducted the tax from the dividend distributed out of the portion. The judgment proceeds as follows (p. 252*):

"That brings me to the point in the case, which is this. The Commissioners have held that the dividend received from a company is itself a tax bearing subject-matter, and that it is not a subject-matter which represents merely the division to the individual of a fund which has suffered tax so that the tax attaches in the hands of the company, and that the receiver of the dividend has nothing whatever to say to the income-tax as regards that. The matter became of extreme importance in the first instance in

cases where a subject having a small income was entitled to recover back tax. The rule which governs the method of estimating the income in such a case is exactly the same rule as that which governs the method of estimating income for the purposes of super-tax, and if the Commissioners are right in this case in assessing the appellant to super-tax in the sum of 44l., we should arrive at this extraordinary result, that if the income of the appellant was a small one he could recover back income-tax which the revenue authorities had never received and which represented sums which did not exist, which would be quite wrong.

I have always regarded it as fundamental that an individual whose income comes to him straight and is small recovers the tax which he has suffered and no other, and that an individual who pays super-tax pays it in respect of a fund which has super-tax, and no other, so if the appellant had received this money not from the company but direct, by himself holding the source of income from which it was derived, and had not been liable to income-tax in respect of that sum of money by reason of the rules relating to the measurement of income for the purposes of income-tax, his income would not be a subject-matter on which he could recover back tax in case his income was small or on which he would pay super-tax in case his income was a large one. The case of a company is somewhat different, but in essence it is the same and the Attorney-General very properly referred to what I said in *Inland Revenue Commissioner v. Blott* (15), which is a material case. A share-holder can only recover back tax which the money he received has suffered, and he can only be liable to pay super-tax in respect of a dividend which is taxable."

This case does not uphold the contention urged by the defendant company even under the Income Tax Act and rules applicable in England. This decision has been quoted with approval by Lord Tomlin in *Neumann v. Inland Revenue Commissioners* (3). Under the circumstances it appears that even under the English Law the position taken up by the defendant company is not supported by authority. In any event the Income Tax Act does not justify by its terms or even inferentially such a right in a company. If there is no such statutory right is there a right under the contract between the parties? In the course of his argument Mr. Coltman contended that the contract between the company and the share-holders was to pay Rs. 7-8-0, less income-tax at the standard rate. The suggested addition has to go a lot more. It should include the case when the company is not ordered to pay any tax at all. No authority is cited to support the contention which would justify the inclusion of any such term in a contract between a share-holder and a company. The circular letter issued to the share-holders in substance is against the terms of the contract suggested by Mr. Coltman. In terms it says that in-

*Pages of (1930) 2 K. B.—[Ed.]

(15) (1920) 1 K B 114.

come-tax upon the dividends will be payable by the holders of the shares.

As I have pointed out, if by reason of the company's distributable profits being free from income-tax the company is not liable to pay income-tax, as pointed out in *Gimson v. Inland Revenue Commissioners* (14), the dividend when paid to the share-holders is also not liable to be charged to income-tax. If so, there appears to be no justification for a company to say that although the Govt. is not entitled to tax the profits of the company and although when these profits when distributed to the share-holders are not liable to be taxed, the company shall deduct income-tax and thus acquire money which it has no right to receive and is under no obligation to pay or account to anyone. Barring general arguments, nothing is cited to support this contention. The inferential right of the company to deduct income-tax, when it has in fact paid income-tax, has been recognized and is not sought to be disturbed, but when it is sought to be extended so as to permit a company to make a profit for its own benefit and not for the benefit of the Govt. in the name of income-tax, I think it is but right that a clear authority should be called for before that right can be recognized.

It was urged that the company gave to the share-holders a certificate under s. 20 and that enabled them to recover a refund under s. 4, Income Tax Act. If this is sought to be argued as a defence it must mean that although the company has deducted from the share-holders a sum as income-tax, they are given a document by which they will be able to recover the same from the Govt. There is no such defence in the written statement or the issues and I do not think it is proper to permit Counsel to raise it in the course of his argument. The contract as suggested by Mr. Coltman would mean that the company had power (presuming it had) to give the share-holders a document which would absolve the share-holders from their liability to pay the tax. The company will therefore deduct from the dividend what the share-holders would have to pay by way of tax. This contention is open to two objections. The first is that there is no initial contract between the company and the share-holders that the company shall give a certificate under s. 20, Income Tax Act. Section 51 of the Act provides that when there is a reasonable cause or excuse the company is absolved from the obligation to give a certificate. Moreover, even

if such a certificate were granted I do not see how the refund section can be applicable when in fact the Govt. have not received any tax at all from anyone. Without an initial payment there can be no refund as pointed out in *Gimson v. Inland Revenue Commissioners* (14). The second objection is that having regard to s. 14(2) (a) it is not established that on receipt of a dividend warrant (with or without a certificate) the share-holder is under a liability to pay tax under the circumstances existing in this case. Indeed, it may be disputed if the company was justified at all in issuing certificates in the terms they were given. I therefore think that there being no contract and no statutory right the company was not justified in deducting income-tax from the dividends declared for the years in which the company had in fact paid no tax. The assessment orders put in as exhibits show that the company was exempted from paying all tax from 1925-26 up to 1933-34. Therefore for those years the right to deduct amount on the ground of income-tax must be rejected.

On the point of limitation I agree with the learned Chief Justice. There is no evidence to prove that the plaintiff became a holder of her preference shares upon the terms of the circular letter of December 23, 1918. The contention of the defendant company that the plaintiff's husband was a share-holder and as such had received the circular does not help the defendant company. The fact that he held a general power-of-attorney also does not help the company. The knowledge of the circular acquired by him was not acquired in his position as an agent and the knowledge acquired in another capacity cannot be fastened on to the plaintiff.

Beaumont, C. J.—With regard to the order we propose to make a declaration in these terms: Declare that the defendant company not having in fact paid income-tax in respect of profits of the defendant company during the accounting years 1925/26 to 1933/34 (both inclusive) were not entitled to make any deductions in respect of income-tax upon the dividends paid or payments made towards the liability of Rs 26 and interest thereon to the plaintiff and all persons who were from time to time during the said years holders of the second preference shares. With regard to payment the plaintiff asks for an order that the defendant company do pay to her sums of Re. 0-5-5, Re. 0-2-8½, Re. 0-13-6½ and

Rs. 2-8-7½ per each second preference share held by her in respect of dividends declared in July 1931, July 1932, August 1933 and September 1934, and there is no difficulty in making an order in those terms, but the plaintiff also suggests that we should extend the order for payment to the holders of other second preference shares represented by her in the suit. It is, I think, clear that we cannot do that, because some of these holders may be persons against whom the defendant company may have some right of set-off. Mr. Coltman has argued strenuously that in a representative suit the Court cannot make any order for payment. No doubt the rule is established that as against a representative defendant the Court will not make an order for payment. But no authority has been cited to us—nor do I know of any—which shows that the Court cannot in a proper case make an order for payment on behalf of a representative plaintiff. I think, however, all we can do is to make an order in general terms in this form.

Order that the defendant company do pay to the other holders of the second preference shares represented herein by the plaintiff such sums as they may be entitled to having regard to the above declaration, and to the equities existing between themselves and the company with liberty to apply. If we do not make that order the difficulty is this. We are told that there are something like 20,000 holders of second preference shares. If instead of making an order for payment we were to say that we cannot make such an order and that limitation will continue to run as against the holders of second preference shares other than the plaintiff those holders of second preference shares will now have to start suits against the defendant company, we might have 20,000 suits against the defendant company with 20,000 applications for stay pending an appeal in this suit to the Privy Council. In our view we ought to avoid such a contingency, and we think that an order in the terms we have suggested will do no injustice to the defendant company, and will, on the other hand, save limitation from running. Payment will carry interest at the rate of 6 per cent. per annum from the date of judgment and not before (Art. 136). The plaintiff is entitled to the costs of the suit.

D.

*Suit decreed.***NAGPUR HIGH COURT**

Second Appeal No. 286 of 1936

August 16, 1938

NIYCGI, J.

SAMBHOO AND ANOTHER—PLAINTIFFS**—APPELLANTS***versus***PARASHRAM—DEFENDANT—****RESPONDENT**

Berar Land Revenue Code, 1928, s. 129 (3)—Dispute as to right of way — Enquiry and order passed by Tahsildar—Appeal heard by Sub-Divisional Officer exercising powers under s. 32—Subsequent civil suit—Starting point of limitation.

A dispute regarding a right of way which provided access to certain survey number was enquired into by the Tahsildar who was empowered to do so by Govt. Notification at the instance of the defendant and the Tahsildar passed his order on January 10, 1934, in defendant's favour. The plaintiffs thereon preferred an appeal to the Deputy Commissioner which was heard by the Sub-Divisional Officer, who decided it on March 14, 1934. An appeal to the Commissioner was decided on June 13, 1934, and a revision application made to the Local Govt. was decided on December 12, 1934. The decision having been given against the plaintiffs they filed a suit on March 11, 1935, in terms of s. 129 (3) of the Berar Land Revenue Code, 1928:

Held, that although the Tahsildar exercised the powers under the Berar Land Revenue Code under s. 129 his decisions did not have the force of the decisions of the Deputy Commissioner. The order passed by the Sub-Divisional Officer exercising powers under s. 32 became that of the Deputy Commissioner and the period on one year was to be computed from the date of the order passed by the Sub-Divisional Officer. The suit was, therefore, in time.

S. A. from the appellate decree of the Court of the Additional District Judge, Khamgaon, dated April 14, 1936.

Mr. V. K. Rajwade, for the Appellants.

Mr. W. K. Sheorey, for the Respondent.

Judgment.—This is plaintiffs' appeal from the judgment of the Additional District Judge, Khamgaon, in Civil Appeal No. 64-A of 1935 decided on April 14, 1936. The only point which arises for determination in this appeal is whether the suit was within time.

There was a dispute regarding a right of way which provided access to Survey No. 71. It was enquired into by the Tahsildar Malkapur at the instance of the defendant Parashram, and the Tahsildar passed his order on January 10, 1934 in defendant's favour. The plaintiffs thereon preferred an appeal to the Deputy Commissioner which was heard by the Sub-Divisional Officer, Khamgaon, who decided it on March 14, 1934. An appeal to the Commissioner was decided on June 13, 1934 and a revision

application made to the Local Govt. was decided on December 12, 1934. The decision having been given against the plaintiffs they filed a suit on March 14, 1935 in terms of s. 129 (3) of the Berar Land Revenue Code, 1928. Both the Courts below held that the cause of action arose on the date on which the Tahsildar's order was passed, that is to say on January 10, 1934 and that the suit having been filed more than one year after that date was barred by time.

The terms of sub-s. (3) of s. 129 of the Berar Land Revenue Code go to show that it is the decision of the Deputy Commissioner which is the starting point of limitation of one year prescribed therein for instituting a civil suit. The question is whether Tahsildar's order should be deemed to be the order of the Deputy Commissioner for the reason that he was empowered by a notification of the Local Govt. to enquire into and decide the right of way over the boundaries contemplated in s. 129 of the Berar Land Revenue Code. The notification invests all Tahsildars with powers under the Code specified in schedule appended to that notification. The Tahsildar is thereby authorised to enquire into and decide such disputes but that does not invest him with powers of the Deputy Commissioner so as to make his decision a decision of the Deputy Commissioner. There is a clear and unmistakable difference in the Notification afore-mentioned and the notification No. 593-27-XII dated February 7, 1929 which confers on the Sub-Divisional Officers the powers of a Deputy Commissioner under s. 32 (1), cl. (1) to hear appeals from orders passed by Tahsildars, and Naib-Tahsildars under the Code. Whereas in the first notification the expression is "invest all Tahsildars with powers under the Code", the expression in the other notification is "to confer on all Sub-Divisional Officers the powers of a Deputy Commissioner under s. 32" etc. The meaning is clear beyond any controversy. While the Tahsildar exercised the powers under the Code under s. 129 in this case his decisions did not have the force of the decisions of the Deputy Commissioner; the Sub-Divisional Officer who exercised the powers of a Deputy Commissioner under s. 32 stood in the shoes of the Deputy Commissioner, and his decision took effect as if it had been made by the Deputy Commissioner himself. As between the two orders, viz., that passed by the Tahsildar and that passed by the Sub-Divisional Officer it is the latter order

which becomes that of the Deputy Commissioner, as will be clear by a reference to s. 32 of that Act. As the order passed by the Sub-Divisional Officer exercising powers under that section became that of the Deputy Commissioner it became appealable to the Commissioner, and in this case an appeal was actually filed from the Sub-Divisional Officer's order as if it was the Deputy Commissioner's order. The Sub-Divisional Officer's order was passed on March 14, 1934 and the period of limitation of one year must be computed from that date. The plaintiffs would thus have time to file a suit up to March 14, 1935. They filed the suit on March 11, 1935. It must therefore be treated as having been filed within time.

The lower Appellate Court's decree is set aside and the plaintiffs' suit is remanded to the trial Court for trial on merits. The appeal thus succeeds with costs in all the Courts. Counsel's fees Rs. 20.

S.

Case remanded.

RANGOON HIGH COURT
Criminal Reference No. 34 of 1939
May 16, 1939

ROBERTS, C. J. AND DUNKLEY, J.
THE KING—PROSECUTOR

versus

KYAW AYE—ACCUSED

Whipping Act (IV of 1909), s. 3—Offence under s. 380, Penal Code (Act XLV of 1860)—Sentence of whipping, if can be substituted for order of detention in Borstal School passed by trial Court—Burma Prevention of Crime (Young Offenders) Act (III of 1930), s. 25—Order under—Nature of.

In a case of an offence under s. 380, I. P. O., a Magistrate has two alternatives before him. He may send an offender to prison or, in lieu thereof, he may either cause him to be whipped or send him to Borstal; but the power to order a person to be whipped is only in lieu of another punishment under the Code and once an order of detention in Borstal has been passed there is no power to alter this order to a sentence of whipping. Where a Magistrate has ordered detention in Borstal School of an offender, the Sessions Judge has no power to substitute for it a sentence of whipping as that would be enhancing the sentence. 163 Ind. Cas. 74 (1), 163 Ind. Cas. 144 (2) and 165 Ind. Cas. 575 (3), relied on.

Per *Ba U, J.*—(In order of reference) the order passed under s. 25, Prevention of Crime (Young Offenders) Act, has not the same legal effect as an order passed under s. 562, Criminal P. O., as it affects the offender directly in his person and deprives him of his liberty unlike an order under s. 562, Criminal P. O. It is, therefore, a punishment within the meaning of s. 3, Whipping Act, and s. 53, I. P. O.

Cr. Ref. made by Ba U, J., in Criminal Revision No. 125-A of 1939, dated April 28, 1939.

Order of Reference

Ba U, J.—Respondent Kyaw Aye, aged 18, was tried and convicted on a charge of cattle theft under s. 380, I. P. C., and ordered to be detained in the Borstal School for four years. On appeal the learned Sessions Judge of Bassein confirmed the conviction but set aside the order of detention and in lieu thereof gave him 20 lashes. The question is whether the sentence of whipping given in lieu of the order of detention in a Borstal School amounts to enhancement within the meaning of s. 423 (1) (b) (3), Criminal P. C. The learned Govt. Advocate submits that it does. His contention is that though whipping can be given under s. 3, Whipping Act, in addition to or in lieu of any punishment to which an offender is liable, it cannot be given in lieu of an order of detention in a Borstal School as the order of detention is not a punishment. An order of detention passed under s. 25, Prevention of Crime (Young Offenders) Act, according to the learned Govt. Advocate has the same legal effect as an order passed under s. 562, Criminal P. C. He contends that punishment as used in s. 3, Whipping Act, means the kind of punishment as set out in s. 53, I. P. C. There are six kinds of punishments as set out in that section, namely, (1) death : (2) transportation : (3) penal servitude : (4) imprisonment, rigorous or simple : (5) forfeiture of property : (6) fine.

If the order passed under s. 25, Prevention of Crime (Young Offenders) Act, has the same legal effect as an order passed under s. 562, Criminal P. C., it cannot then be punishment in lieu of which whipping can be given. In my opinion, it does not have the same legal effect as an order passed under s. 562, Criminal P. C. The object underlying the infliction of punishment is to make the offender suffer either in person or in purse or in both so that he may not follow his errant way in future and at the same time to make others understand that they will be dealt with similarly if they commit any offence against society. This being recognized not to meet the case of a person having the first lapse in his life from the path of rectitude, s. 562, was introduced. Under the said section, a person who has his first lapse in life need not be sentenced to punishment. Provided certain conditions set out in that section are ful-

filled, he may be given a chance of reforming himself by being let off on recognizances for a certain period of time. If he does not behave himself well within that period, he can be re-called and sentenced to any kind of punishment as prescribed in s. 53 of the I. P. C.

The order thus passed under s. 562, is what I may call an order putting a man on probation of good conduct for a certain period of time. It does not affect him either in person or in purse, but the order passed under s. 25, Prevention of Crime (Young Offenders) Act affects the offender directly in his person. Though he is not sent to jail, he is detained according to his age either in a Borstal School or a training school. It thus deprives him of his liberty. To be deprived of one's liberty is in effect a punishment. Detention in a Borstal or training school lies midway between rigorous and simple imprisonment. A man sent to rigorous imprisonment has to do hard manual labour whereas a man sent to simple imprisonment is allowed to pass his time in idleness. In the case of a boy sent to a Borstal or training school he is neither asked to do hard manual labour nor allowed to pass his time in idleness. He is taught some useful trade so that he may become a useful citizen on his release. Such being the case, I am of opinion, that an order passed under s. 25, Prevention of Crime (Young Offenders) Act is a punishment within the meaning of s. 3, Whipping Act. That this is so is in my opinion, proved by what s. 10 of the aforesaid Act says. Under the said section whipping can be given in lieu of the order of detention in the case of a boy under 16 years of age. Further I may point out that the learned authors of the Law of Crimes, Ratanlal and Thakore are also of opinion that detention in a reformatory is a punishment within the meaning of s. 53, I. P. C. They say "to the six kinds of punishments mentioned in the section two more are added by subsequent enactments, namely, whipping and detention in reformatories." (See p. 85 of their book, 14th Edition.) As this is, however, an important point, I refer the following questions for decision by a Bench, full or otherwise as the learned Chief Justice may decide :

(1) Whether whipping can be given in lieu of an order of detention in a Borstal School.

(2) If so, how many stripes should be regarded as equivalent to a particular period of detention.

I may note that the sentence of whipping in this case has been carried out.

Mr. U Myint Thein, Govt. Advocate, for the King.

Order of Division Bench

Roberts, C. J.—In this case two questions have been referred for our decision. The first is whether whipping can be given in lieu of an order of detention in a Borstal School, and the second, if so, how many stripes should be regarded as equivalent to a particular period of detention. The facts out of which this question arises are concerned with a matter in which the respondent and another were tried for an offence under s. 380, I. P. O. and the Fourth Additional Magistrate of Bassein passed an order against the respondent of four years' detention in the Borstal Institute. The learned Sessions Judge thought that this was unsuitable and substituted for it a sentence of twenty lashes of whipping which we regret to learn, has been carried out. Now, under s. 3, Whipping Act, whoever commits, among other offences an offence against s. 380, I. P. O., may be punished with whipping in lieu of any punishment to which he may, for such offence be liable under the said Code, that is to say, the Magistrate who tried the case might have decided to order whipping in the case of this respondent; but what in fact he decided to do was to send him to be detained in the Borstal Institute. How then, did the learned Sessions Judge pass a sentence of whipping? He could only do so by invoking s. 3, Whipping Act, and he could only pass a sentence of whipping in lieu of any punishment to which the respondent might be liable under the said Code, that is to say, he could only pass a sentence of whipping in lieu of a sentence of imprisonment; but the respondent had never been sentenced to imprisonment, and in order to give the learned Sessions Judge power to sentence him to whipping he must notionally re-convert the order sending him to the Borstal Institute into a sentence of imprisonment. He has no power to do so as that would be enhancing the sentence. It is clear that a Magistrate, in such a case, has two alternatives before him. He may send an offender to prison or, in lieu thereof, he may either cause him to be whipped or send him to Borstal; but the power to order a person to be whipped is only in lieu of another punishment under the Code and once an order of detention in Borstal has been passed there is no power to alter this order to a sentence of whipping.

The authorities which bear upon the point are numerous and clear. In *Emperor v. Ah Hwa* (1), it was pointed out that an order for detention in the Borstal Institute in substitution of a sentence of imprisonment is not enhancement, that is to say, it is a lesser sentence than that of imprisonment. It follows that a sentence of imprisonment must always be an enhancement of an order for detention in a Borstal Institute. This authority was followed in *Tha E v. Emperor* (2). The latter decision was referred to by a Full Bench in *King-Emperor v. Ismail* (3). In the circumstances the sentence which has been carried out was an illegal one. As it has been carried out the records will be sent back to the learned Sessions Judge for future guidance in matters of this kind.

Dunkley, J.—I agree.

s.

Reference answered.

(1) 14 R 119; 163 Ind. Cas. 74; A I R 1936 Rang 227; (1936) Or. Cas. 527; 37 Or. L J 790; 8 R Rang. 809.

(2) 14 R 143; 163 Ind. Cas. 144; A I R 1936 Rang. 229; (1936) Or. Cas. 513; 37 Or. L J 793; 8 R Rang. 611.

14 625; 165 Ind. Cas. 575; A I R 1936 Rang. 48 (1936) Or. Cas. 976; 9 R Rang. 215 (F B).

LAHORE HIGH COURT

Final Revision No. 1580 of 1939

January 24, 1940

BLACKBIE, J.

MOHAMMAD SHARIF—PETITIONER

versus

DIWAN SINGH—RESPONDENT

Criminal Procedure Code (Act V of 1898), ss. 522 (3), 433, 438—S. 522 (3), applicability—Whether gives right of appeal against order passed under s. 522—Court of reference in s. 522 (3), what is—Court having power to report case under s. 438, if Court of reference.

Sub-s. (3) of s. 522, Criminal P. O., only applies to the Court which is dealing with the original matter either as a Court of Appeal, confirmation, reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under s. 522. 135 Ind. Cas. 679 (1), relied on.

A Court of reference in sub-s. (3) of s. 522, Criminal P. O., can only be interpreted as meaning a Court which has the power to refer and that is only a Court empowered under s. 433. A Court which has power to refer the case for orders to the High Court under s. 438 is not a Court of reference. 145 Ind. Cas. 327 (2), explained.

Or. R. from the order of the Sessions Judge, Sialkot, dated August 3, 1939.

Mr. Mohammad Aslam Khan, for the Petitioner.

Mr. S. L. Puri, for the Respondent.

Order.—This case involves a question of law for which no direct authority has been cited before me. The learned Magistrate heard and decided a criminal case against the petitioner for criminal trespass and convicted him. He apparently held that the trespass was merely of a technical nature, as he only sentenced the petitioner to imprisonment till the rising of the Court and a small fine. There was no appeal against this order. The learned Magistrate was later moved under s. 522, Criminal P. O., to restore possession to the complainant in the original case. The learned Magistrate refused to restore possession as he was of opinion that the conduct of the complainant was not entirely satisfactory and that he had deliberately given wrong boundaries in his application to the Civil Court and by this means had been put in possession of the whole *baithak* to which he was not entitled. The learned Magistrate in view of this declined to exercise his discretion to make an order under s. 522 and left it to the complainant to get his rights by application to a Civil Court. As I have said there was no appeal to the learned Sessions Judge. A revision petition was however put in by the complainant for enhancement of sentence and whilst this was pending another petition was put in to the learned Sessions Judge to pass the order under s. 522 which the learned trial Court had declined to pass. The learned Sessions Judge entertained these petitions. He did not however report them for the orders of the High Court. He took action himself and passed orders granting this application apparently believing himself to be entitled to act under sub-s. (3) of s. 522, Criminal P. O. He dismissed the other application for enhancement.

There is one thing that I am clear about in this case and that is that sub-s. (3) of s. 522, only applies to the Court which is dealing with the original matter either as a Court of Appeal, confirmation, reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under s. 522. The learned Counsel for the petitioner has drawn my attention to a case reported in *Ghazan v. Bhag Bhari* (1) in which the same view was held by another Judge of this Court. It is clear to me therefore that as far as sub-s. (3) of s. 522 is concerned the learned Sessions

Judge was neither a Court of Appeal nor a Court of confirmation nor a Court of Revision. His power with regard to the revision petition before him for enhancement of sentence was limited to reporting the matter to the High Court and he could not revise the order himself. It has been contended on behalf of the respondent that he was a Court of reference, the argument being that s. 438, Criminal P. O., gives him the power to refer the case for orders to the High Court. Reliance has been placed upon a judgment reported in *Fida Hussain v. Sarfaraz Hussain* (2). There is one remark at the end of the judgment which might be construed as meaning that the Judges took it for granted that a Court reporting the case for orders under s. 438 was a Court with power to act under sub-s. (3) of s. 522. The matter however does not appear to have been put explicitly before the Bench and to have been definitely considered by them, as the real question which was involved in that case was whether a Court which could take action under sub-s. (3) of s. 522 had to do so within a month of its order or could do so at any time without limit.

It is true that a case reported by a Sessions Judge under s. 438 is frequently loosely described as a reference but when it comes to interpreting a statute one cannot gain any support from the mere fact that a term is habitually loosely used. One has to look at the statute itself. Looking at the statute itself I find that a Court of reference can only be a Court such as is described in s. 433 of the Code where the word 'refer' is definitely used. No such word is used in s. 438 where the word 'report' is used instead. There would have been no difficulty in using the word 'refer' in s. 438 in place of the word 'report' had it been the intention of the Legislature to include a Court acting under s. 438 in the category of Courts of reference. It was contended that the Legislature which amended the statute in 1923 by adding sub-s. (3) to s. 522 intended to include a Court acting under s. 438. If however this was their intention they have not carried it out by the language which they have used. In my opinion a Court of reference in sub-s. (3) of s. 522 can only be interpreted as meaning a Court which has the power to refer and that as far as

(1) A I R 1932 Lah. 210; 135 Ind. Cas. 679; (1932) Cr. Cas. 254; 33 Cr. L J 191; 33 P L R. 481; Ind. Rul. (1932) Lah. 151.

(2) 12 Pat. 787; 145 Ind. Cas. 327; A I R 1933 Pat. 617; (1933) Cr. Cas. 1366; 34 Cr. L J 940; 14 P L T 696; 6 R P 161.

I can see from the Code, is only a Court empowered under s. 433, Criminal P. O.

The order of the learned Sessions Judge therefore appears to me to be without jurisdiction and I must and do set it aside. It was argued before me that I should not set it aside as substantial justice has been done. I am not however really satisfied that substantial justice would be done by the learned Sessions Judge's order. The learned Magistrate had a discretion to pass an order under s. 522 or not and if he was of opinion, and he was the best judge of this, that the complainant had not come into Court with clean hands and had himself been guilty of some malpractice in his proceedings with relation to the case, I think that the order which he passed refusing to take action under s. 522 was not unjustified. As a result therefore I set aside the order of the learned Sessions Judge in this case and restore the original order of the learned Magistrate. In other words the petition is accepted.

s.

Order set aside.

BOMBAY HIGH COURT Full Bench

Civil Revision Application No. 138 of 1939
October 11, 1939

N. J. WADIA, DIVATIA AND LOKUR, JJ.
RAMRAO BHAGWANTRAO INAMDAR
AND ANOTHER—DEFENDANTS—APPELLANTS
versus

Babu APPANNA SAMAGE AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (2), s. 115—Interpretation and scope of—"Formal defect", meaning of—Defect, should not affect merits of case—Withdrawal allowed on ground not contemplated by r. 1 (2)—Order amounts to exercising jurisdiction not vested in Court and is revisable under s. 115.

Clause (a) of O. XXIII, r. 1 (2), Civil P. C., is illustrative of the "grounds" referred to in cl. (b), and although the "grounds" need not be *ejusdem generis* with the ground mentioned in cl. (a), they must be "at least analogous" to it. The ground in cl. (a) requires that the suit must fail by reason of some formal defect; whereas the grounds contemplated in cl. (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect. [p. 413, col. 1.]

[Case-law discussed.]

The expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. This expression includes misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the

suit. *Robert Watson & Co. v. Collector of Zillah Rajshahye* (11), relied on. [p. 413, col. 2.]

Where the plaintiff prays for an injunction on the basis of his being the owner of the site which he claims to be an accretion to his land as an alluvion and the suit is dismissed for want of proof, the plaintiff cannot be allowed to withdraw the suit in appeal in order to file another suit claiming title to the site in suit on the ground of adverse possession as there is no defect of form in the suit but a defect of substance arising out of his inability to prove the title on which he based his claim. Allowing the withdrawal of the suit on grounds not contemplated by O. XXIII, r. 1 (2) amounts to the exercise of jurisdiction not vested in the Court under r. 1 (2) and its order can be corrected in revision under s. 115. 119 Ind. Cas. 773 (24), relied on.

O. R. App. against an order of the Assistant Judge, Belgaum, in Appeal No. 6 of 1938.

Mr. B. D. Belvi, for the Appellants.

Mr. D. R. Manerikar, for the Respondents.

Lokur, J.—This is an application in revision against the order of the Assistant Judge of Belgaum allowing the withdrawal of a suit with liberty to file a fresh suit. The original plaintiff, who died during the pendency of the suit, filed the suit in the Court of the Subordinate Judge of Chikodi for an injunction restraining the defendants from obstructing him in removing the trunk of the *babul* tree which he has cut down. He alleged that the tree stood on his land survey No. 12c/1 of Badakatul and had been in his enjoyment for 40 years. The land is bounded by a stream on its east and the defendants who are the *inamdars* of the village contended that the tree was not standing on the plaintiff's land but in the bed of the stream of which the flow had been wrongfully diverted by the plaintiff by artificial means. The plaintiff claimed that the said portion of the bed was an alluvion and as such was an accretion to his land, while the defendants contended that the new land in the bed of the stream was not an alluvion since it was formed as a result of the plaintiff's wrongful construction of a fencing in the bed of the stream, and that even if it were an alluvion, they, as the *inamdars* of the entire village, were entitled to it. The trial Court held that the new land was not an alluvion, that the plaintiff had wrongfully encroached upon the bed of the stream, of which the *inamdars* were the owners, and that the plaintiff could become entitled to it only by being in adverse possession thereof for the statutory period. The trial Court observed that adverse possession had not been

specifically pleaded in the plaint, and that even if the plaintiff be allowed to prove his title by adverse possession, the evidence adduced was insufficient to hold it proved. The suit was, therefore, dismissed with costs, and in the appeal filed by the deceased plaintiff's sons, they applied for permission to withdraw the suit with liberty to file a fresh suit, on the ground that "the case of adverse possession and declaration was not embodied in the plaint," "through oversight." In spite of the respondents' objections, the application was granted and the suit was allowed to be withdrawn with liberty to file a fresh suit. The respondents (the original defendants) have now come in revision. The question that arises in this case is whether the ground on which the withdrawal of the suit has been allowed is such as is contemplated by O. XXIII, r. 1, sub-r. (2), Civil P. O., 1908. Under that sub-rule, withdrawal of a suit with liberty to institute a fresh suit in respect of the same subject-matter may be permitted to the plaintiff, where the Court is satisfied

"(a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim."

In the present case there was no formal defect fatal to the suit, and the permission for withdrawal was granted for a reason said to fall under cl. (b). It is contended for the petitioners that "other sufficient grounds" mentioned in cl. (b) must be *ejusdem generis* with the ground mentioned in cl. (a). On the other hand it is urged for the opponents that there is no such limitation on the expression used in cl. (b), and that the suit may be allowed to be withdrawn on any ground whatsoever, provided the Court deems it to be sufficient. There is a sharp conflict of judicial opinion on this point, and it is necessary to go to the root of the principle and the history of the legislation on this subject. In cl. (b) the nature of the "grounds" which may be regarded as sufficient is not specified, and ordinarily general words in a statute, like all others, ought to be deemed to carry their full and natural meaning, and uncalled for restrictions ought not to be imposed on their plain and ordinary meaning. An exception to this is however recognized in the accepted canon of interpretation that if a general word is preceded by particular and specific words of the same nature as itself, it takes its meaning from them, and is presumed to be restricted to the same genus as those words. But this doctrine of *ejusdem*

generis is by no means of universal application, and should not be applied where there are adequate grounds to show that the natural and wider meaning is intended. To quote from Maxwell on the Interpretation of Statutes (Edn. 8, p. 293):

"If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the larger survey."

In *Kali Ram v. Dharman* (1) and in *Sadeq Reza v. Asaf Kader* (2) an unrestricted meaning was given to the words "other sufficient grounds" and sub-r. (2) (b) was so interpreted as to give the Court authority to permit the withdrawal of a suit on any ground, which appeared to it to be sufficient, whether that ground was in the nature of a formal defect or not; but the earlier rulings to the contrary were not discussed in these two cases. In *Kannuswami Pillai v. Jagathambal* (3) Sadasiva Ayyar, J. differed from the earlier rulings in *Aiya Goundan v. Gopanna Manrادیار* (4), *Khorda Co., Ltd. v. Durgā Charan Chandra* (5) and *Mabulla Sardar v. Rani Hemangini Debi* (6) and expressed his opinion that there was nothing clearly indicated in the section itself from which it could be inferred that the Legislature intended to allow withdrawal with permission only in the cases where the suit was bad by reason of a formal defect or something analogous to a formal defect. His opinion was however *obiter*, since the decision ultimately turned on the finding that the ground, whether analogous to a formal defect or not, was insufficient. The other Judge in that case, Oldfield, J., expressly stated that he was not disposed to reconsider the principle referred to in *Aiya Goundan v. Gopanna Manrادیار* (4) and that it was not necessary to decide whether in that case the Court had jurisdiction to allow the withdrawal of the suit by the plaintiffs, since, even if it had the plaintiffs had not been honest and deserved no consideration. In the three cases referred to by Sadasiva Ayyar, J., and also in *Kali*

(1) A I R 1934 All. 214; 147 Ind. Cas. 441; (1934) A L J 821; 6 R A 538.

(2) A I R 1931 Cal. 268; 127 Ind. Cas. 549; 34 O W N 578; Ind. Rul. (1930) Cal. 833.

(3) 41 M 701; 46 Ind. Cas. 265; A I R 1919 Mad. 1071; 35 M L J 27; (1918) M W N 497; 24 M L T 46; 8 L W 145.

(4) 27 M L J 480; 26 Ind. Cas. 57; A I R 1915 Mad. 480; 1 L W 726; 16 M L T 253; (1914) M W N. 832.

(5) 11 O L J 45; 5 Ind. Cas. 187.

(6) 11 O L J 512; 6 Ind. Cas. 629.

Prasanna Sil v. Panchanan Nandi (7), it was held that the sufficient ground referred to in cl. (b) must be *ejusdem generis* with the defect referred to in cl. (a). In *Buta Singh v. Hardit Singh* (8) this was taken as "settled law." In *Jagmohan v. Ram Khelawan* (9), Boys, J., took the same view and observed that "any other sufficient ground" must be *ejusdem generis* with a formal defect. The Oudh Court also has taken the same view in *Tikai Chobay v. Firm Sheo Dayal Ramji Das* (10). Several other rulings to the same effect were cited at the bar, but a review of them shows that the decision in each case depended mostly on its own facts, and the grounds were in fact insufficient, but the doctrine of *ejusdem generis* was resorted to in order that it might be held that the permission granted was *ultra vires*, and therefore liable to be interfered with in revision. As already stated, the application of the doctrine must depend upon "the intention of the Legislature as gathered from the larger survey" of the scope of the legislation.

Before the Civil P. C. was enacted in 1859, suits were allowed to be withdrawn on certain recognized grounds, such as those mentioned in the leading case in *Robert Watson & Co. v. Collector of Zillah Rajshahye* (11). In that case their Lordships of the Privy Council laid down in effect that there was no power in the Courts in India, similar to that exercised by Courts of Equity or Common Law in England, to dismiss a suit with liberty for the plaintiff to bring a fresh suit for the same matter, or to enter a non-suit, and that such power of Indian Courts was limited to questions of form, as in the case (1) of misjoinder of parties, or of the matters in suit, (2) where a material document had been rejected for not having a proper stamp, and (3) if there had been an erroneous valuation of the subject-matter of the suit. Their Lordships proceeded to observe (p. 170*) :

"In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit . . ."

(7) 44 O 367; 33 Ind. Cas. 670; A I R 1916 Cal. 255; 23 O L J 489; 20 O W N 1000.

(8) A I R 1930 Lah. 175; 124 Ind. Cas. 686; Ind. Rul. (1930) Lah. 558.

(9) A I R 1929 All. 683; 119 Ind. Cas. 859; (1929) A L J 961; Ind. Rul. (1929) All. 1099.

(10) 3 Luck 403; 107 Ind. Cas. 887; A I R 1928 Oudh 482; 5 O W N 61.

(11) 13 M I A 160; 3 Beng. L R 48; 12 W R 43; 2 Suther 269; 2 Sar. 500 (P O).

*Page of 13 M. I. A.—[Ed.]

Although the suit with which their Lordships were dealing was of the year 1856, their decision was pronounced in 1869. In the interval the Civil P. C. of 1859 was passed, and s. 97 of that Code empowered the Court to allow the withdrawal of a suit with liberty to file a fresh suit for the same matter, if the plaintiff at any time before final judgment satisfied the Court that there were "sufficient grounds" for permitting him to withdraw. The section contained no words corresponding to those in cl. (a) of O. XXIII, r. 1, sub-r. (2) of the present Code, and Courts began to make very free use of the power given to them, regardless of the nature of the grounds. In *Joy Kishen Mookerjee v. Raj Kishen Mookerjee* (12) it was held that permission under s. 97 could be granted where the plaintiff stated that it would be out of his power to adduce evidence existing in certain records, within the period fixed by the Court for hearing the case. The suit was allowed to be withdrawn by the Appellate Court on a similar ground in *Khaton Koonwar v. Baboo Hurdoot Narain Singh* (13), Phear, J., observed (p. 163) :

".....instead of passing a final decree against him (plaintiff) now on the ground of there being no evidence to support his case, it is right in the interest of justice to allow him to withdraw his suit with permission to bring a fresh suit to enforce his claim against the defendants."

This case was decided in 1873 and the decision was clearly opposed to the principle laid down by the Privy Council in *Robert Watson & Co. v. Collector of Zillah Rajshahye* (11), but s. 97 of the Code was regarded as not recognizing that principle. But next year in *Muddun Ram Doss v. Israil Ali* (14) under similar circumstances Kemp, J. followed *Robert Watson & Co. v. Collector of Zillah Rajshahye* (11) and held that the plaintiff could not be permitted to withdraw with liberty to bring a fresh suit, after issues had been joined, and he had failed to produce evidence to support his claim. In view of this conflict of decisions, the words as to the suit failing by reason of some formal defect were first added in the corresponding s. 373, Civil P. C., of 1877 and the same wording was retained in the Code of 1882. In *Mahipati v. Nathu* (15), Scott, C. J. thought that this change was introduced to abrogate the view taken by Kemp, J. of the Bengal High Court in *Muddun Ram Doss v. Israil*

(12) 16 W R 101.

(13) 20 W R 163.

(14) 21 W R 291.

(15) 33 B 722; 4 Ind. Cas. 252; 11 Bom. L R 1109.

Ali (14) just cited. He observed (p. 726*): "The words of the Code of 1882 are different from the words construed in that case by Kemp, J., for the Court is authorized to permit withdrawal not only where the suit must fail by reason of some formal defect but also where there are sufficient grounds for permitting the plaintiff to withdraw."

With great deference we think that this view misinterprets the purpose of the addition of cl. (a). If sufficiency was to be the only test of the grounds on which the withdrawal of a suit could be permitted, then the words in cl. (a) would be superfluous. It is a well-recognized canon of construction that a statute ought to be so construed that if it can be prevented, no clause, section or word shall be "superfluous, void or insignificant": *The Queen v. Bishop of Oxford* (16). The obvious object of the addition was to give effect to the ruling of the Privy Council and not to override it as the earlier rulings referred to above though s. 97 of the Code of 1859 did. Although the expression "sufficient grounds" necessarily included the ground that a suit must fail by reason of some formal defect, the latter was specifically mentioned in cl. (a) by way of an illustration. The fact that it is mentioned in a separate clause by itself does not indicate that it absolutely restricts the following clause, but it provides an illustration of the grounds to be considered sufficient in a general way. The "grounds" though not *ejusdem generis* with the ground mentioned in cl. (a) must at least be analogous to it. In the Code of 1903, the only change made in the wording of cl. (b) was the addition of "other" before the words "sufficient grounds". In *Burathgunta Pentadee v. K. P. Rajamma* (17), the addition of the word "other" was held to suggest that the "sufficient grounds" must be *ejusdem generis* with the "formal defects" under cl. (a). This view was accepted by Beasley, J. in *Naimathulla v. Abdul Razack* (18). With respect, we do not think the word "other" suggests anything of the kind. It simply means "other than" the ground mentioned in cl. (a). By way of analogy, it may be pointed out that in *Chhajju Ram v. Neki* (19), their Lordships of the Privy Council interpreted the

words "any other sufficient reason" appearing in O. XLVII, r. 1, Civil P. C., 1903, as meaning "a reason sufficient on grounds at least analogous to those specified immediately previously," and that interpretation is binding upon us. In our opinion, there is a distinct difference between the Latin phrase *ejusdem generis* and the words "at least analogous," the former being more restrictive than the latter. On the principle of *ejusdem generis* the meaning of a general word is wholly restricted to the same genus to which the preceding word or words belong. The expression means "of the same kind," whereas "analogous," according to Chambers's Twentieth Century Dictionary means "bearing some correspondence with or resemblance to; similar in certain circumstances, or relations."

When this distinction is borne in mind it is easy to reconcile the seemingly conflicting decisions of our High Court. In *Bai Kashibai v. Shidapa Annapa* (20) the question of interpretation did not arise, since it was held on merits that failure to produce documents was not a sufficient ground for the withdrawal of the suit with liberty to file a fresh suit. In *Narandas Raghunathdas v. Shantilal Bholabhai* (21) Marten, J. made certain *obiter dicta* admittedly not required for the disposal of that case, expressing his dissent from the ruling in *Kali Prasanna Sil v. Panchanan Nandi* (7) which had held that cls. (a) and (b) of sub-r. (2) must be read together and that "other sufficient grounds" in cl. (b) must be *ejusdem generis* with "some formal defect" in cl. (a). He did not however mean to lay down any definite ruling, but casually observed (p. 385*):

"I am very reluctant, speaking for myself, to fetter what appears to me to be the plain words of the Act, and although it may be that one has to read sub-ss. (a) and (b) together I am as at present advised by no means satisfied that the *ejusdem generis* rule applies."

In other words, though in his opinion the *ejusdem generis* rule does not apply, cls. (a) and (b) have to be read together, that is to say, cl. (a) is illustrative of the "grounds" mentioned in cl. (b). In *Lala Punjushet v. Motiram Budhu* (22) although Macleod, C. J. says that he agrees with the construction put upon O. XXIII, r. 1 (20) 37 B 682; 21 Ind. Cas. 23; 15 Bom. L R 823.

(21) 45 B 377; 58 Ind. Cas. 1004; A I R 1921 Bom. 267; 22 Bom. L R 1012.

(22) 50 B 192; 94 Ind. Cas. 777; A I R 1926 Bom. 315; 28 Bom. L R 440.

(16) (1879) 4 Q B D 245.
(17) (1911) 1 M W N 105; 8 Ind. Cas. 868.
(18) A I R 1925 Mad. 1268; 91 Ind. Cas. 292; 22 L W 535.
(19) 49 I A 144; 72 Ind. Cas. 566; A I R 1922 P O 112; 3 L 127; 30 M L T 295; 26 O W N 697; 41 P L R (P O) 1922; 3 P L T 435; 16 L W 37; 17 P W R 1922; 43 M L J 332; 24 Bom. L R 1238; 4 U P L R (P O) 99; 36 C L J 459 (P O).

by the decision in *Kali Prasanna Sil v. Panchanan Nandi* (7) he does not go so far as to say that the doctrine of *ejusdem generis* should be applied. Following *Chhajju Ram v. Neki* (19), he held that the sufficient ground mentioned in cl. (b) should be "analogous to a formal defect." In the more recent case in *Bai Mahakore v. Bhikhabhai Sankalchand* (23) the learned Chief Justice has fully discussed both these cases, and has expressed his agreement with the view taken by Marten, J. in *Narandas Raghunathdas v. Shantilal Bholabhai* (21). As regards the application of the *ejusdem generis* rule, he says (p. 117*):

"To my mind the language of the rule is quite plain, and there is no scope for the introduction of the *ejusdem generis* rule. The Court must be satisfied either that the suit must fail by reason of some formal defect or that there are other sufficient grounds for allowing the order asked for. If the 'sufficient grounds' within cl. (b) are to be analogous to the grounds specified in cl. (a), it would seem that cl. (b) must be confined to cases in which the Court thinks that the suit must fail, and on that reading cl. (a) would deal with suits which must fail for some formal defect, and cl. (b) with suits which must fail for some defect which is not formal but is of a similar nature. It seems to me that to read the clause in that way is to ignore the plain language in which it is expressed. I have no doubt whatever that cl. (b) is not limited to cases in which the Court thinks that the suit must necessarily fail."

The learned Chief Justice however has added that "the two clauses must be read together" and one has in cl. (a) an illustration of the sort or reason which the Legislature thought would be sufficient, and in that way cl. (a) may, to some extent, limit the generality of the words in cl. (b). With great respect we concur in this view, which is exactly what we mean by saying that cl. (a) is illustrative of the "grounds" referred to in cl. (b), and although the "grounds" need not be *ejusdem generis* with the ground mentioned in cl. (a), they must be "at least analogous" to it. The ground in cl. (a) requires that the suit must fail by reason of some formal defect; whereas the grounds contemplated in cl. (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect. To determine what grounds are analogous to formal defects, it is necessary to know what defects are to be deemed "formal." The instances of defects "of form" cited by the Privy Council in *Robert Watson & Co. v. Collector of Zillah Rajshahye* (11)

include misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the suit. This shows that the expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not.

Applying this test to the facts of the present case, it is evident that the ground on which the opponents are allowed to withdraw the suit, is a defect of substance, as distinguished from a defect of form. They prayed for an injunction on the basis of their being the owners of the site which they claimed to be an accretion to their land as an alluvion. They adduced all their evidence and failed to prove that the site was an alluvion. Their suit was dismissed. Then they wanted in appeal to be permitted to withdraw the suit in order to file another suit claiming title to the said site on the ground of their adverse possession for over twelve years. There was no defect of form in the suit, but a defect of substance, arising out of their inability to prove the title on which they had based their claim. They joined issues with the petitioners on that basis, and allowed the suit to be fully tried to the end. It was only when they found that the trial Court did not uphold their title as claimed by them that they sought to withdraw the suit in order to start the litigation afresh and ask for the same relief on a different basis. In allowing the suit to be withdrawn on this ground, the Assistant Judge acted without jurisdiction, and his order can be corrected in revision under s. 115, Civil P. O., as was done in *Bhikaji v. Anant Laxman* (24). It is urged that the Assistant Judge, in the exercise of his discretion, has held the ground alleged by the plaintiffs for withdrawing the suit to be sufficient, and his discretion cannot be interfered with in revision. It was so held in *Ishar Das v. Aya Ram* (25) but in the present case there being no such ground as is contemplated by cl. (b) of sub-r. (2), the question whether it was sufficient did not arise, and in considering that question and holding the ground to be sufficient, the learned Assistant Judge exercised a jurisdiction

(23) 59 B 114; 154 Ind. Cas. 553; A I R 1935 Bom. 28; 36 Bom. L R 1110; 7 R B 335.

* Page of 59 B.—[Ed.]

(24) 31 Bom. L R 613; 119 Ind. Cas. 773; A I R 1929 Bom. 320; Ind. Rul. (1929) Bom. 519.

(25) 13 L 537; 136 Ind. Cas. 1; A I R 1932 Lah. 360; 33 P L R 275; Ind. Rul. (1932) Lah. 177.

which did not vest in him under the sub-rule. His order must therefore be set aside and the appeal heard and disposed of on its merits, as if the suit has not been withdrawn. The Rule is made absolute. The order allowing the plaintiffs to withdraw the suit is reversed and their application for permission to withdraw the suit is rejected. The appeal is remanded for being heard and disposed of according to law. The opponents shall pay the petitioners' costs and bear their own.

D.

*Rule made absolute.***MADRAS HIGH COURT**

Appeal No. 14 of 1938

September 5, 1939

LEACH, C. J. AND KUNHI RAMAN, J.

ABDUL HAMEED—APPELLANT

versus

MOHAMMAD YOONUS (PETITIONER)

AND OTHERS—RESPONDENTS

Muhammadian Law—Will—Formalities necessary—Letter and telegram giving instructions to solicitors for cancelling certain provision in will held could be admitted to probate—Cutchi Memon—Will—Law applicable.

No writing is required under Muhammadian Law to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. Where, therefore, the testator having decided to make certain alteration in the will and after receiving the draft codicil, instructed his solicitors to amend it by inserting a provision cancelling the provision he had made in the will with regard to the school fees of his grandchildren, by a telegram and a letter, the letter and the telegram containing instructions from part of will and can be admitted to probate. 49 Ind. Cas. 637 (1) and *Mazhar Hussain v. Bodha Bibi* (3), relied on.

The provisions of the Muhammadian Law with regard to wills apply to a Cutchi Memon. 49 Ind. Cas. 637 (1), relied on.

Mr. P. K. Janakirama, for the Appellant.

Messrs. T. A. Rangachari, V. Subramaniam, D. Narsaraju and V. Satyanarayana, for the Respondents.

Leach, C. J.—Hajee Sir Ismail Sait, a member of the Cutchi Memon community and a resident of Bangalore, died on April 24, 1934 in the Tuberculosis Sanatorium at Arogyavaram, Chittoor District. He was survived by a widow, five sons (the appellant and respondents Nos. 1 to 4) and a daughter (respondent No. 5). He had sixteen grandchildren, who are respondents Nos. 6 to 21. He left a will dated March 19, 1934, and the present appeal

arises out of an application which was made by the executor for the grant of probate. By his will the testator provided for the education of his grandsons. For some of them he made special provisions with regard to their education and maintenance. While he was in the Sanatorium he decided to fix the allowance which his sons and daughter were to receive under his will and he directed his solicitors, Messrs. Moresby and Thomas, Madras to draw up a codicil to give effect to his intentions in this respect. The instructions to draft the codicil were embodied in a letter dated April 5, 1934 and signed on the testator's behalf by respondent No. 1. Messrs. Moresby and Thomas prepared a draft and sent it to him on April 6. Two of the testator's grandchildren had been at school at Aligarh. One died while at school and the other was consequently withdrawn from the school. On April 13, 1934 the testator directed respondent No. 1 and his agent, D. L. Narasappa to write to Messrs. Moresby and Thomas in these terms:

"I beg to acknowledge the receipt of your letter of the sixth instant with the draft codicil. I am grieved to inform you that since the receipt of this codicil my grandson, Abdul Sammad, suddenly died at Aligarh University. I have withdrawn my other grandson from school and have decided to cancel the allowances provided for school fees. I have therefore wired you as under: 'Your letter, sixth; since my grandson Abdul Sammad died have therefore decided omit also school fees—Don't delay—Ismail,' which I beg to confirm."

Respondent No. 1 who applied for probate of the will also asked that the telegram referred to in this letter and the letter should be read as parts of the will and admitted to probate. The learned Judge who heard the application, (Wadsworth, J.) granted probate of the will, refused to admit to probate the telegram and the letter. The appeal concerns the question whether this decision is right. The refusal of the learned Judge to admit these documents to probate was based on the opinion which he formed that they were only intended to provide material for the preparation of a draft codicil which the testator was to settle later.

Although according to the oral evidence the testator was in clear mind until two days before he died, he was undoubtedly seriously ill when he instructed respondent No. 1 and his agent to write to Messrs. Moresby and Thomas on April 13, 1934, and from the documentary evidence it is quite evident that soon afterwards he became too ill to attend to his affairs. On April 14, Messrs. Moresby and Thomas wrote to him acknowledging

receipt of his telegram instructing them to omit from the will the provisions made for school fees but asked for further instructions in order to clear up a doubt which they felt with regard to the extent of the instructions. By cl. 14 (a) of the will the testator provided for the maintenance and education of the five sons of respondent No. 2, including provision for the pursuit of studies in England or America. In cl. (b) he made a similar provision for the education of any sons who might subsequently be born to the second respondent and in cl. (f) he made provision for the education and maintenance of Sulaiman, the son of the appellant. Sulaiman was then reading for the bar in England. In their letter asking for further instructions Messrs. Moresby and Thomas referred to the fact that Sulaiman was in England and observed that probably the testator did not wish to make any alteration in the clause relating to him but they would be glad to know by return whether he wished them to strike out from the will cls. 14 (a) and 14 (b). In addition to writing this letter Messrs. Moresby and Thomas sent him a telegram asking for instructions. The telegram and the letter were not replied to and it is obvious that this was because the testator was too ill to give instructions. On April 12, Messrs. Moresby and Thomas submitted a bill of costs to the testator and on April 21, the first respondent wrote to them stating that his father was not well enough to go through their letter in consequence of which it had not been placed before him.

The testator being a Outchi Memon the provisions of the Muhammadan Law with regard to wills apply. That a Outchi Memon is governed by the Muhammadan Law in this respect was held in *Sarabai Amibai v. Mahomed Cassum Haji Jan Mahomed* (1), and the contesting respondents have not disputed the correctness of the decision. It is also accepted, as it must be, having been accepted by the Judicial Committee, that by the Muhammadan Law no writing is required to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained: see *Mahomed Altaf Ali Khan v. Ahmad Buksh* (2). The appellant says that the telegram and the letter which he asks to be admitted to probate embody a definite decision by the testator that the

provisions which he had made in his will with regard to school fees should be cancelled. If that is the position there can be no doubt that the telegram and the letter should be admitted to probate. The contesting respondents however say that the learned Judge was correct in treating the telegram and the letter as being material for the preparation of a draft and that the testator left open the definite position until the draft had been submitted to him. The case in *Sarabai Amibai v. Mahomed Cassum Haji Jan Mahomed* (1), has direct bearing on this appeal. In that case a Outchi Memon wrote to his brother-in-law Bhai Abdullahhai, as follows: "In the will which you will get made to-morrow and give me, be kind not to forget (to add) my 'Mukhtayari' so long as I am alive and after me my wife's 'Mukhtayari.' Whatever costs may be incurred I will pay you. Written by your servant, Mahomed Haasam Haji."

On the other side of this document were the words "Bhai Abdullahhai", the name of the brother-in-law. "Mukhtayari" means absolute ownership or full power. The document was unattested. The intention was that the brother-in-law should instruct a solicitor to draw up a will embodying the intentions of the deceased. It was held that the document was in the nature of instructions to his legal adviser with regard to the disposition of his property and that under Muhammadan Law the document operated as a valid will which might be admitted to probate. The deceased died before the will was drawn up. Marten, J. cited with approval the following statement from Mayne's Hindu Law, Edition 8, p. 588:

"So, a paper drawn up in accordance with the instructions of the testator, and assented to by him, will be a good will, though not signed. And if a paper contains the testamentary wishes of the deceased, its form is immaterial."

He also referred to the case in *Mahomed Altaf Ali Khan v. Ahmed Buksh* (2). In that case the Privy Council held that a document which was a power-of-attorney containing an expression of what was to be done with property after the death of the donor of the power operated as a will. In *Mazar Husen v. Bodha Bibi* (3), the Privy Council held that a letter operated as a will. The letter contained this statement:

"You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same manner as stated by me in para. 3."

(1) 43 B 641; 49 Ind. Cas. 637; A I R 1919 Bom. 40; 21 Bom. L R 49.

(2) 25 W R 121.

(3) 21 A 91; 25 I A 219; 7 Sar. 304 (P O).

The letter was addressed to the writer's agent. Now what is the position here? The testator having decided to make certain alterations in his will and after having received the draft codicil instructed his solicitors to amend it by inserting a provision cancelling the directions he had given in his will with regard to the school fees of his grandchildren. He wrote; "I..... have decided to cancel the allowances provided for school fees" and sent a telegram also couched in language equally clear. The testator had made up his mind what was to be done and he gave definite instruction to this end. The fact that the solicitors were not certain whether the instructions affected the grandson who was studying for the Bar in England did not alter the nature of the instructions. In these circumstances the letter and the telegram cannot be regarded as being instructions to the solicitors to submit a draft the provisions of which were to be deemed to be merely tentative. The learned Judge formed the opinion that the letter and the telegram were instructions merely for the preparation of a draft codicil which the testator would settle after perusal, but there is no evidence to be found in support of this. I can see no difference in principle between this case and the case in *Sarabai Amibai v. Mahomed Cassum Haji Jan Mahomed* (1), and I accept the judgment in that case as correctly deciding the question under discussion.

For the reasons indicated I consider that the appeal should be allowed and the telegram and the letter admitted to probate. It is not necessary to inquire what will be the effect of admitting these documents to probate. That question will be decided if and when it arises in proper proceedings. The costs of all the parties who have appeared before us will be paid out of the estate, but not on the Advocate and client basis.

Kunhi Raman, J.—I agree with my Lord.

N.-S.

Appeal allowed.

CALCUTTA HIGH COURT

Appeal No. 1978 of 1936

March 23, 1939

S. K. GHOSE AND B. K. MUKHERJEA, JJ.
AMULYA KRISHNA BANDOPADHYAYA
—DEFENDANT No. 2—APPELLANT

versus

RARULI PIONEER CO-OPERATIVE
BANK, LTD. AND OTHERS—RESPONDENTS

Mortgage—Redemption—Mortgage of entire property to K—Subsequent mortgage of one-fourth share by co-sharer to plaintiff—K obtaining decree purchasing property in execution and selling it to B—Plaintiff no party to suit—Suit by plaintiff decreed and one-fourth property purchased by him—Plaintiff held entitled to redeem entire property—Lis pendens—Purchaser of equity of redemption pending mortgage suit purchasing subsequently rights of mortgagee decree-holder—As between such person and one no party to suit his right of redemption is not affected by lis pendens—Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Refusal of Appellate Court to extend time for filing cross-objection—Interference in second appeal—Limitation Act (IX of 1908), s. 5—Cross-objection not filed within time—Wrong impression of legal adviser, if ground for extension.

A mortgage of an entire taluk was executed in favour of K. Subsequently the plaintiff company obtained a mortgage of one-fourth share of the taluk from A who was a co-sharer in the mortgaged property. K instituted a suit on mortgage and got a decree. The plaintiff, was not made a party to that suit. K in execution of the mortgage decree put up the entire taluk to sale and purchased it himself and then sold it together with all his subsisting rights under the mortgage decree to B. The plaintiff company, in the meantime, instituted a suit on their mortgage bond against A and having got a decree purchased a fourth share of the mortgaged property and instituted a suit for redemption, against K and B.

Held, that the plaintiff's right of redemption extended to the entire mortgage of K and was not confined to so much of it as related to one-fourth share of the property. In allowing the plaintiff to redeem the mortgage he could not be directed to deposit the amount due under the decree passed in favour of K as he was not a party to the mortgage suit and hence was not bound by the decree.

As between the mortgagee on the one hand and the purchaser of the equity of redemption pending the mortgage suit, on the other, the right of redemption must be held to be subject to the rights of the mortgagee decree-holder. But where such purchaser steps into the shoes of the mortgagee decree-holder, by purchasing the rights of the mortgagee as between him and the puisne mortgagees who were no party to the mortgage suit his right to the equity of redemption must be deemed to have stood intact and it is not affected in any way by the doctrine of *lis pendens*.

It is entirely discretionary with the Court of Appeal below to extend the time for filing cross-objections and in refusing to extend time it cannot be said that it committed an error of law which could be interfered with in second appeal.

There is no provision in the Lim. Act which would entitle a party who has failed to file a cross-ob-

jection within period of limitation to extension of time simply because his legal adviser was under a wrong impression.

A. from the appellate decree of the Sub-Judge, Khulna, dated September 14, 1936.

Messrs. Amarendra Nath Bose, Hiralal Chakravarti and Rabindra Nath Bhattacharjee, for the Appellant.

Messrs. Atul Chandra Gupta, Jatindra Nath Sanyal and Joy Gopal Ghose, for the Respondents.

Mr. Bireswar Chatterjee, for the Deputy Registrar.

B. K. Mukherjee, J. — This appeal is on behalf of defendant No. 2 in a suit for redemption of a mortgage. The material facts which are not disputed may be shortly stated as follows: There is *putni taluk* known as *banka taluk* in the District of Khulna which belonged to one Harish Chandra Roy. After the death of Harish, his executor who was the father of defendant No. 4 mortgaged the entire *taluk* to the Khulna Loan Co., who are defendant No. 1 in the present suit, on December 22, 1922. On March 31, 1927 the plaintiff company obtained a mortgage of one-fourth share of the *taluk* from defendant No. 3 who was a co-sharer in the mortgaged party. Defendant No. 1 instituted a suit on their mortgage bond in 1921 and got a decree on August 19, 1930. The plaintiff, who as stated above, was a puisne mortgagee of a fourth share of the property was not made a party to that suit. Defendant No. 1 in execution of the mortgage decree put up the entire *taluk* to sale and purchased it themselves on August 25, 1933. They took symbolical possession of the property on March 13, 1934. On December 18, 1934, they sold the property together with all their subsisting rights under the mortgage decree to defendant No. 2 who is the appellant before us. The plaintiff company, in the meantime, instituted a suit on their mortgage bond against defendant No. 3 and having got a decree purchased a fourth share of the mortgaged property on January 26, 1934. They now instituted the present suit for redemption, against defendants Nos. 1 and 2 on the allegation that as they were not made parties to the mortgage suit for defendant No. 1, the mortgage decree and sale were not binding on them and their rights of redemption remained intact. Defendant No. 2 contested the suit. He

denied *inter alia* the rights of the plaintiffs to redeem and contended firstly that the plaintiff company could not in any event exercise their right of redemption beyond a fourth share of the property which was comprised in their mortgage.

The second contention was that as he himself was a previous purchaser of 1/6th share of the mortgaged property from defendant No. 5 he acquired a prior right to redeem the mortgage of defendant No. 1 in respect of the entire property as also the mortgage in favour of the plaintiffs. The Munsif who tried the suit overruled the first contention of the appellant and came to the conclusion that the plaintiffs' right of redemption extended to the entire mortgage of defendant No. 1 and was not confined to so much of it as related to 1/6th share of the property. He held, however, that, as defendant No. 2 had purchased a sixth share of the property from defendant No. 5 previous to the mortgage sale by defendant No. 1 by the subsequent purchase of the mortgagee's rights of defendant No. 1, he got an absolute interest in the 1/6th share which could not be redeemed by the plaintiffs. The result was that the plaintiffs' suit for redemption was allowed to the extent of 5/6th share of the mortgaged property. Against this decision, the plaintiffs preferred an appeal reiterating their claim to redeem the entire mortgage security and defendant No. 2 filed cross-objections in which he took amongst others the grounds that the plaintiffs should not be allowed to redeem more than a fourth share of the mortgage. The lower Appellate Court dismissed the cross-objection of defendant No. 2 as being filed out of time and it dismissed the plaintiffs' appeal also on its merits. Defendant No. 2 has preferred this second appeal which is directed against the dismissal of his cross-objections and the plaintiffs have preferred a cross-objection challenging that part of the Appellate Court's decree which did not allow their claim to redemption of the whole mortgage.

So far as the appeal of defendant No. 2 is concerned, Mr. Bose who appears for the appellant argues that the lower Appellate Court ought to have extended the period of time for filing cross-objections under O. XLI, r. 22, Civil P. O., and it had refused to do so under a pure misconception of law. The notice of the appeal filed by the plaintiffs was served on defendant No. 2 on November 11, 1935 and he entered appearance on

December 3, 1935, but the cross-objections were not filed till August 15, 1936 and the Court of Appeal below did not think that there was any sufficient reason for not filing them within thirty days from the date when the notice of the appeal was served upon him. In my opinion, it was entirely discretionary with the Court of Appeal below to extend the time for filing cross-objections and in refusing to extend time it cannot be said that it committed an error of law which could be interfered within second appeal. Mr. Bose's argument is that as the mortgage sale held at the instance of defendant No. 1 was set aside in a proceeding under O. XXI, r. 90, Civil P. O., commenced by defendants Nos. 6 and 7, by the Appellate Court, in July 1935 and the order was reversed in part by this Court, only on July 22, 1936, his client, defendant No. 2, could not possibly file his cross-objections till the decision of the High Court was made. The learned Subordinate Judge overruled this contention by saying that as the plaintiffs were left out from the mortgage suit of defendant No. 1, their right to redeem the mortgage stood intact and the fact that there was a mortgage sale made no difference. Mr. Basu contends that this view is wrong and it is only when there is a mortgage sale, that he can raise the question of partial redemption. Mr. Gupta who appears for the respondent on the other hand takes up the position that as the plaintiffs were left out and were not made parties to the mortgage suit, neither the decree nor the sale was in any way binding on them and as they had a right to redeem the entire mortgage of defendant No. 2 the sale did not in any way affect their rights.

We have been referred to a number of decisions on this point by the learned Advocates on both sides; but I do not think it at all necessary for us to enter into the controversy and discuss the propriety of the views respectively put forward by the learned Advocates. The mortgage sale was set aside, as stated above, in July 1935, when the suit was pending in the trial Court. The appeal was filed in regular course by the plaintiff and defendant No. 2, if he wanted to challenge the judgment of the trial Judge, was bound to prefer an appeal himself or else to file a cross-objection within time laid down by law. Nothing had happened which stayed his hands in any way or prevented him from filing an appeal or cross-objection. There is no provision in the Lim. Act which would entitle him to extension of time simply because his legal

adviser was under the impression that if the order setting aside the sale was not reversed, it could not be worth while proceeding any further. In the usual course of things he should have filed his appeal or cross-objections within proper time and if he thought that the sale set aside proceeding would in any way affect the decision, he could have prayed for staying the hearing of the appeal till the final decision in the other matter was given. I do not consider that there is any reason whatsoever for not filing the cross-objections within the specified period and I hold, that the cross-objections were rightly disallowed by the lower Appellate Court. I cannot therefore entertain the ground urged by Mr. Bose that in the circumstances of the case the plaintiffs' right of redemption should have been limited to the $\frac{1}{6}$ th share which they purchased in execution of their mortgage decree against defendant No. 3.

The next point for our decision is, as to whether the Court below was right in holding that the plaintiffs could not redeem the $\frac{1}{6}$ th share of Abani, defendant No. 5 which was purchased by defendant No. 2. This share was undoubtedly purchased by defendant No. 2 after the preliminary decree was obtained by defendant No. 1 in his mortgage suit but before the mortgage sale was actually held. Mr. Gupta's contention is that the equity of redemption to the extent of $\frac{1}{6}$ th share must have been destroyed by the mortgage sale under the doctrine of *lis pendens* and consequently defendant No. 2 had no interest in the equity of redemption which would be deemed to have survived the sale. I do not think that this contention is sound. The effect of the application of the doctrine of *lis pendens* would be that the purchase by defendant No. 2 would be subject to the rights of the mortgagee as declared in the mortgage suit. As between the mortgagee on the one hand and defendant No. 2, who purchased the equity of redemption pending the mortgage suit, on the other, the right of redemption must be held to be subject to the rights of the mortgagee-decree-holder. But as defendant No. 2 has now stepped into the shoes of the mortgagee-decree-holder, as between him and the plaintiffs who were no party to the mortgage suit his right to the equity of redemption must be deemed to have stood intact and it is not affected in any way by the doctrine of *lis pendens*. In my opinion, the Court below was right in holding that the plaintiffs shall be allowed to redeem the mortgage of de-

defendant No. 1 to the extent of 5/6ths share.

The last question is, on what terms the redemption should be allowed. The Court below allowed the plaintiffs to redeem 5/6ths share of the mortgage on depositing in Court 5/6ths share of the amount due under the decree passed in favour of defendant No. 1 within one month from the date. This, in my opinion, is not proper. The plaintiffs were not parties to the mortgage suit and consequently are in no way bound by the decree. The mortgagee as against him is entitled to the mortgage money with interest at the bond rate up to the date of the expiry of the period of grace. Mr. Gupta does not dispute this proposition but what he says is that the plaintiffs were entitled to claim relief under the Money-lenders Act as there was stipulation in the mortgage bond for payment of compound interest with quarterly rests. I think that in the circumstances of this case, defendant No. 2 should be allowed simple interest at the rate of 12 per cent. per annum from the date of the bond up to March 13, 1934, when defendant No. 2 is admitted to have taken possession of the mortgaged properties and on depositing 5/6ths of the total amount thus determined within two months from the date, defendant No. 2 shall re-transfer 5/6ths share of the *putni taluk* to the plaintiffs at the cost of the latter and the plaintiffs will be put in possession of the same. As this is a matter consequent on the decree for redemption which is made by this Court, I do not think that the dismissal of the cross-objections filed by defendant No. 2 where this point was raised, stands in the way of making such an order in the exercise of our powers under the Civil P.O. Subject to the variation mentioned above, the decree of the Court below stands. Parties will bear their own costs.

S. K. Ghose, J.—I agree.

s.

Decree modified.

BOMBAY HIGH COURT

First Appeal No. 105 of 1937

July 11, 1939

N. J. WADIA AND INDARNARAYAN, JJ.

LALLUBHAI BHIKHABHAI

CHUNAWALLA—PLAINTIFFS—APPELLANTS

versus

RATANCHAND RAICHAND—DEFENDANT

—RESPONDENT

Negotiable instruments—Hundi—Namjogi—A obtaining hundi drawn by B and payable to C—A

sending it to C by post—Hundi intercepted by thief and payee's name removed and another substituted—Amount paid to such person—Liability of drawer.

Where a *Namjogi hundi* is obtained from a drawer all that the drawer in such a case guarantees, is that the drawee will honour and pay the *hundi* when it is presented to him on maturity, and if the drawee fails to do so, then the drawer undertakes to repay the amount thereof, provided the said *hundi* is returned in an undischarged state to the drawer. [p. 421, col. 2.]

A obtained a *Namjogi hundi* drawn by B and made payable to C whose name was mentioned in the *hundi* as payee. On receiving the *hundi* A sent it by ordinary post to C. The *hundi*, however, was intercepted by a thief who removed the name of C, the payee, thus making it read payable to third person by making an endorsement making it payable to one G. The *hundi* was thus delivered to G who presented it to the drawee who paid the amount to G. A instituted a suit against the drawer and the drawee on the basis of *hundi*.

Held, that the drawee not being in a position to return the *hundi* in an undischarged state would certainly be liable in damages for wrongful conversion of the *hundi*, the measure of damages being the amount of the *hundi*. [p. 421, cols. 1 & 2.]

Held, also that the drawer was in no way responsible for the *hundi* falling into the hands of the thief, or the alteration which resulted in the loss of money to A or in the payment by the drawee of the *hundi*; hence the proximate cause could not be laid at the door of drawer and he was, therefore, not liable. [p. 423, col. 1.]

[Case-law referred to.]

F. A. from the decision of the First Class Sub-Judge at Surat, in R. O. S. No. 239 of 1935.

Messrs. G. N. Thakor and H. M. Choksi, for the Appellants.

Messrs. H. C. Coyajee, M. R. Vidyarthi and R. A. Desai, for the Respondent.

Indarnarayan, J.—This is an appeal from the decision of the First Class Subordinate Judge of Surat dismissing the plaintiffs' claim against defendant No. 1, the drawers of the *hundi* in question. The facts are summarized by the trial Judge and are shortly as follows: The plaintiffs had a current deposit account with defendant No. 1, who also did business at Surat. The plaintiffs wanted to remit a sum of Rs. 6,000 to the Bombay firm of Ishverlal Amthalal, and in order to enable them to do so they applied to defendant No. 1 for a *Namjogi hundi* drawn by defendant No. 1 and made payable to Ishverlal Amthalal, whose name was mentioned in the *hundi* as the payee. A sum of Rs. 1-14-0 was taken for the *hundi* man charges and debited to the plaintiffs' account and the sum of Rs. 6,000 was similarly debited. The plaintiffs on receiving the *hundi* sent it by ordinary post to Ishverlal Amthalal on April 22, 1935. But the cover containing

this *hundi* appears to have gone astray in post and the *hundi* was intercepted by some thief who cleverly removed the name of Ishverlal Amthalal, the payee, thereon, thus making the *hundi* read "Payable to Shah..." and on the reverse he made an endorsement making the *hundi* amount payable to Messrs. Greaves Cotton & Co. This endorsement however bears no signature whatever. The *hundi* appears to have been delivered to Messrs. Greaves Cotton & Co., who presented it to the drawees, the firm of Raichand Motichand at Bombay, who paid the amount of the *hundi* to Messrs. Greaves Cotton & Co. As there was no reference about this *hundi* in Ishverlal Amthalal's letter to the plaintiffs sent two or three days later, the plaintiffs were put on their inquiry. In reply to their letter, they were informed by Ishverlal Amthalal that the *hundi* had never reached him, but that inquiries showed that the amount thereof had been paid as a result of the forged endorsement thereon to Messrs. Greaves Cotton & Co. A few days later the plaintiffs served notices of demand on both defendant No. 1, the drawers, and defendant No. 2, the drawees. Both of them repudiated liability, defendant No. 1 on the ground that the *hundi* given by them at the request of the plaintiffs had in fact been cashed by the drawees thereof and hence they were in no way liable as to what happened to the *hundi* itself after it had left their possession and had been handed over to the plaintiffs. The drawees also denied negligence in their reply. Later this suit was filed. Defendant No. 1 appeared to defend on the ground mentioned in his written statement, but defendant No. 2 failed to appear at the hearing.

There was an *ex parte* decree against defendant No. 2, the drawees, and rightly so because it is obvious on an examination of the *hundi khoka* as it now stands with the name of the payee erased that it was distinctly tampered with and a waving line substituted. The result of the alteration is one which a person with reasonable care could have easily detected and the drawees were undoubtedly guilty of negligence in paying the *hundi* amount to Messrs. Greaves Cotton & Co. It however transpires that Raichand Motichand & Co., defendant No. 2, have subsequently become insolvents. The plaintiffs therefore turn to the drawers, defendant No. 1, for the payment of the amount. In his argument the learned Counsel for the plaintiffs

has tried to steer clear of the suit having been based on the *hundi* itself. He now argues that he paid Rs. 6,000 in consideration for the said *hundi*, amount of which has not been paid according to the agreed terms to Ishverlal Amthalal, and that therefore he is entitled to a return or refund of the sum of Rs. 6,000 from defendant No. 1 because they have failed to carry out their part of the contract, *viz.*, payment to Ishverlal Amthalal of Rs. 6,000 by the drawees. One has however to look at the plaint in the suit to see that this contention cannot hold water. In para. 9 of the plaint it is stated :

"In the above circumstances, the present suit has been filed to recover Rs. 6,000 of our principal amount and Rs. 102 of interest at the rate of 12 annas per month per hundred according to the custom of *hundi* from April 23, 1935, till the date of the suit and Rs. 1-14-0 of the discount charges (*hundiaman*), altogether the suit has been filed to recover Rs. 6,103-14-0."

It is difficult to reconcile the argument that the suit is on a basis entirely different from that of the *hundi* as is now sought to be made out with the language of this paragraph in the plaint. In dealing with the basis of his claim the learned Counsel for the plaintiffs in his opening address relied on portions of para. 5 of the plaint wherein it is stated :

"Not only that but defendant No. 1 has been culpably negligent in not discharging his own duty according to law by not giving information to defendant No. 2 that the said *hundi* (of ours) was a *Namjogi hundi*, etc., and the firm of Ishverlal Amthalal not having received the amount of the said *hundi* from defendant No. 2, defendant No. 1 is also liable to pay to us Rs. 6,000 of the *hundi* and Rs. 1-14-0 being the discount charges thereof."

One has further to ask the question : If the suit is not on the *hundi* itself, how are defendant No. 2, the drawees, liable and why were they joined in the suit as a co-defendant? The plaintiffs' learned Counsel contends that his suit is based on a cause of action of failure of consideration. Defendant No. 2 could certainly not be sued on such a cause of action, and as it is admitted that the identical *hundi* was honoured and paid to Messrs. Greaves Cotton & Co., I fail to see how there could be said to have been a failure of consideration. Fortuitous circumstances coming into existence after the *hundi* left defendant No. 1 resulting in Ishverlal Amthalal not getting the *hundi* payment from defendant No. 2 make no difference. I am therefore of opinion that the suit as originally framed in the plaint was designed to be one on the *hundi* itself. On the facts of this case (when the plaintiffs are not in possession

of the *hundi*) the cause of action, to my mind, open to them is necessarily one in damages for wrongful conversion of the *hundi*, or for moneys had and received, if they had chosen to file a suit against Messrs. Greaves Cotton & Co., which for some mysterious reason they have failed to do. Defendant No. 2 the drawees, could only possibly be liable, if at all, to the plaintiffs on the basis of a cause of action for wrongful conversion of the *hundi*, or in damages and on no other account. Under the circumstances, I do not see how it is now open to the plaintiffs to argue that they are suing apart from the *hundi*, especially when the ground set out in the memorandum of appeal para. 6 states:

"Sections 36, 37 and 38, Negotiable Instruments Act have not been duly considered and applied to the facts of the case."

Another test which might be applied as to the nature of the suit sought to be made out in the plaint is the fact that one of the important exhibits relied upon by the plaintiffs and produced by them is a set of rules of the Bombay Shroff Association according to which this *hundi*, as mentioned on the face of it, was drawn. If the suit was not based on the *hundi*, I fail to see why the rules of the Bombay Shroff Association with reference to such *hundis* were produced and relied upon in this case. If the suit is based on the *hundi* itself, then a cause of action based on wrongful conversion would be one based on tort, and it has been held in cases of this kind that a suit based on a contractual relationship cannot be altered to a suit the basis of which is one in tort. However, I am prepared to consider this case on the basis that this is in effect a suit for damages for wrongful conversion inasmuch as the drawees, defendant No. 2, took possession of the *hundi* from Messrs. Greaves Cotton & Co., and have retained it. A suit on the *hundi* itself could not be maintained, as after it was lost to the payee Ishverlal Amthalal and to the true owners the plaintiffs, it was further paid by defendant No. 2, drawees, and discharged by Messrs. Greaves Cotton & Co., who presented it for payment. There can be no doubt on the undisputed facts in the case that the true owners of the *hundi* were the plaintiffs and that in the circumstances they would in law be entitled to claim back the return of the *hundi* (in an undischarged state) from defendant No. 2, i.e., in the condition in which it left the plaintiffs. Defendant No. 2 not being in a position now to return the *hundi* in an undischarged state

(in which it left the plaintiffs) would certainly be liable in damages for wrongful conversion of the *hundi*, the measure of damages being the amount of the *hundi*. Messrs. Greaves Cotton & Co., would also be liable for wrongful conversion in law as they derived title to the *hundi* under a forged endorsement albeit innocently.

The question then before us is whether defendant No. 1 the drawers of the *hundi*, are liable to the plaintiffs for the claim in suit. Apart from the fact that the *hundi* was asked for from defendant No. 1 by the plaintiffs themselves, all that the drawer in such a case guarantees, to my mind, is that the drawee will honour and pay the *hundi* when it is presented to him on maturity, and if the drawee fails to do so, then the drawer undertakes to repay the amount thereof, provided the said *hundi* is returned in an undischarged state to the drawer. The plaintiffs in this case are obviously not in a position to return the *hundi* in an undischarged state to the drawers, defendant No. 1, and hence they could only fall back upon the plea that the *hundi* has not been paid by the drawees. The gravamen of the charge levelled against defendant No. 1 is that they failed to intimate to the drawees the fact that the *hundi* was a *Namjogi hundi* in favour of Ishverlal Amthalal. *Hundis* are specially saved from the general law under s. 1, Negotiable Instruments Act and are governed by the custom attaching to *hundis*. No attempt has been made to prove any custom as to the drawer's duty being to give any such information to the drawee as to the *hundi* being drawn in favour of a particular payee. The evidence on record is all one way against this contention, as in the plaintiff Sitaram Lallubhai's own statement he states:

"I have never received back money of the *hundis* from the drawer without returning the *hundi* to him. The uncashed *hundi* is to be returned to the drawer if the *hundi* money is to be had. If the *hundi* is lost, a duplicate would be asked or its money. There is no instance of the *hundi* having been lost and money received for such a *hundi*. I do not know of any instance like that of others."

In the defendant's *munim's* deposition he pleads ignorance of the rules of the Bombay Shroff Association relative to *Namjogi hundis*. The defendant in his evidence states:

"If the man who took the *hundi* brings it back we would pay the money not otherwise. If our agent has not accepted a lost *hundi* after the reply we would draw a duplicate *hundi* or refund the money."

In the absence of any such custom being proved—it was not even alleged in the plaint—and in the absence of any other

evidence that there was any such duty on the drawer, I am unable to hold that the drawer in this case was guilty of any neglect of duty with reference to the *hundi* or as to the absence of any such intimation from him to the drawee. Now, it is admitted that the same *hundi* which found its way to Messrs. Greaves Cotton & Co., under the forged endorsement was presented to the drawees, and has in fact been paid by them. It is therefore to my mind certainly not a case of a dishonour of the *hundi*, or refusal to pay on the part of the drawees. It is however pointed out that it was not a payment to Ishverlal Amthalal. In the rules relied upon by the plaintiffs, there is r. 30, to which our attention has been drawn by the learned Counsel for the defendant which reads :

"It is safe to write on the *hundi* to be sent for acceptance in Bombay by the person sending the *hundi* to Bombay that the amount should be paid to a certain person at his address, so that if the *hundi* is lost or mislaid then by writing in such manner the acceptor will hesitate to pay the amount to any other person."

Now, it appears to me that the words appearing in this rule, *viz.*, "by the person sending the *hundi* to Bombay," can only refer to the plaintiffs in this case and that hence the omission, if any, was on the part of the plaintiffs themselves. Several cases have been cited by the learned Counsel for the plaintiffs, but as admitted by him there is no decided case wherein the question of the liability of the drawer in such a case has been gone into or decided. The case nearest to the present one as regards facts is, I think, the one reported in *Ganeshdas Ramnarayan v. Lachminarayan* (1). There the plaintiff at Sholapur having bought a *Shahjogi hundi* drawn at Sholapur upon the defendants in Bombay, endorsed it to Ramrukh Ramkisson, and sent it by post to him for collection. In course of its transmission it was stolen, and the name of Ramrukh Ramkisson was expunged and another name, *viz.*, that of Dwaradas Lalji, was substituted. On December 9, 1893, the *hundi* was presented for payment to the defendants in Bombay by a person giving his name as Dwarkadas Lalji, and the defendants paid it without enquiry as to the responsibility of position of the person to whom they paid it. The plaintiff sued the defendant for value of the *hundi*. It was held that the defendants—drawees—were guilty of conversion of the *hundi* and were liable to the plaintiff, the lawful owner thereof, in trover. It is noteworthy that in

(1) 18 B 570.

that case the drawers of the *hundi* were originally made party defendants to the suit, but that at the suggestion of the trial Court, on its being pointed out that there was no cause of action disclosed against the drawer the claim against the drawer was abandoned.

The case in *Thorappa v. Umedmalji* (2), does not help very much, except that there also the question was not of the liability of the drawer, but it does indicate that the cause of action in such a case would be one based on wrongful conversion. We have also been referred to the case in *Jaggivandas Jamnadas v. Nagar Central Bank Ltd.* (3), but that again was a case of a cheque, and there it was held that the drawee being discharged by payment in due course, under s. 85, Negotiable Instruments Act, the drawer was also discharged. But the case of a cheque, I am afraid, is on a different basis, and the law appertaining to cases of cheques could have no bearing on the issues in the present case, and it cannot be inferred that because the drawee in this case remained liable by reason of having paid to a wrong party under a forged endorsement that therefore the drawer defendant No. 1 also continued to be liable.

In *Burchfield v. Moore* (4), a bill of exchange was, without the privity of the acceptor, altered by inserting the words "payable at A" and afterwards endorsed to the plaintiff for value who took it *bona fide* and without knowledge of the alteration, it was held that that was a material alteration which discharged the acceptor. The plaintiff's remedy in such a case is confined to a right to recover the consideration for the bill as between himself and his immediate endorser; and a similar remedy may be resorted to between all prior parties until the party is reached through whose fraud or laches the alteration was made. I think the principle underlying that decision would apply to the facts of the present case, and no party to the instrument prior to the one who was responsible for the alteration or fraud could possibly be held liable. Defendant No. 1, the drawers, would, in any event, not be hence liable. In *Sulleman Hussain v. New Oriental Bank Corporation Ltd.* (5), Sir Charles Sargent, C. J. made a remark which

(2) 25 Bom. L R 604; 87 Ind. Cas. 226; A I R 1924 Bom. 205.

(3) 50 B 118; 93 Ind. Cas. 619; A I R 1926 Bom. 262; 28 Bom. L R 226.

(4) (1854) 23 L J Q B 261; 3 El. & Bl. 683; 2 O L R 1308; 18 Jur. 727; 2 W R 454.

(5) 15 B 267.

might be of some help and guidance in this case which was as follows (p. 279*):

"By this course of reasoning the conclusion is arrived at that the bill was not dishonoured by the Bank's refusal to pay the plaintiff in Bombay, and therefore that the Bank, as drawers, are not liable."

Mr. Coyajee has referred us to the case in *Ram Singh v. Gulab Rai-Mehr Chand* (6), where it was held by Sir Shadi Lal, C. J. that the alteration in the *hundi* reducing the period of payment was a material alteration within the meaning of s. 87, Negotiable Instruments Act :

"Plaintiff having failed to prove that this was done with the consent of Ram Singh and Ohajju Ram, or in order to carry out the common intention of the original parties, the *hundi* was thereby rendered void as against them, and plaintiff could not be allowed to fall back upon the contract as it existed prior to the alteration."

The principle underlying that case may, I think, well be applied to the present one; and it is therefore not open to the plaintiffs to say that defendant No. 1 is yet liable after payment, of the *hundi* by defendant No. 2—after the forged endorsement—especially as defendants were in no way concerned or privy to the alteration in the *hundi*. The learned Counsel for the plaintiffs in the course of his reply mentioned in support of his contention that defendant No. 1 continued to be liable that in case a *hundi* was burnt or otherwise destroyed, he had a right to get back the Rs. 6,000 from the drawer, or a duplicate of the *hundi*. This, to my mind, does not militate against the drawer's position in this case for the simple reason that in the hypothetical case taken by the learned Counsel it would be the undoubted right of the drawer before giving a duplicate (or "Painth" or "Petha" as it is called) first to ascertain definitely from the drawee that the original had not been acted upon, and presented or paid, and could not possibly be acted upon, by first satisfying himself as to the destruction of the document. The drawers in this case were in no way responsible for the *hundi* (sent by the plaintiffs by ordinary post) falling into the hands of the thief, or the alteration which resulted in the loss of money to the present plaintiffs, or in the payment by the second defendant of the *hundi*; hence the proximate cause cannot be laid at the door of defendant No. 1. He is in the position of a defendant here and even if this were considered to be a case of *pari delicto* the

maxim *positio potior est defendantis* would apply.

Even if the suit were on a *hundi*, as is mentioned in the memorandum of appeal, and s. 37 were applicable, it would not help the plaintiffs' case. Section 37, Negotiable Instruments Act states that the maker of a promissory note or cheque, the drawer of a bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors. The words "until acceptance" are important. In this case not only was the *hundi* drawn by defendant No. 1 accepted, but it in fact was paid by the drawees, defendant No. 2. In *Norman v. Ricketts* (7), a customer was asked for "the favour of a cheque within a week." The cheque was sent by the customer by post in consequence of this request. The cheque was stolen in transit, and it was paid by the bankers of the drawer to the thief. It was held that the debtor was in no way responsible, as the sending of the cheque was payment. In his short judgment the Master of the Rolls stated (p. 182*) :

"If a debtor had to pay his creditor money, as a general rule the debtor must come and pay his creditor. But if the creditor asked him to pay in a particular way, the debtor might do so."

In the present case plaintiffs asked defendant No. 1 to debit their account with Rs. 6,000 and to give them a *Namjogi hundi* for the amount on a Bombay firm. Defendant No. 1 did so according to plaintiffs' express instructions. No further duty hence lay on their shoulders, except the liability to repay if the *hundi* was returned dishonoured or unpaid. In his opening address the learned Counsel for the plaintiffs touched upon the point that the *khoka* of the *hundi* was in the possession of defendant No. 1. Though no further argument was developed on the point, I might mention that defendant No. 2 in sending the *khoka* of the *hundi* to defendant No. 1, the drawers, for the purpose of accounts were not dealing with the live *hundi* which had already on being discharged by Greaves Cotton & Co., lost its character of being a *hundi* known as such in Indian mercantile usage. The appeal will, therefore, be dismissed with costs.

N. J. Wadia, J.—I agree.

D.

Appeal dismissed.

(7) (1886) 3 T L R 182.

*Page of (1886) 3 T L R.—[Ed.]

(6) 1 L 262; 55 Ind. Cas. 610; A I R 1920 Lah. 80; 168 P L R 1920.

LAHORE HIGH COURT

Civil Revision Petition No. 97 of 1939

March 28, 1939

BHADE, J.

Lala LADHA RAM—PETITIONER*versus***OFFICIAL RECEIVER, JUDICIAL
COMMISSIONER'S COURT, KARACHI****AND OTHERS—CREDITORS—RESPONDENTS**

Provincial Insolvency Act (V of 1920), ss. 38, 39, 40, 42—Jurisdiction of Insolvency Court to impose penalty on insolvent in shape of suspension from practice—Suspension is governed by High Court Rules—Order of Court cannot extend their scope—Application for discharge—Court must consider provisions in s. 42 together with Receiver's report—Agreement between parties—Procedure in s. 38 must be followed.

According to the rules of the Lahore High Court, the license of an insolvent legal practitioner is only suspended till his discharge—whether absolute or conditional. An Insolvency Court has no jurisdiction to impose a penalty on the insolvent in the shape of suspension from practice. The suspension is the result of the rules framed by the High Court and the scope of the rules cannot be extended either by the agreement of the parties or by the order of the Insolvency Court.

When the application for discharge of an insolvent Advocate came up for hearing, he stated that he was prepared to deposit with the Official Receiver Rs. 20 per mensem till his creditors got eight annas in the rupee and that in default of any payment, he should be disallowed to practise as an Advocate. This was agreed to by the Official Receiver and the Counsel representing creditors and on the basis of this agreement the Court passed an order granting a conditional discharge and for six years, subject to the condition that the insolvent should deposit a sum of Rs. 20 with the Official Receiver every month. It was also ordered that in case of default he would be liable to suspension of practice as provided by the High Court Rules and Orders. The proved debts amounted only to Rs. 181-8-0 :

Held, that the Court was dealing not with an application under s. 38, Prov. Insol. Act, but with the insolvent's application for discharge and for that purpose the Court was bound to consider the matters laid down in s. 42, along with the report of the Receiver and then decide what order was appropriate in the circumstances of the case. The order passed was not in accordance with law and was not fair to the parties. The order of the Court purported to be based on the agreement between the parties but the procedure laid down for a "composition" or "scheme of arrangement" in s. 38, was not followed. The proper order to pass would have been to annul the adjudication and if the insolvent had then failed to carry out the terms of the compromise he would have been liable to be re-adjudged insolvent; *vide* ss. 39 and 40.

Lala Ladha Ram, in person.

Mr. S. C. Manchanda, for the Respondents.

Order.—The petitioner, Lala Ladha Ram, an Advocate, was declared insolvent on June 15, 1938. Nothing was apparently recovered from him to satisfy his debts,

which as shown in the list attached to his petition amounted to Rs. 2,185. He applied for his discharge within the period of three years fixed by the Court. The Official Receiver reported that the insolvent had shown no assets except his wearing apparel, that the accounts filed by him were not reliable and that being a Barrister-at-law, he ought to be able to pay at least about Rs. 40 per mensem from his income. He recommended that the operation of discharge be suspended for a year and that during this period the petitioner should deposit with the Official Receiver any property acquired by him and submit an account of his income and expenditure every month. When the application for discharge came up for hearing, Lala Ladha Ram stated that he was prepared to deposit with the Official Receiver Rs. 20 per mensem till his creditors got eight annas in the rupee and that in default of any payment, he should be disallowed to practise as an Advocate. It may be mentioned in this connexion that, according to the rules of this Court, when a legal practitioner is adjudged insolvent, his license to practise is automatically suspended till his discharge, whether absolute or conditional; *vide* High Court Rules and Orders, Vol. V, Chap. VI-B, r. 11. The above statement of Lala Ladha Ram was agreed to by the Official Receiver and the Counsel representing creditors and on the basis of this agreement the Court passed an order, granting a conditional discharge and for six years, subject to the condition that Lala Ladha Ram should deposit a sum of Rs. 20 with the Official Receiver every month with effect from July 1, 1938. It was also ordered that in case of default Lala Ladha Ram shall be liable to suspension of practice as provided by the High Court Rules and Orders.

Lala Ladha Ram appealed to the District Judge from this order, but the appeal was dismissed. He has now filed a petition for revision of the order. The petitioner has raised two points which require consideration: (i) that the conditional order of discharge for six years was not justified when the debts proved before the Receiver amounted to Rs. 181-8-0 as shown in his report (ii) that the Insolvency Court had no jurisdiction to order that the petitioner would be liable to be suspended from practice in default of payment of the monthly instalment of Rs. 20. After considering the facts on the record, I am of opinion that there is force in these conten-

tions. The order of the learned Judge of the Insolvency Court purports to be based on the agreement between the parties but the procedure laid down for a "composition" or "scheme of arrangement" in s. 38, Prov. Insolvency Act, was not followed. If that procedure had been followed the proper order to pass would have been to annul the adjudication and if the insolvent had then failed to carry out the terms of the compromise he would have been liable to be re-adjudged insolvent: *vide* ss. 39 and 40.

As a matter of fact, the Court was dealing not with an application under s. 38, but with the insolvent's application for discharge and for that purpose the Court was bound to consider the matters laid down in s. 42, along with the report of the Receiver and then decide what order was appropriate in the circumstances of the case. The Court however did not apply its mind at all to the report of the Receiver or the matters referred to in s. 42, Prov. Ins. Act. As a result, the Court has passed an order which is not in accordance with law and which is not fair to the parties. The petitioner has urged that the proved debts amounted to Rs. 181-0-0 and that he did not state that he was prepared to go on paying Rs. 20 per mensem for six years, nor asked for a conditional discharge only. The statement of the petitioner that in default of payment he would be liable to be suspended from practice was, on the other hand, of no value to the creditors: for this depended upon the rules of this Court and not upon the agreement between the parties. According to the rules of this Court, the license of an insolvent legal practitioner is only suspended till his discharge—whether absolute or conditional. An Insolvency Court has no jurisdiction to impose a penalty on the insolvent in the shape of suspension from practice. The suspension is the result of the rules framed by the High Court and the scope of the rules cannot be extended either by the agreement of the parties or by the order of the Insolvency Court.

In the present instance, the order of the Insolvency Court that the petitioner will be liable to be suspended from practice in the event of his failure to comply with the conditions attached to the order seems to go beyond the scope of the rules as framed by the High Court. Of course, the petitioner may be debarred from practice under the rules, if the order of condi-

tional discharge could be and were revoked and the adjudication restored. But that is a different matter on which I express no opinion. I doubt if the Official Receiver even would have agreed to the order passed, if the exact position under the law had been realized. I accordingly accept this petition and setting aside the orders of the Courts below remand the case for re-decision of the application for discharge according to law. No order as to costs.

s.

Petition allowed.

CALCUTTA HIGH COURT

Criminal Revision Case No. 515 of 1939

June 27, 1939

S. K. GHOSH, J.

RAMESWAR MARWARI—ACCUSED—
PETITIONER*versus*AMAR NATH SINHA—COMPLAINANT—
OPPOSITE PARTY

Calcutta Municipal Act (III of 1923), ss. 406, 407, 488—Ss. 406 and 407 cover case of person storing oil in transit as broker—Conviction cannot be based on alleged plea of guilty at previous trial.

Even if the accused was storing the oil in transit as a broker, that would not take him out of the provisions of ss. 406 and 407. Sub-s. (1) of these two sections is wide enough to cover such a case.

The Magistrate is in error in referring to an alleged plea of guilty at the previous trial. A conviction cannot be based on such an alleged plea of guilty.

Messrs. H. L. Ganguly and Sudhir Chandra Choudhury, for the Petitioner.

Messrs. Bhola Nath Roy and Bhudhari M. Chatterjee, for the Opposite Party.

Order.—The petitioner in this case has been convicted under ss. 406 and 407 read with s. 488, Cal. Municipal Act which has been extended to Howrah and sentenced to pay a fine of Rs. 150 or in default to undergo simple imprisonment for three months. The prosecution case is that the petitioner stored for sale 127 tins of mustard oil which was not of the prescribed quality and which was adulterated. It appears that there was a previous trial at which the petitioner was convicted but that conviction was set aside on appeal. There was a re-trial with the result as stated above. At the trial the petitioner pleaded not guilty. He also examined one witness to show that he acted as a broker in respect of sale of the 127 tins of mustard oil, and that at the material time he was

keeping the tins, because they were returned by the purchaser who was unable to pay the price. The learned Magistrate was clearly in error in referring to an alleged plea of guilty at the previous trial. Had the present conviction been based on this alleged plea of guilty, I would have found it necessary to set aside the conviction. The Magistrate however has relied upon other evidence, namely, the evidence of P. W. No. 1 and P. W. No. 2 along with the evidence of D. W. No. 1. The finding is "that the accused stored the oil for sale, and manufactured the oil himself directly or indirectly by his son."

The learned Advocate for the petitioner has contended that the Magistrate should have relied upon D. W. No. 1 and found that the petitioner was merely a broker to the transaction. That is not finding, and is not also consistent with the fact that the petitioner was actually storing the oil, and that there was a cistern containing oil which according to the Magistrate, was identical with the oil in the tins. However, even if it be the case that the petitioner was storing the oil in transit as a broker, that would not take him out of the provisions of ss. 406 and 407. Sub-s. (1) of these two sections is wide enough to cover a case like that of the petitioner even on the assumption that he was acting as a broker and keeping the tins in transit. The conviction is therefore affirmed. The sentence need not be interfered with. The Rule is discharged.

S.

*Rule discharged.***MADRAS HIGH COURT**

Appeal No. 133 of 1935

July 20, 1939

WADSWORTH, J.

RAMAKRISHNA—APPELLANT*versus***PANCHAMAL NARASIMHA KAMATH****AND OTHERS—RESPONDENTS**

Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Money left with vendee for payment to vendor's creditor—Priority between vendee and creditor—Vendor, if entitled to lien on money left with vendee.

The statutory lien created under s. 55 (4) (b), T. P. Act, must operate to the extent to which there is any portion of the purchase money lying unpaid in the hands of the vendee or his transferee with notice. If there is a novation or a direct undertaking between the vendee and the creditor for the payment to the latter of the money retained in the vendee's hands, then that money may cease to be a part of the unpaid purchase price and may

become a debt payable only to the creditor in respect of which there can obviously be no occasion for a lien in favour of the vendor. But when there is no privity between the vendee and the creditor who is to be paid off, the money in the hands of the vendee, whatever be the purpose for which it is retained remains in fact money at the disposition of the vendor, who can presumably countermand the instructions given to the vendee as to the disposal of that fund. It is, therefore, the vendor's money in respect of which he is entitled to the statutory lien.

A. against the appellate order of the District Court, South Kanara, dated February 7, 1935.

Mr. K. Vittal Rao, for the Appellant.

Messrs. K. Sanjiva Kamath and K. P. Sarvothama Rao, for the Respondents.

Judgment—This appeal is against an order making absolute an attachment of a vendor's lien in execution of a mortgage decree. The appellant is the transferee from the original vendee. There were three items sold two of which were covered by a mortgage. The vendee retained with himself a sum of money sufficient to discharge the mortgage and the interest thereon. He did not discharge the mortgage but sold the three properties to the present appellant, the transfer also reciting the fact that money had been retained for the discharge of the mortgage. The appellant also did not discharge the mortgage. Consequently the mortgagee had sued thereon and in execution of his mortgage decree the two items actually covered by the mortgage have been sold. The mortgagee is now seeking to recover the balance due under the mortgage decree by the attachment and sale of the original mortgagor's lien as vendor over item No. 3 which was no part of the mortgaged property.

It is contended that when a vendee retains in his hands part of the purchase price for payment to a mortgagee of a portion of the property sold, the vendor's lien does not exist. The only authority quoted in support of this proposition is an Oudh case which relies on the decision in *Abdulla Beary v Mammali Beary* (1), which itself has been overruled by the Full Bench in *Sivasubramania Iyer v. Subramania Iyer* (2). It seems to me a self-evident proposition that the statutory lien created under s. 55 (4) (b), T. P. Act, must operate to the extent to which there is any portion of the purchase money lying unpaid in the

(1) 33 M 446; 5 Ind. Cas. 87; 7 M L T 376.

(2) 39 M 997; 37 Ind. Cas. 428; A I R 1918 Mad. 1045; 31 M L J 530; (1916) 2 M WN 306; 20 M L T 375; 4 L W 415 (F B).

hands of the vendee or his transferee with notice. If there is a novation or a direct undertaking between the vendee and the creditor for the payment to the latter of the money retained in the vendee's hands, then that money may cease to be a part of the unpaid purchase price and may become a debt payable only to the creditor in respect of which there can obviously be no occasion for a lien in favour of the vendor. But when there is no privity between the vendee and the creditor who is to be paid off, the money in the hands of the vendee, whatever be the purpose for which it is retained remains in fact money at the disposition of the vendor, who can presumably countermand the instructions given to the vendee as to the disposal of that fund. It is therefore the vendor's money in respect of which he is entitled to the statutory lien. There can be no doubt that in the present case the appellant purchased the property with full notice of the liability undertaken by the original vendee. He cannot therefore resist the attachment of the vendor's right. The appeal is therefore dismissed with costs.

N. D.

*Appeal dismissed.***NAGPUR HIGH COURT**

Miscellaneous Appeal No. 74 of 1938

February 28, 1939

GRILLE, J.

Seth DEVI KISHEN AND ANOTHER—

APPELLANTS

versus

R. S. Seth CHAMPALALSA AND OTHERS—

RESPONDENTS

Mortgage—Costs—Preliminary decree for sale against mortgagor and subsequent purchasers of part of mortgaged property—Appeal by purchasers only, dismissed with costs—Purchasers held personally liable for costs of appeal.

In a mortgage suit a preliminary decree for sale was passed against the mortgagor and subsequent purchasers of part of the mortgaged property. The mortgagor did not appeal, but the subsequent purchasers, did, and that appeal was dismissed with costs :

Held, that the subsequent purchasers were personally liable for the costs of the appeal. It would in this case be an unfair hardship on the mortgagor if the property mortgaged were to be saddled with the costs awarded against the subsequent purchasers and against them alone. The ordinary rule of the costs in a mortgage suit being amalgamated with the money realisable by sale of the mortgaged property did not apply to the case. 135 Ind. Cas. 578 (2), explained

Misc. A. from an order of the Court of the Additional District Judge, Khandwa, dated February 5, 1938.

Mr. Fida Hussain, for the Appellants.

Messrs. V. V. Kelkar and W. K. Sheorey, for the Respondents.

Order.—The present appellants, judgment-debtors, were impleaded in a mortgage suit as subsequent purchasers of part of the mortgaged property. The mortgagee was granted a preliminary decree for sale. The mortgagor did not appeal, but the present appellants, the subsequent purchasers, did, and that appeal failed. The Divisional Bench of the Judicial Commissioner's Court ordered that the costs of the appeal will be borne by the appellants. Subsequently an application was made in the High Court by the decree-holder for an amendment of the decree in respect of the order regarding costs, and the following order was passed, the non-applicants being absent although served :

"It is clear that the costs referred to in the decree as the costs of the respondent were the costs of respondents Nos. 1, 2 and 3 (the plaintiffs), and it is these costs that are to be paid by the appellants (defendants Nos. 3 and 4). The decree be amended so as to make this clear."

In executing his decree the decree-holder asked that this decree for costs amounting to Rs. 695-12 should be executed against these particular judgment-debtors personally. The judgment-debtors resisted, contending that the costs awarded in appeal against the mortgage decree formed part of the mortgage debt and that the same should first be realised from the sale of the mortgaged property alone along with the debt, and that the deficit could be realised personally from them only if the sale of the mortgaged property fell short of the amount decreed with the costs. Reliance was placed on O. XXXIV, rr. 4 and 6 of the Civil P. C. The executing Court held that the subsequent purchasers were personally liable for the costs which had been awarded against them in appeal, and it is against this order that they have now appealed.

The executing Court has based its decision on the ruling in *Maung Po Mya v. M. A. S. Firm* (1), where it was laid down that the amount of an order for costs made in favour of the mortgagee plaintiff jointly against the mortgagor and a party from whom costs are not recoverable under a final personal money decree (e. g. a puisne or a prior mortgagee) should in the absence of a special order or special reasons to the contrary, be regarded as being recoverable personally from that party. The learned

(1) 9 R 186; 133 Ind. Cas. 225; A I R 1931 Rang. 153; Ind. Rul. (1931) Rang. 241.

Counsel for the appellants in this Court has relied on a ruling in the Madras High Court subsequent in date to that of the Rangoon High Court on which the executing Court relied, for the proposition that a personal decree for costs may be passed against a defendant who had not executed the mortgage: *Rajagopalaswami Naicker v. Palanisawmi Chettiar* (2). On the strength of this the learned Counsel contends that the property should first be put to sale and that these subsequent purchasers can only be called on to satisfy the decree for costs in the event of these not being recoverable from the mortgaged property.

Now, the decision in the Madras High Court does not go so far as to cover the actual circumstances in the case before me. The person who was there held liable for a personal decree for costs was not a subsequent purchaser of part of the mortgaged property but a son of the mortgagor. But in any event I do not consider that it is necessary to resolve any conflict that there may be in the views enunciated in the two judgments. No doubt it is the exception to impose a personal liability for costs in a mortgage suit, particularly so when the matter in dispute is between the mortgagor and the mortgagee alone. But it appears to me that in this particular case it would certainly be an unfair hardship on the mortgagor if the property mortgaged were to be saddled with the costs awarded against the present appellants and against them alone, in the present case. The mortgagor did not contest the decision of the trial Court; that was done only by the subsequent purchasers of the mortgaged property, and their appeal failed signally. It is of no avail for the learned Counsel to contend that he was fighting the mortgagor's battle and that the mortgagor should share in the costs. In fact what he is asking is that the mortgagor should bear, if possible, the entire amount of the costs. The mortgagor wisely realised that it was no use spending money in preferring a useless appeal, and it does not seem just that the balance which may remain due to him after the sale of the property should be diminished by the very substantial costs which the present appellants have incurred by fighting an infructuous appeal with which the mortgagor decided to have nothing to do. This case is eminently one

in which the ordinary rule of the costs in a mortgage suit being amalgamated with the money realisable by sale of the mortgaged property is not to be followed, and it appears, although it is not absolutely clear, that this was the view taken by the Divisional Bench of this Court in amending the appellate decree. The result is that the appeal fails and is dismissed with costs, Counsel fee Rs. 25.

s.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 11 of 1937

May 22, 1939

DAVIS, J. C. AND LOBO, J.

LACHHUMAL MORUMAL—PLAINTIFF—
APPELLANT

versus

ATTAMUHAMMAD KHAN NABIBAKSH
KHAN AND OTHERS—DEFENDANTS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, s. 47—Decree, if can be adjusted or extinguished by executory agreement—Enforcement of such agreement in execution proceedings—Variation of decree, if adjustment of whole decree—Compromise agreement which is total adjustment of decree, if can be enforced in execution of decree which is totally adjusted or satisfied.

A decree can be adjusted or extinguished by an executory agreement, if that is the intention of the parties. Though, unless that agreement merely varies the decree within certain limits, it cannot be enforced in execution proceedings of the original decree, it must be made the subject of a separate civil suit. 171 Ind. Cas. 477 (4), explained, 167 Ind. Cas. 417 (1), held no longer good law. [p. 429, col. 1.]

[Case-law referred to.]

A variation of a decree cannot be deemed an adjustment of the whole decree within the meaning of O. XXI, r. 2, Civil P. C. A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can, therefore, be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, it cannot be enforced in execution of a decree which is totally adjusted or satisfied. [p. 430, col. 2; p. 431, col. 1.]

S. A. against the decree of the Assistant Judge, Sukkur, dated October 29, 1936.

Mr. Dipchand Chandumal, for the Appellant.

Mr. Kimatrai Bhojraj, *Amicus curiae*.

Davis, J. C.—This is an appeal from a judgment of the Assistant Judge of Sukkur, dismissing an appeal from an

(2) 55 M 332; 135 Ind. Cas. 578; 34 L.W. 961; 62 M.L.J. 93; Ind. Rul. (1932) Mad. 162; A.I.R. 1932 Mad. 155; (1932) M.W.N. 554.

order of the Subordinate Judge of Sukkur who dismissed an execution application made by the appellant in this appeal on the ground that the decree had been adjusted by an agreement in which the judgment-debtor agreed to pay off the balance of the mortgage debt by instalments and on default agreed to convey one of the mortgaged properties while the judgment-creditor agreed that the other of the mortgaged properties would be released. It was argued in appeal that the order of the Subordinate Judge and the judgment of the Assistant Judge were wrong because there is a ruling of a Division Bench of this Court reported in *Udharam Baharmal v. Murarilal Shiamlal* (1); that a decree cannot be adjusted by an executory agreement. It is true that this ruling is to that effect and followed, what was believed to be, the preponderance of judicial opinion at the time, but one of the learned Judges even then appeared to agree with the ruling in *Ramanarasu v. Matta Venkatta Reddi* (2), and differed from it with some doubt, but it would appear that the preponderance of judicial opinion is now in favour of the view taken by Reilly, J. in that case, and though, ordinarily, we should be bound by a ruling of a Division Bench of our own Court, the view that a decree can be adjusted or extinguished by an executory agreement, if that is the intention of the parties as now the high authority of the Privy Council in its support in a recent case reported in *Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer* (3), though, unless that agreement merely varies the decree within certain limits, it cannot be enforced in execution proceedings of the original decree; it must be made the subject of a separate civil suit; and this, we think, distinguishes the case in *Udharam Baharmal v. Murarilal Shiamlal* (1), from the case in *Ramibai Jetmal v. Rewachand Shantokram* (4), where the question before the Court was whether a substituted decree could be executed in the

same execution proceedings as the original decree.

It is true that in the Privy Council case in *Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer* (3), their Lordships were considering the operation of s. 47, Civil P. C., nevertheless the question whether a compromise agreement varying the original decree could be enforced in execution proceedings in continuation of those taken to execute the original decree was considered. It was decided that provided the compromise agreement did not attempt to bring under the decree a liability extraneous to the decree and was intended to govern the liability of the debtor under the decree and to have effect upon the time and method of its enforcement there was nothing in O. XX, r. 10, Civil P. C., or elsewhere which prevented the parties from coming to a valid agreement for time and even for the payment of an increased rate of interest to be enforced in execution proceedings. But the passage in that judgment most material to the point before us, whether a decree can be adjusted or extinguished by an executory agreement is as follows (p. 85*):

"The purpose of providing a limitation of six months for such applications to the Court which passed the decree is not altogether plain and the objects may be more than one; but this provision, like the rule itself, affords no sufficient ground for holding that the Code makes parties wholly incompetent to come to an arrangement for time enforceable in execution proceedings. Such bargains may take different forms and it is not possible to pre-judge the individual case. If it appears to the Court, acting under s. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under s. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court. Their Lordships are in agreement with the statement in *Gobardandas v. Dau Dayal* (5) at p. 535, that 'in numerous cases a compromise between the decree-holder and the judgment-debtor entered into in the course of execution proceedings; which was duly recorded, has been enforced,' and they are not of opinion that the practice, which is both widespread and inveterate, is contrary to the Code. They are of opinion that in the present case the compromise can and

(5) 54 A 573, (585); 138 Ind. Cas. 583; A I R 1932 All. 273; (1932) A L J 365; L R 13 A 199 Rev.; Ind. Rul. (1932) All. 467; 16 R D 293 (F B).

(1) 30 S. L. R. 249; 167 Ind. Cas. 417; A I R 1936 Sind 191; 9 R S 182.

(2) 56 M 198; 141 Ind. Cas. 429; 63 M L J 598; (1932) M W N 840; 36 L W 558; A I R 1933 Mad. 28; Ind. Rul. (1933) Mad. 132.

(3) A I R 1939 P C 80; 180 Ind. Cas. 378; 1939 O L R 187; 11 R P C 176; 1939 O W N 313; 5 B R 476; 43 O W N 501; 1939 R D 208; (1939) 1 M L J 652; 69 O L J 317; 14 Luck. 192; 41 Bom. L R 704; 50 L W 39; (1939) A L J 481; (1939) M W N 692; 66 I A 84 (P O).

(4) 31 S L R 491; 171 Ind. Cas. 477; A I R 1937 Sind 229; 10 R S 107.

should be enforced in these execution proceedings."

There are also other cases of other High Courts in support of the view taken by the Madras High Court in *Ramanarasu v. Matta Venkata Reddi* (2). In *Kalyanji Dhana v. Dharamsi Dhana & Co.* (6), the view was taken that a decree can be adjusted by an executory agreement and can be pleaded as a bar to further execution proceedings. The same view was taken in *Satyabadi Sahu v. Mani Sahu* (7) and *Arunachallam Chettyar v. V. M. R. P. Firm* (8), where the learned Judges make clear the difference between a case where the judgment-creditor is prepared to accept a mere promise of the judgment-debtor as an adjustment of the decree, and a case where the judgment-creditor is not prepared to accept a mere promise but demands performance, and a case where there may be no agreement but merely a counter-offer when there would be no adjustment of the decree and no bar to further execution proceedings.

The question was also argued before us as to how far the ruling in *Ramibai Jethmal v. Rewachand Shantokram* (4), was overruled by the Privy Council judgment in *Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer* (3), and it was pointed out that that ruling follows the previous ruling in *Udharam Baharmal v. Murarilal Shiamlal* (1). So far as it follows the ruling in *Udharam Baharmal v. Murarilal Shiamlal* (1), it must be deemed no longer good law, and so far as it conflicts either with the Privy Council ruling in *Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer* (3), or the previous ruling in *Firm Hetram Bodhraj v. Firm Aya Ram Tola Ram* (9), it must no longer be deemed good law, and this point was indeed noticed in a case of this Court reported in *Kazi Ali Muhammad Khairat Mohamed Sheikh v. Ganga Ram Chotomal* (10), but the case in *Firm Hetram Bodhraj v. Firm Aya Ram Tola Ram* (9), dealt primarily with the question of the substitution of one decree for another and the enforcement of the

substituted decree in the same execution proceedings as the original decree and the sentence. "In short, a decree can be adjusted within the meaning of r. 2, O. XXI, Civil P. O., only by an executed agreement and not by an executory agreement" must be read with the sentence that follows, and as read alone is not a correct statement of the law. The question is also urged before us as to how far an adjustment means merely a variation of the decree, and it was argued that an adjustment cannot be an extinguishment of the decree because in the Privy Council case in *Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer* (3) Sir George Rankin in delivering the judgment of the Board appears to speak of a compromise and an adjustment of the decree. It is true that at one place in the judgment his Lordship says:

"The compromise of 1927, however, was recorded: it was an adjustment even if it was something more, and it contained the terms upon which the adjustment was agreed to,"

and it was this adjustment which their Lordships held could be enforced in execution proceedings. But we think that by "adjustment" was meant a partial adjustment, an adjustment in part and not in whole within the meaning of O. XXI, r. 2, Civil P. O., for we do not see how, when a decree has been adjusted as a whole, there remains in those execution proceedings anything further to execute. In *Ramanarasu v. Matta Venkata Reddi* (2), at p. 209*, Reilly, J. says:

"What the exact meaning of the expression 'adjustment of a decree' as used in O. XXI, r. 2, Civil P. O., is, has been explained by Sadasiva Ayyar, J., in *Ladd Govindoss v. Ramdoss Vishnadoss* (11). The learned Judge there stated that 'any transaction which extinguishes the decree as such in whole or in part and results in satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree is an adjustment of the decree'."

That these compromise agreements are regarded as partial adjustments appears to be the view of the Bombay High Court from the case in *Shivappa Dandappa v. Gurpadappa Doddappa* (12). A variation of a decree cannot be deemed an adjustment of the whole decree within the meaning of O. XXI, r. 2, Civil P. O., and this will be at once clear if O. XXI, r. 2, Civil P. O., is read substituting for the word "adjustment" in its grammatical variations the word "variation" in its grammatical variations.

(11) (1915) M W N 225; 28 Ind. Cas. 376; A I R 1916 Mad. 604; 17 M L T 222.

(12) 35 Bom. L R 91; 142 Ind. Cas. 220; A I R 1933 Bom. 100; Ind. Rul. (1933) Bom. 214.

*Page of 56 M.—[Ed.]

(6) 37 Bom. L R 230; 157 Ind. Cas. 646; A I R 1935 Bom. 303; 8 k B 74.

(7) 15 Pat. 390; 165 Ind. Cas. 940; A I R 1936 Pat. 619; 18 P L T 110; 3 B R 106; 9 R P 236.

(8) (1938) Rang. 385; 175 Ind. Cas. 498; A I R 1938 Rang. 202; 10 R Rang. 500 (F B).

(9) 32 S L R 415; 172 Ind. Cas. 999; 1938 O L R 98; 1938 A L R 129; 10 R P O 196; (1938) A L J 150; 4 B R 308; 42 O W N 509; 1938 O W N 310; 47 L W 606; 40 P L R 606; (1938) M W N 662 (P O).

(10) A I R 1939 Sind 93; 181 Ind. Cas. 284; 11 R S. 212; (1939) Kar. 502.

A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can therefore be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, we do not see how it can be enforced in execution of a decree which is totally adjusted or satisfied.

Turning to the facts of this case, it appears that both Courts have found that there was a compromise agreement between the parties whereby the balance of the decretal amount due on the mortgage debt was to be paid off within twelve months, failing which one of the mortgaged properties was to become the property of the plaintiff who was to release the other mortgaged property, and that it was the intention of the parties that this new contract was to extinguish the rights and liabilities under the decree. There was an immediate extinguishment of the decree, not an extinguishment dependent upon some future contingency.

Quite apart then from the question whether the compromise agreement could have been enforced as a mere variation as to method and time of the satisfaction of the decretal liability within the ruling in *Oudh Commercial Bank Ltd. v. Fyzabad v. Bin Basni Kuer* (3), it appears it was and was intended to be a total adjustment of the decree. The application to enforce the original decree on the basis of a repudiation of this agreement was rightly rejected by the executing Court which ordered the adjustment of the decree to be recorded. In my opinion therefore the appeal should be dismissed with costs.

Lobo, J.—The appellant in this second appeal held a mortgage decree against the respondents for a sum of Rs. 450, the mortgage security being a residential house and some agricultural land. On September 25, 1934, he applied for execution and notice was issued to the judgment-debtors. On December 3, 1934 the respondents, judgment-debtors, put in an application under O. XXI, r. 2, Civil P. O., which reads thus :

"It is prayed on behalf of the defendants that in the decree of the above suit, the plaintiff has made an adjustment on September 4, 1934, in respect of the decretal amount, viz., that he will take the balance of Rs. 350 after giving credit for Rs. 110 being the

amount received by him towards the decree, and that the defendants would pay the said sum (Rs. 350) to the plaintiff within 12 months of the adjustment. If the defendants fail to pay the amount during the period, the plaintiff shall be the owner of the entire immovable property, viz., land belonging to the defendants shown as mortgaged in the decree and the defendants shall have no interest therein, but the plaintiff shall release the other immovable property, viz., (residential) house which is mortgaged by the decree and the mortgage right of the plaintiff over it will disappear. The plaintiff having arrived at this adjustment inspired confidence in the defendants but on the morrow he has come and filed an execution application.

It is, therefore, prayed that this Honourable Court will be pleased to get the above adjustment confirmed by the plaintiff and to sanction the same. An affidavit is herewith attached."

The Subordinate Judge held the adjustment proved, ordered it to be recorded and dismissed the appellant's execution application with costs. The appellant preferred an appeal to the District Court of Sukkur. His appeal was however dismissed, the Assistant Judge who heard the appeal holding the adjustment proved, and holding also, after a review of a number of rulings of various High Courts, that the adjustment was 'within the purview of O. XXI, r. 2, Civil P. O.' This second appeal was admitted as a point of law was clearly involved and the learned Advocate for the appellant pointed out that subsequent to the date of the Appellate Court's judgment there had been two decisions of our Court in *Udharam Baharmal v. Murarilal Shiamlal* (1) and *Ramibai Jethmal v. Rewachand Shantokram* (4) and in view of the former of these decisions the judgments of the lower Courts could not be maintained. When the matter came before this Bench for formal hearing it was found that the respondents were unrepresented. As the point involved was one of considerable importance and of very frequent occurrence, and as it was further represented to us that the decisions of our Court in *Udharam Baharmal v. Murarilal Shiamlal* (1) and *Ramibai Jethmal v. Rewachand Shantokram* (4) appeared to require re-consideration in the light of recent decisions of their Lordships of the Privy Council and decisions of several High Courts in India, we adjourned the hearing after inviting the President of the Bar Council and Karachi Bar Association to argue the matter for the respondents as *amicus curiæ*.

We have now heard the very full arguments of the learned Advocate for the appellant and Mr. Kimatral Bhojraj as *amicus curiæ* and I have arrived at three conclusions: (i) that the decision

of a Bench of this Court in *Udharam Baharmal v. Murarilal Shiamlal* (1) to which I was a party, is incorrect in so far as it relates to O. XXI, r. 2, Civil P. O., and the recording of an adjustment thereunder; (ii) that the case in *Ramibai Jethmal v. Rewachand Santokram* (4) has been rightly decided and is good authority and (iii) that this appeal must fail because both the lower Courts have arrived at a correct decision of the point involved. I have had the advantage of reading the judgment of my learned brother the Honourable the Judicial Commissioner and as I am in complete accord with it I would only briefly set out the reasons which I feel justify the conclusions recited above. In *Udharam Baharmal v. Murarilal Shiamlal* (1) I agreed with my learned brother, the Honourable Mr. Havelivala, in holding that a compromise such as had been alleged in that case by the judgment-debtor was not an adjustment which could be recorded under O. XXI, r. 2, Civil P. O., and could defeat the execution application filed by the judgment-creditor. The alleged compromise was an executory contract. It contained provisions to be performed in the future and could not be treated as an adjustment so as to operate as a bar to execution. But I have made it clear in my judgment in that case that I considered that the learned Judges of the Madras High Court in *Ramanarasu v. Matta Venkata Reddi* (2) had taken the correct view when they held that there was no legal impediment in the way of a decree-holder accepting a mere promise that the judgment-debtor will do something at some future date as a legal and immediate adjustment in satisfaction of his decree. At p. 266* of the report this passage occurs:

"In my opinion the view of the learned Judge of the Madras High Court in the case referred to above appears to be sound, but in view of the fact that the majority of the High Courts in India have expressed the opinion that an executory agreement cannot be pleaded as an adjustment of decree under O. XXI, r. 2, Civil P. O., and considering that the facts and nature of the agreement in the case before us are distinguishable from those in the Madras case, I think it safer to accept this opinion rather than that of the learned Judge of the Madras High Court in the case referred to in *Ramanarasu v. Matta Venkata Reddi* (2), which, so far as I have been able to see, stands alone except for the single Judge ruling in *Bagamal v. Shih Parshad* (13)."

But this is no longer the position, for not only has the decision in the Madras case been accepted by other High Courts

(13) 120 Ind. Cas. 686; A I R 1930 Lah. 334; Ind. Rul. (1930) Lah. 142.

*Page of 30 S I R—[Ed.]

in India, but recent judgments of their Lordships of the Privy Council place the correctness of the Madras view beyond all question. In *Kalyanji Dhana v. Dharamsi Dhana & Co.* (6) Broomfield, J., in 1935 has carefully reviewed the earlier authorities and agrees with the view of the learned Judges in *Ramanarasu v. Matta Venkata Reddi* (2). The judgment was reported in 1936 and was probably not available in May 1936 when the judgment in *Udharam Baharmal v. Murarilal Shiamlal* (1) was written. In 1936 the Patna High Court in *Satyabadi Sahu v. Mani Sahu* (7) adopted the same view following the decisions of Madras and Bombay in *Ramanarasu v. Matta Venkata Reddi* (2) and *Kalyanji Dhana v. Dharamsi Dhana & Co.* (6). The judgment in this case is dated in January 1936 but it was certainly not available till after May in that year. Courtney-Terrill, C. J. says in his judgment in this Patna case:

"In my opinion the clearest and the correct pronouncement of the law is in the judgment of the Madras High Court delivered in 1932 by Reilly and Anantakrishna Ayyar, JJ., in *Ramanarasu v. Matta Venkata Reddi* (2)."

The case in *Shankar Atmaram v. Keshav Govind* (14) was cited in argument as another instance in which the Bombay High Court had accepted the Madras view; but though the point appears to have been taken, the part of the judgment dealing with it is not contained in the report of the case in *Shankar Atmaram v. Keshav Govind* (14). All these cases have been cited with approval in the Full Bench decision of the Rangoon High Court in *Arunachallam Chettiar v. V. M. R. P. Firm* (8) where it was held that a decree can be adjusted within the meaning of O. XXI, r. 2, Civil P. O., by a new contract that the judgment debtor will do something in future, if the decree-holder is willing to take such a promise instead of the decree which he has. It is not necessary in every case that the judgment-debtor shall perform the promise which he makes to the decree-holder before adjustment can be regarded as complete. The Chief Justice in his judgment in this case makes the position clear when he says

"Now the adjustment, or new agreement, must fulfil the essentials of any other valid contract before it can be enforced as such. It may be reached by the offer of a promise for a promise and mutual acceptances as for instance where the decree-holder agrees to accept a mere promise by the judgment-debtor to convey certain lands to him. The fact that the

(14) 60 B 729; 164 Ind. Cas. 9; A I R 1936 Bom. 277; 38 Bom. L R 505; 9 R B 70.

contract is executory on both sides does not mean that it is any the less a valid agreement and adjustment of the decree. On the other hand the adjustment, or new agreement, may be reached by the offer of a promise for an act; as for instance where a decree-holder agrees that upon the conveyance by the judgment-debtor of certain lands to him he will accept them in full settlement of the decree

To my mind the entire controversy on this point is set at rest by two very recent pronouncements of their Lordships of the Privy Council in which are to be found a clear exposition of the principles underlying O. XXI, r. 2, Civil P. C., and the question of adjustments or compromises of decrees generally, and an equally clear indication of the limits within which adjustments or compromises are to be recognized and given effect to by Courts in execution proceedings. In *Oudh Commercial Bank Ltd., Fyzabad v. Bin Basni Kuer* (3), Sir George Rankin who delivered judgment of the Board says :

"On this difficult and important question, their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it is sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of s 47 involve that questions relating to such terms may fall to be determined by the executing Court."

And little later his Lordship says :

"Such bargains may take different forms and it is not possible to prejudge the individual case. If it appears to the Court, acting under s. 47, that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution, proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under s. 47. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court."

The facts in the case are somewhat complicated but the 'difficult and important question' to which his Lordship refers was just this: whether an executing Court could recognize and give effect to an adjustment of a decree involving an alteration only of the instalments payable thereunder and an enhancement of the rate of interest, or whether as the learned Judges of the Chief Court of Oudh had held, the original decree had thereby been altered or varied by the parties and the alteration or vari-

ation could not be recognized and acted upon by the executing Court in execution proceedings of the original decree even though it had been recorded by the Court with the consent of the parties.

Their Lordships in this case have merely enlarged upon and elaborated a principle already enunciated by the Board in the earlier case in *Firm Hetram Boodhraj v. Firm Aya Ram Tola Ram* (8). The facts in that case were simple. A decree of 1923 imposed upon the judgment-debtor a liability of Rs. 1,04,000 with interest at 6 per cent, and a certain D stood surety. There was no provision for the discharge of the liability by instalments. There was however a provision for payment of instalments making up a smaller total and at a lower rate of interest, the faithful observance of which provision would enable the judgment-debtor to escape the decretal liability. Some years later this provision was, by consent of parties, altered and duly certified and recorded by the Court. The judgment debtor having defaulted the decree-holder applied for execution of the decree. The judgment-debtor contended in these proceedings that the compromise arrived at in 1928 created a new liability which superseded the original decree and rendered it no longer enforceable. He further contended that the compromise was not an adjustment under O. XXI, r. 2, Civil P. C., and lastly contended that the executing Court possessed no authority to enforce through execution the new liability which could only be enforced by obtaining a decree in a fresh suit on the compromise. It was held by their Lordships that the compromise of 1928 affected only the provisions upon the observance of which the full decretal liability could be avoided. The decretal liability remained save of course to the extent to which it had in fact been reduced by moneys already paid. The compromise affected only the provisions upon the observance of which the full decretal liability could be avoided. In these circumstances it was immaterial to consider whether the compromise was not an adjustment within O. XXI, r. 2, Civil P. C. If it was, it was duly recorded or certified and the Court could recognize it in executing the decree. If it was not such an adjustment there was nothing to prevent the Court from doing that which it obviously should do, viz., looking at it and taking it and the payments made under it into account in executing the decree.

It seems to me that if these two decisions

of their Lordships of the Privy Council are read together the legal position laid down is this: The parties to a decree obtain certain rights and incur certain obligations thereunder. There is nothing in the Civil P. O., restricting their liberty of contract with reference to these rights and obligations. They may by contract alter these rights and obligations in any way they choose. If they contract to do so upon terms which have reference to and affect the execution, discharge or satisfaction of the decree, the provisions of s. 47, Civil P. O., involve the determination of questions relating to such terms in execution proceedings. If the contract between the parties leaves the liability of the judgment-debtor under the decree in substance unaffected and is confined to variation merely of subsidiary matters such as the time and mode of payment the contract between the parties whether or not it amounts to an adjustment within the meaning of O. XXI, r. 2, Civil P. O., may be enforced by the Court in execution of the original decree at the instance of the judgment creditor. If on the other hand, the contract between the parties introduces terms which are foreign to the decree and introduces into the decree a liability extraneous thereto the Court in execution proceedings at the instance of the judgment creditor will not enforce the contract but leave the judgment creditor to a separate suit. If in spite of such contract the judgment creditor seeks to execute the original decree the judgment-debtor may successfully plead the contract as a bar to such execution.

It appears to me therefore on a consideration of the law which I have referred above that the decision in *Udharam Baharmal v. Murarilal Shiamlal* (1) is not good law and also that the case in *Ramibai Jethmal v. Rewachand Shantokram* (4) has been correctly decided and is good law. In *Ramibai Jethmal v. Rewachand Shantokram* (4) there was a decree for maintenance at the rate of Rs. 23 per month and a right of residence in the family house and a charge was created on certain property to secure the maintenance. Ramibai however alleged that subsequent to the decree she had come to an agreement with the respondents whereby certain property was released from the charge and her right to maintenance was secured as a charge upon one property only and there was a further agreement whereby in addition to Rs. 23 per month for maintenance she was to

be entitled to Rs. 15 per month for residence in lieu of residence in the family house. The appellant sought the assistance of the executing Court for enforcement of her rights under the decree as varied by the agreement. It was held that her application had been rightly dismissed as what he was seeking to execute was not a decree passed by the Court but a contract containing terms extraneous to the original decree which the parties had chosen to substitute by mutual agreement for the decree of the Court. In the words of their Lordships of the Privy Council, the appellant had attempted to bring under the decree a liability extraneous thereto and this the executing Court had no right to enforce but rightly referred the appellant to another suit. There are some passages however in the judgment in *Ramibai Jethmal v. Rewachand Shantokram* (4) which would appear to support the decision in *Udharam Baharmal v. Murarilal Shiamlal* (1). To that extent *Ramibai Jethmal v. Rewachand Shantokram* (4) cannot be held to be good law.

Turning to the appeal before us, I see no difficulty in holding that both the lower Courts have arrived at a correct decision of the point involved and that this appeal must consequently fail. Both the lower Courts have held that the adjustment was proved and that it was the intention of the parties that the adjustment should extinguish their rights and liabilities under the original decree. Execution of the original decree, in these circumstances, not be enforced. The case was entirely distinguishable from the ruling of our High Court in *Ramibai Jethmal v. Rewachand Shantokram* (4) and fell clearly within the decision of the Madras High Court in *Ramanarasu v. Matta Venkata Reddi* (2). I, therefore, agree with my learned brother that this second appeal should be dismissed with costs.

D.

Appeal dismissed.

ODUH CHIEF COURT

Civil Reference No. 3 of 1938.

March 19, 1940

THOMAS, C. J. AND ZIA-UL HASAN, J.

SANT RAM—APPELLANT

versus

PUTTI LAL—RESPONDENT

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 12—Tenant mortgaging his holding—S. 12, if applies—Proper remedy of tenant.

Section 12, U. P. Agri. Relief Act, is meant to

apply only to valid mortgages and not to those which are *ab initio* void. In the case of mortgages which are void by reason of being against any enactment, the mortgagee is not entitled to get back his money except when any portion of the consideration forms an independent transaction. The mortgage of an agricultural holding in contravention of the provisions of the Rent Law is void *ab initio*. Hence, a statutory tenant who has made a mortgage of his holding cannot avail himself of the provisions of s. 12 of the Agri. Relief Act but his remedy lies in a suit for ejectment in the Revenue Court.

[Case-law relied on.]

O. Ref. made by the District Judge of Gonda.

Mr. H. K. Ghose, appears *amicus curæ*.

Judgment.—This is a reference by the learned District Judge of Gonda under O. XLVI, r. 1, Civil P. C.

It appears that three brothers holding a statutory tenancy mortgaged their holding usufructually for a sum of Rs. 100. The holding stood recorded in the village papers in the name of one of the brothers. He filed an application under s. 12 of the U. P. Agri. Relief Act and as the amount secured by the mortgage was less than Rs. 500 the application was dealt with by an Assistant Collector of the first class. He held that the mortgage had been paid off by the usufruct and allowed the application with costs against the mortgagee. He held that the mortgage be redeemed without payment of any amount by the applicant and directed the mortgagee to deliver the title deeds, if any, to the mortgagors. An appeal was preferred to the District Judge by the mortgagee and the learned Judge being in doubt as to whether s. 12 of the Agri. Relief Act applies to a mortgage by a tenant has made this reference for this Court's opinion on the question whether or not a tenant who has mortgaged his holding can avail himself of the provisions of the section.

It is now well-established that the mortgage of an agricultural holding in contravention of the provisions of the Rent Law is void *ab initio*. It was so held by the late Court of the Judicial Commissioner of Oudh in *Beni Madho v. Kali Pershad*, (6 O. C. 331) (1), by this Court in *Dasrath v. Sandala*, (3 O. W. N., 217) (2) and by the Board of Revenue in *Mahadeo Singh v. Pudai Singh*, (12 R. D., 490) (3) and in *Mahammad Sabber v. Shervani*, (14 R. D., 469) (4).

(1) 6 O. C. 331.

(2) 3 O. W. N. 217; 93 Ind. Cas. 310; A. I. R. 1926 Oudh 270; L. R. 7 A (O) 81; 13 O. L. J. 499.

(3) 12 R. D. 490.

(4) 14 R. D. 469.

Their Lordships of the Privy Council have also laid down in *Moti Chand v. Ikramullah Khan*, (L. R. 44 I. A. 54) (5), that the policy of an enactment cannot be defeated by any agreement or ingenious device. It is thus clear that a transfer in contravention of the Rent Law is wholly invalid. Our reading of s. 12 of the Agri. Relief Act, however, is that it was meant to apply only to valid mortgages and not to those which are *ab initio* void. That section provides for the filing of an application for "redemption" of a mortgage "after the principal money has become due;" but in the case of an invalid mortgage there can neither be any redemption nor can any money be due on that mortgage. The sections of the Act following s. 12, which prescribe the procedure to be followed on an application being presented under s. 12, also show that what the Legislature contemplated while enacting s. 12, was a valid mortgage. The procedure prescribed is similar to that of s. 83 of the T. P. Act, and by that procedure the mortgagee is allowed to take the money deposited by the mortgagor. In the case of mortgages which are void by reason of being against any enactment it has been held that the mortgagee is not entitled to get back his money except when any portion of the consideration formed an independent transaction. In the present case the money appears to have been advanced merely as consideration for the mortgage and so the mortgagee cannot claim it as legally due to him. In the case of 14 R. D., 469 referred to above it was held by the Board of Revenue that the mortgagee of an ordinary or of a statutory holding is liable to ejectment as a sub-tenant.

We are, therefore, of opinion, that a statutory tenant who has made a mortgage of his holding cannot avail himself of the provisions of s. 12 of the Agri. Relief Act but that his remedy lies in a suit for ejectment in the Revenue Court.

D.

Order accordingly.

(5) 44 I. A. 54; 39 Ind. Cas. 454; 15 A. L. J. 150; 5 L. W. 388; 21 M. L. T. 267; 32 M. L. J. 363; 21 O. W. N. 616; 19 Bom. L. R. 433; 39 A. 173; 26 O. L. J. 24; (1917) M. W. N. 453; A. I. R. 1916 P. C. 59 (P. C.).

FEDERAL COURT

Appeal from the Patna High Court.

March 18, 1940

MAURICE GWYER, C. J., S. M. SULAIMAN

AND S. VARADACHARIAR, JJ.

SUBHANAND CHOWDHARY

AND ANOTHER—APPELLANTS

versus

APURBA KRISHNA MITRA

AND ANOTHER—RESPONDENTS

Bihar Money-lenders Act (III of 1938), s. 11—Certificate to question validity of s. 11 granted—New Act of 1939 coming into force—Question becoming not existent—Federal Court, if can still entertain appeal—Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7—Scope of—Interest to which mortgagee would be entitled under Civil Procedure Code (Act V of 1908), O. XXXIV, r. 11, if can be reduced.

When jurisdiction to hear an appeal is once vested in the Federal Court by the grant of a certificate, it cannot be divested by any subsequent event. A certificate is the key which unlocks the door into Federal Court, and a litigant who has once passed through that door cannot afterwards be ejected by the happening of events outside and beyond his control. It is quite immaterial that the relief which the appellants claim arises from an Act which was not law when the certificate was granted. Section 205 (2) is plain; and once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so. Where a certificate was granted on the question of validity of s. 11 of Bihar Money-lenders Act, 1938, but in the meanwhile the new Act of 1939 came into force, and the question ceased to exist, the certificate does not become "infructuous" and the jurisdiction to hear appeal is not taken away from the Federal Court. [p. 437, col. 2, p. 438, col. 1.]

Parliament never contemplated a contingency of the kind; but that is no reason why the Federal Court should not give effect to the plain language of the Act. Nor could it lightly adopt a construction which would have this result, that an appeal properly begun and continued in Federal Court was suddenly, by the action of a Provincial Legislature, taken out of its jurisdiction and transferred to the jurisdiction of the Judicial Committee. [p. 438, col. 1.]

Section 7 of the Bihar Act of 1939 is expressly limited to interest claimable upto the date of the institution of the suit. The Act has maintained a distinction between loans advanced before the Act and loans advanced subsequently. The contract for the payment of interest not having been declared illegal, but only unenforceable beyond a certain point, the creditor retains his contractual rights except to the extent to which the statute has expressly limited them. In these circumstances, it may perhaps be open to doubt whether the policy of the Bihar legislation can properly be taken into account by a Court which is considering whether there are any grounds for "reducing the rate of interest to which a mortgagee would ordinarily be entitled under the provisions of O. XXXIV, r. 11 of the Code, since this would in effect be to extend the Act to a period with which the Legislature has not chosen to deal; but it may be that the wide powers of re-opening transactions originating before or after the commencement of the Act given to the Court by s. 8 of the Bihar Act of 1939 were regarded by the Legislature as conferring a much wider discretion than that given by

O. XXXIV, r. 11 or by the Usurious Loans Act, 1918. [p. 438, col. 2.]

Mr. B. B. Tawakley (Senior Advocate, Federal Court) with Major Surendrapal Singh (Advocate, Federal Court) instructed by Mr. T. K. Prasad, Agent, for the Appellants.

Sir Brojendra Mitter (A.-G. of India and Senior Advocate, Federal Court) with Mr. Raghbir Singh (Advocate, Federal Court) instructed by Mr. B. Banerji, Agent for Respondent No. 1, Respondent No. 2 did not enter appearance.

Judgment.—In this case the facts do not differ materially from others which have come before us lately from Bihar; but the Advocate-General of India, on behalf of the respondents, has raised a novel and interesting point.

The plaintiff (the present first respondent) obtained a decree in the Court of the Subordinate Judge, Muzaffarpur, and the decree (with certain modifications in their favour) has been upheld in the High Court. The defendants' claim to have the benefit of s. 11 of the Bihar Money-lenders Act, 1938, was rejected since that provision had already been held by the High Court to be void *Sadanand Jha v. Aman Khan* (1); but the High Court granted a certificate under s. 205 (1) of the Constitution Act.

The date of the judgment of the High Court and of their certificate was January 17, 1939. On May 1, 1939, the Bihar Money-lenders (Regulation of Transaction) (Act VII of 1939), came into force. The application of the appellants to the High Court for admission of their appeal to the Federal Court was made on May 11, and the appeal was finally admitted by the High Court on October 2, last. The Act of 1939, which has been before this Court in several cases during the present sittings, repealed and re-enacted s. 11 of the Bihar Money-lenders Act, 1938, and since it had been reserved for the consideration of the Governor-General and had received his assent, its validity cannot be challenged as that of the Act of 1938 has been.

Such are the facts of the case, and the Advocate-General admitted that if the appeal were properly constituted, the appellants would be entitled to the benefit of the Act of 1939; but he contended that there was no appeal properly before the

(1) 18 Pat. 13; 179 Ind. Cas. 379; A I R 1939 Pat. 55; 20 P L T 1; 5 B R 265; 11 R P 357.

Court. He put his argument in this way. The certificate under s. 205 (1), granted on January 17, certified that the case involved a substantial question of law as to the interpretation of the Constitution Act, that question being (or so it is to be presumed, for the certificate does not mention any particular question of law) whether s. 11 of the Bihar Money-lenders Act, 1938, was, as the High Court had held in their earlier decision, void under s. 107 of the Constitution Act, because repugnant to an existing Indian law: s. 2 of the Usury Laws Repeal Act, 1855, s. 3 of the Usurious Loans Act, 1918, and possibly also s. 37 of the Contract Act, 1872. The Advocate-General admitted that on the day when this certificate was granted it was a good and valid certificate, and that the appellants were entitled at that time to appeal to this Court not only on the question as to the validity of s. 11 of the Act of 1938, but also on any other ground mentioned in s. 205 (2) of the Constitution Act. But, he said, the question of law as to the validity of s. 11 ceased to exist at the beginning of May, when the new Act of 1939 came into force and, since the Act was retrospective, the certificate had become, to use his own expression, infructuous and ineffective. Accordingly, he argued that this Court had no longer jurisdiction to hear the appeal, either on the constitutional or on any other ground since an effective certificate alone is the foundation of the Court's jurisdiction; and that the appellants must seek their remedy if any, before the Judicial Committee. He also pointed out that the object of the appeal now is to obtain the benefit of the Act of 1939, that is to say, of a law which was not yet in existence when the certificate was granted by the High Court.

Section 205 of the Constitution Act is in the following terms :

"205. (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certificate that the case involves a substantial question of law as to the interpretation of this Act or any order in Council made thereunder and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court on any other ground, and no direct appeal shall lie

to his His Majesty in Council either with or without special leave."

The granting of a certificate is thus the necessary condition precedent to the exercise of its jurisdiction by this Court; and it sets in motion a train of consequences. No provision is made for the cancellation or vacating of a certificate after it has once been granted. The Advocate-General did indeed suggest that the High Court had power in appropriate circumstances to vacate a certificate under s. 151 or s. 152 of the Civil P. O. He abandoned the suggestion however before the conclusion of his argument, and in our opinion he was prudent to do so. Plainly s. 152 of the Code has no application to such a case as the present, and there can be no inherent power to alter a decree or certificate, which was correct at the time when it was made or given, because of the happening of some subsequent event.

If the High Court had no power to vacate its certificate, this Court has certainly no power to do so. Can it then treat an existing certificate as having become "infructuous," because the constitutional question with respect to which it was given subsequently becomes of no more than academic interest. The Advocate-General referred to the observations of the Judicial Committee in *Attorney-General for Alberta v. Attorney-General for Canada* (2) where the Lord Chancellor stated that it was the practice of the Committee not to entertain appeals which have no relation to existing rights created or purported to be created or to express opinions on subjects which are no longer of any practical interest. In our opinion, it would be convenient for this Court to follow the same practice and we have in an earlier case declined to hear arguments on the validity of the repealed Bihar Act of 1938. But we are not now considering the convenience or otherwise of a particular practice; we are considering a question of jurisdiction. The certificate granted by the High Court on January 17, 1939, admittedly conferred jurisdiction on this Court to hear the appeal; and we have to determine whether that jurisdiction has been taken away from us, by reason of the alteration of circumstances. In our opinion, when jurisdiction to hear an appeal is once vested in this Court by the grant of a certificate, it cannot be divested by any subsequent event. A certificate is the key which unlocks the door. (2) (1939) A.C. 117, (122, 128); 108 L.J.P.C. 1; 159 L.T. 609; 82 S.J. 1029; 55 T.L.R. 65; (1939) 1 A.E.R. 423.

locks the door into this Court, and a litigant who has once passed through that door cannot afterwards be ejected by the happening of events outside and beyond his control. It seems to us quite immaterial that the relief which the appellants now claim arises from an act which was not law when the certificate was granted. Section 205 (2) is plain; and once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so. Nor do we think though it is not necessary to decide the point, that the jurisdiction of this Court to entertain the appeal on those other grounds would be excluded, even if an appellant declined to argue before us that the decision of the High Court on the constitutional question with respect to which the certificate had been granted was wrong.

It is sufficient for us to base our judgment on what we conceive to be the true construction of s. 205 of the Constitution Act, and we do not think it necessary to decide whether the appellants had also a vested right under the Act of 1938, which was saved to them by s. 8 of the Bihar General Clauses Act, notwithstanding the repeal of the Act of 1938 by the Act of 1939.

The facts in the present case are unusual and are unlikely to recur. We do not suppose that Parliament ever contemplated a contingency of the kind; but that is no reason why we should not give effect to the plain language of the Act. Nor could we lightly adopt a construction which would have this result, that an appeal properly begun and continued in this Court was suddenly, by the action of a Provincial Legislature, taken out of our jurisdiction and transferred to the jurisdiction of the Judicial Committee.

In our opinion, therefore this Court has jurisdiction to entertain the appeal. The appellants' Counsel did not argue any grounds of appeal other than the application of the Bihar Act of 1939, and, as we have already said, the Advocate-General of India, on behalf of the respondents, admitted that if the appeal were properly constituted and this Court had jurisdiction, the appellants were entitled to the benefit of the Act. We accordingly allow the appeal to the extent of reducing the interest payable to the plaintiff up to the date of the institution of the suit to Rs. 8,500 in respect of the first mortgage bond, Ex. I and to Rs. 3,995 in respect

of the second bond, Ex. I (a). As regards interest *pendente lite*, this is governed in the case of mortgage actions by O. XXXIV, r. 11, of the Civil P. C. which provides that the Court may order payment of interest, up to the date on or before which payment of the amount found due is under the preliminary decree to be made by the mortgagor, at the rate payable on the principal, or where no such rate is fixed at such rate as the Court may deem reasonable, and it is to be observed that though this provision has found a place in the Code since 1929, s. 7 of the Bihar Act of 1939 is expressly limited to interest claimable upto the date of the institution of the suit. The Act has maintained a distinction between loans advanced before the Act and loans advanced subsequently; as regards the latter it has limited the rate of interest (s. 5) and has also prohibited compound interest (s. 6) while as regards the former it has only limited the aggregate amount of interest payable up to the date of the institution of the suit (s. 7). The contract for the payment of interest thus not having been declared illegal, but only unenforceable beyond a certain point, the creditor retains his contractual rights except to the extent to which the statute has expressly limited them. In these circumstances, it may perhaps be open to doubt whether the policy of the Bihar legislation can properly be taken into account by a Court which is considering whether there are any grounds for reducing the rate of interest to which a mortgagee would ordinarily be entitled under the provisions of O. XXXIV, r. 11 of the Code, since this would in effect be to extend the Act to a period with which the legislature has not chosen to deal but it may be that the wide powers of re-opening transactions originating before or after the commencement of the Act given to the Court by s. 8 of the Bihar Act of 1939 were regarded by the Legislature as conferring a much wider discretion than that given by O. XXXIV, r. 11 or by the Usurious Loans Act, 1918. Having regard to all the circumstances, we think that the justice of the case will be met by allowing the plaintiff (respondent) simple interest at 12 per cent. per annum rather than the 12 per cent. compound interest with yearly rate specified in the contract, in respect of the principal amount due on both the bonds from December 20, 1934, to the date fixed for payment in the revised decree to be passed by the High Court.

From the latter date the aggregate amount due for principal, interest and cost will carry interest at 6 per cent. per annum till the date of realisation or payment.

The case will be remitted to the High Court with a direction to discharge their order dated January 17, 1939, and the order of the Subordinate Judge dated March 2, 1936, and to pass a decree in the terms above stated. The respondents will retain the costs already awarded to them in the High Court and in the Court below; there will be no order as to costs in this Court.

D.

Case remitted.

BHOPAL HIGH COURT

First Civil Appeal No. 14 of 1939
August 19, 1939

MOHAMMAD AHMAD KHAN, C. J. AND
P. C. BIRDIE, J.

Sethani HARKUNWAR BAI—
APPELLANT

versus

Dewan Bahadur KESRI SINGH—
RESPONDENT.

Civil Procedure Code (Bhopal) (Act V of 1908), ss. 2 (8), 58—Ex parte decree of foreign Court awarding costs to defendant—Suit by defendant in Court in Bhopal State to recover costs based on judgment of foreign Court—Maintainability of.

The definition of 'judgment' in s. 2 (8), Civil P. O., (Bhopal) covers both an order and a decree, and equally holds good whether the decree is passed *ex parte* or on merits.

Where in a suit in a foreign Court plaintiff's witness who was under examination, absented himself and upon an adjournment being disallowed the Counsel withdrew from the suit with the result that the plaintiff's claim was rejected and she was required to pay the costs of the defendant, the absence of the witness on the date fixed for his further examination and the consequent withdrawal of plaintiff's Counsel from prosecution amounted to a default in proper prosecution of the suit on the part of the plaintiff and the suit, must be deemed to have been decided by the foreign Court *ex parte* under O. XVII, r. 2, Civil P. O. A suit based on such a judgment to recover the costs from the defendants is maintainable in a Court in Bhopal State and is not barred by s. 58, Bhopal Civil P. O.

Mr. Mohammad Nasiruddin and Molvi Syed Mohammad, for the Appellant.

Mr. Mohammad Yaqub Khan, for the Respondent.

M. A. Khan, C. J.—This appeal has its origin in a foreign judgment pronounced by the Bombay High Court on July 9, 1934 where the appellant sued the respondent for the recovery of a sum of Rs. 40,000; and the respondent filed a counter claim.

On July 9, 1934 plaintiff's witness named Hariram Swamiram, who was under examination, absented himself whereupon Counsel for the plaintiff applied for adjournment. This being disallowed the Counsel withdrew from the suit with the result that the plaintiff's claim was rejected and she was required to pay the costs of the other party amounting to Rs. 14,834-8. The respondent, failing to realise the decretal amount in Bombay, sued the appellant for the same in the Court of the District Judge, Sehore (Bhopal State) on the basis of the said foreign judgment. The defendant pleaded that a regular suit for the recovery of costs was forbidden in law.

The learned District Judge after a lengthy discussion decided that the withdrawal of the appellant's Counsel from the prosecution of the suit in Bombay High Court amounted to withdrawal of her suit, and decreed the plaintiff's suit in full. In fact, the absence of the appellant's witness on the date fixed for his further examination in the Bombay High Court and the consequent withdrawal of her Counsel from prosecution amounted to a default in proper prosecution of the suit on the part of the appellant. Hence it follows that the suit was decided by the Bombay High Court *ex parte* under O. XVII, r. 2 of Civil P. O.

The defence plea that s. 53 of Bhopal Civil P. O., did not permit a regular suit for the recovery of costs does not hold good for the simple reason that the plaintiff sought to recover his costs on the basis of a foreign judgment. In British India itself, no doubt, such a suit was barred by s. 47 of Civil P. O.; but Bhopal State being a foreign country within the meaning of s. 13 of Civil P. O., the decrees of Bombay Courts were not executable in the Courts of that State. Therefore, the only alternative left for the respondent was to file a regular suit on the basis of the foreign judgment. The other ground of appeal urged before us is that Bombay High Court's decree in the suit does not fall in the category of a foreign judgment. Under s. 2 (8) of Civil P. O. 'judgment' means the statement given by the judge of the grounds of a decree or order. This definition covers both an order and a decree, and equally holds good whether the decree is passed *ex parte* or on merits. The appellant has not attacked the foreign judgment in suit on any of the grounds mentioned in s. 27 of the Bhopal State Civil P. O. (corresponding to s. 13 of the British Indian Civil P. O.). Hence the same is conclusive between the

parties. Therefore, there is no ground to interfere in the decree of the lower Court. It is ordered that the appeal be dismissed. The appellant to pay the respondent's costs throughout.

B.

Appeal dismissed.

PRIVY COUNCIL

Appeal from the Lahore High Court

February 26, 1940

LORD THANKERTON, SIR GEORGE RANKIN AND

MR. M. R. JAYAKAR

JAGAT SINGH AND OTHERS—APPELLANTS

versus

SANGAT SINGH AND OTHERS—

RESPONDENTS

Will—Construction—Absolute estate—Widow held made absolute owner of property—Civil Procedure Code (Act V of 1908), O. II, r. 2, O. XXIII, r. 3—Suit for declaration of title to property—Property outside jurisdiction of Court not included—Compromise—Such property included—Compromise brought on record by date only and not made exhibit—Decree, if nullity for non-registration of compromise—Suit on compromise for possession of property which was outside jurisdiction of Court which passed decree on compromise—O. II, r. 2, if applies—Compromise, if binding—Party acting on compromise, whether can plead that it was result of pressure and undue influence.

A testator by his will made his wife the "exclusive owner" of a certain property. She was to have "all kinds of powers to deal with the property aforesaid. She shall be considered full owner." But towards the end of the will there was a provision that "after the death of my wife, whatever property remains shall be owned by the sons of my brother who shall have no connection or concern therewith. Besides, my wife, shall not be entitled to sell immovable property. The sons of my brother shall also have no such right".

Held, that the prohibition against selling must be disregarded as repugnant to the absolute gift to the wife and that she was made the absolute owner of the property. [p. 442, col. 2.]

In a previous suit the reversioners sued the widow for a declaration that the will in her favour by her deceased husband was not valid and that she had no right to certain properties situated within the jurisdiction of the Court. The suit however, was compromised. The compromise dealt with another property also which was outside the jurisdiction of the Court. Some money was to be paid to the widow. The Court by its decree "ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise as a whole with this reservation that the sum stipulated shall be paid into Court within fifteen days from to-day, in case of failure the widow to be entitled to recover that amount by execution." The widow subsequently executed the decree and got the money stipulated in the compromise. The widow also gifted away the property, which was situated beyond the jurisdiction of the Court, and which was given to her by the compromise for lifetime only. A suit was instituted by the sons of the reversioners for declaration that the gifts were beyond her power.

The High Court held that by not including in the suit which was compromised a claim to recover possession of these lands the reversioner had forfeited all right therein by virtue of O. II, r. 2, Civil P. C.

Held, (i) that had that claim been included in the plaint, the suit could not have been entertained. Moreover so long as that suit was undisposed of it was always possible that the Court, if it thought that there was anything in the point as to O. II, r. 2, would give leave to the plaintiff to amend by including a claim to recover possession of those lands. Consequently O. II, r. 2, Civil P. C., did not apply; [p. 443, col. 1.]

(ii) That the Court had jurisdiction to pass a decree in terms of the compromise though it included the property situated outside its jurisdiction. When it was agreed that she should have the lands for her life, there was no doubt or difficulty as to the jurisdiction of the Court to include these lands within the declaration made as to the other lands and assets. It was no longer a question of a decree for possession but merely of a judicial determination as to the reversionary rights of the plaintiff or his descendants. Whether the Court acted irregularly and failed to comply strictly with O. XXIII, r. 3 of the Civil P. C., mattered nothing. He acted by consent and within his jurisdiction his decree was enforced in execution by the widow and no proceedings had at any time been taken to have it set aside. So the non-registration of the compromise which was referred to by the Court by date though not marked as exhibit, did not affect the jurisdiction of the Court to pass the decree that the terms of the compromise should be carried out as a whole. And under Registration Act, s. 17 (i), no question of registration arose as regards decree. 53 Ind. Cas. 534 (2) and *Pranal Annee v. Lakshmi Annee* (3), relied on. [p. 444, col. 1.]

(iii) Considered as a contract, the compromise was binding on the widow. The decree recorded the compromise though the compromise was not recited textually either in the body of the decree or in a schedule thereto. 53 Ind. Cas. 534 (2) and *Pranal Annee v. Lakshmi Annee* (3), relied on. [p. 444, col. 1.]

(iv) That the widow took the benefit of the compromise and acted on it for many years before repudiating it. As she not only got rid of the claim of the reversioner to be the sole owner of her husband's lands and other assets, but enforced one of the terms of the compromise against him, there was more than sufficient *prima facie* evidence that she understood the transaction and that there was no pressure or undue influence. [p. 444, col. 2.]

Order XXIII, r. 3, Civil P. C., is sufficiently complied with by a reference to the compromise being made in the decree. *Pranal Annee v. Lakshmi Annee* (3), relied on. [*ibid.*]

Sir Hari Singh Gour, Kt. and Mr. R. K. Handoo, for the Appellants.

Messrs. J. P. Eddy K. C. and M. H. Rashid, for the Respondents.

Sir George Rankin. — This appeal is brought from a decree of the High Court at Lahore, dated January 31, 1936, reversing a decree of the Subordinate Judge, Lyallpur, dated January 31, 1935, and dismissing the appellants' suit. The subject-matter of the dispute is some 6½ squares of land in the district of Lyallpur in the Punjab,

which (as is now admitted) belonged to one Ishar Singh who died childless on October 6, 1905, leaving him surviving a widow Bishan Devi, also a brother's son Sundar Singh who died on January 10, 1922. On February 7, 1929, the widow purported to make a gift of one portion of the land to Sangat Singh (respondent No. 1) and of another portion to a certain Gurdwara (respondent No. 2). The present suit was brought on August 7, 1933, by the appellants, who are three of the four sons of Sundar Singh. The fourth son was made a defendant and is now respondent No. 3. The claim of the plaintiff is for a declaration that the gifts of land to Sangat Singh and to the Gurdwara have no validity or effect beyond the life of Bishan Devi.

Ishar Singh on September 19, 1905, made a will of which probate was granted to Bishan Devi by the District Judge of Peshawar on November 3, 1906. Apart from an interest in the family house at Rawalpindi, Ishar Singh by his will declared himself to be the absolute and exclusive owner of the property which he disposed of thereby. He declared that Sundar Singh, his nephew, was disobedient and of bad character and was to be totally disinherited. He made the following dispositions in favour of his wife :

"4. My wife is *Mst. Bishan Devi*. She has greatly served me. She has all along been faithful to me. I make this will in her favour that she shall be exclusive (*illegible*) owner of the following properties after my death :—

(a) Entire cash including pro-notes for Rs. 13,000 and other items.

(b) Liquor, , *Charas* Opium, etc., of all kinds.

(c) Land, situate in Nathe.

(d) Lands, situate in Lyallpur.

(e) Three-quarter share in Nowshahra property.

(f) All ornaments.

Sundar Singh or any other person shall have no connection therewith, nor shall they interfere in the management thereof. My wife, *Mst. Bishan Devi*, may manage the said property in whatever way she likes. She shall have all kinds of powers to deal with the property aforesaid. She shall be considered full owner. So long as Malik Arjan Singh is alive he will manage the land in Lyallpur.

7. After the death of my wife, *Mst. Bishan Devi*, whatever property remains shall be owned by the sons of Sundar Singh. Sundar Singh shall have no connection or concern therewith. Besides, my wife, *Mst. Bishan Devi*, shall not be entitled to sell immovable property. The sons of Sundar Singh shall also have no such right.

8. The remaining movable or immovable property of mine shall be exclusively owned by my wife, *Mst. Bishan Devi*."

Mutation of the lands at Lyallpur into the name of Bishan Devi was obtained from the Colonisation Officer on March 13, 1907, but the entry was restricted by the condition "so long as she is alive and does

not remarry." This was in accord with the customary law of the parties independently of her husband's will. On November 12, 1906, Sundar Singh filed a plaint in the Court of the District Judge, Peshawar, against Bishan Devi and other defendants. By this plaint as amended he claimed a declaration that the will of Ishar Singh was not valid or binding on him as regards (*inter alia*) the immovables at Mahal Nathe and Nowshahra, or the stock of liquor and opium, etc., at Peshawar or the Govt. Promissory Notes for Rs. 13,000 in deposit at the Treasury, Peshawar. The sole relief claimed was a declaration and the suit was brought upon a court-fee of Rs. 10 only, though valued for purposes of jurisdiction at over Rs. 26,000. The case made was that the business of dealers in intoxicants, etc., under excise licences was not the separate business of Ishar Singh but a joint family business which had been carried on by him jointly with his brothers and after their deaths with the plaintiff Sundar Singh, and that all the properties had been acquired out of the joint funds of the business. Sundar Singh claimed to be the sole heir to and possessor of the property above mentioned and sued for a declaration "that the will is unlawful and null and void and has no effect upon the rights of the plaintiff who holds proprietary possession over the property in question." The plaint stated that "a separate suit will be brought for recovery of the ornaments, valued at Rs. 15,000, other movable property and lands situate at Lyallpur which are in possession of the defendants."

This suit was compromised in June, 1907, and as the validity and effect of the compromise is now in question it becomes necessary to notice it in detail. On June 9, a petition to the Court of the District Judge was signed by Bishan Devi and by Sundar Singh. It set forth that the parties had made the settlement therein expressed and it concluded "hence this application by way of a compromise is submitted with the prayer that it may be accepted and the case decided in terms thereof." The main terms were that the lands at Mahal Nathe and at Lyallpur should belong to Bishan Devi for her life and on her death to Sundar Singh and his male descendants. An iron safe, a cow and a calf were to belong to Bishan Devi. Sundar Singh was to pay her Rs. 8,150 in cash. Govt. Promissory Notes to the value of Rs. 13,000 deposited in the Treasury were to be entered in the names

of the sons of Sundar Singh. Bishan Devi was to be absolute owner of all ornaments, clothes and other movables in her possession. Sundar Singh was to get the book-debts, stock-in-trade and other trade movables and to be liable to pay any debts of Ishar Singh. The petition of compromise was signed at Rawalpindi and was handed over to one Mohan Singh, an Honorary Magistrate, who sent it by post to the District Judge. On June 11 the case came on before the District Judge and Bishan Devi was represented by her agent Jagat Singh and by a Pleader. Sundar Singh was present in person. As appears by the note of the District Judge, Jagat Singh stated to the Court:—

"Met. Bishan Devi signed the compromise in my presence but she subsequently stated that she only accepted it if the Rs. 8,150 was paid at once and if the Rs. 13,000 was invested in a bank. She signed of her own free will knowing the contents of the deed."

By his decree the District Judge "ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise dated June 9, 1907, as a whole with this reservation that the sum of Rs. 8,150 shall be paid into Court within fifteen days from to-day in case of failure defendant No. 1 (Bishan Devi) to be entitled to recover that amount by execution."

On some date between June 26 and July 15, 1907, an application for execution was filed by Jagat Singh on behalf of Bishan Devi against Sundar Singh asking that a sum of Rs. 7,535 lying in the Treasury on account of Ishar Singh be paid to Bishan Devi on account of the sum of Rs. 8,150 due to her under the compromise. This application was successful and on July 15, a receipt was given by Jagat Singh on the lady's behalf for Rs. 7,535 received through Court. Other instances of action taken under the compromise are in evidence but need not here be referred to.

The gifts made on February 7, 1929, by Bishan Devi to the first and second respondents on the lands at Lyallpur are contrary to the terms of the compromise of June, 1907, whereby these lands were to belong to her for her lifetime only and she was not to be competent to alienate them. Hence the present suit brought by sons of Sundar Singh on August 7, 1933. The defence of Bishan Devi (original defendant No. 1) was that she was *parda-nashin*, that she signed a blank paper and not the completed deed of compromise, that her signature was obtained by undue pres-

sure and without independent advice, and that she never agreed to the compromise. She contended further that the compromise could not be put in evidence for want of registration and that the Court at Peshawar was not competent to pass the compromise decree. Other contentions need not now be referred to.

It was maintained for the plaintiffs that the will of Ishar Singh gave to his widow a life interest and no more, and that the plaintiffs were entitled as his nearest reversioners to the declaration which they sought independently of the compromise.

The learned Subordinate Judge dealt with a number of questions which are no longer in dispute. He found (*inter alia*) that the land at Lyallpur was Ishar Singh's and not his wife's, that the business in which he was engaged was his separate business and not a joint family business, that Sangat Singh (respondent No. 1) was not adopted by him. But in the High Court the issues were narrowed to three questions only, (1) whether by her husband's will Bishan Devi got an absolute interest in the Lyallpur lands, (2) whether the compromise was brought about by coercion and undue influence or whether she signed the deed after fully understanding its contents, (3) whether the deed was inadmissible in evidence for want of registration.

On the question as to the true construction of the will of Ishar Singh the trial Court and the High Court were agreed in holding that its effect was to make Bishan Devi absolute owner of the Lyallpur property. Their Lordships are of the same opinion. The prohibition against selling the immovables is not addressed to the widow only but is extended to the sons of Sundar Singh under cl. 7 and is not in their Lordships' view to be regarded as showing an intention to give to the widow an interest for life or the estate of a Hindu woman, but as a condition which the testator was proposing to attach to an absolute interest. Clause 4, is in clear and emphatic language, consistent only with the gift of an absolute interest, and the phrase "whatever property remains" in the first part of cl. 7 of the will is in keeping with this intention. The prohibition against selling must be disregarded as repugnant to the absolute gift to Bishan Devi. Clause 8 is a residuary clause which does not affect the land at Lyallpur.

It is therefore necessary for the plaintiffs-appellants to rely upon the compromise of June, 1907. The learned Subordinate

Judge held that the deed was admissible in evidence; that the compromise was entered into by Bishan Devi with knowledge of its contents and voluntarily; and that the case of coercion and undue influence was untrue. The learned Judges of the High Court have held that the deed is inadmissible for want of registration and that it has not been established that it was read over to her or that she signed it after fully understanding its meaning or effect. They do not appear to hold that coercion or undue influence has been proved. At the root of their judgment is an opinion formed by them to the effect that by not including in the suit of 1906 a claim to recover possession of the Lyallpur lands Sundar Singh had forfeited all right therein by virtue of O. II, r. 2, Civil P. C. (Section 43 of the Code of 1882). They are mistaken in supposing that the claim to Rs. 13,000 Govt. Promissory Notes and to the land at Nowshahra was not included in the suit. The plaintiff was on the footing that Sundar Singh was in possession of these and other items and required only a declaration to clear his title; whereas the land at Lyallpur and the ornaments were in Bishan Devi's possession and the claim to them must necessarily be put as a claim to recover possession. In these circumstances their Lordships cannot agree with the High Court in regarding the compromise as bad by reason that Bishan Devi was not advised that she could safely treat the claim of Sundar Singh to the Lyallpur lands as barred. On the contrary, such advice had it been given, would in their Lordships' view have been rash rather than sound. The lands at Lyallpur being situate in the Punjab, outside the District of Peshawar, a claim to relief in respect of them could have been entertained by the District Judge under s. 19 of the Code of 1882. The High Court would seem to have assumed that s. 19 was not merely permissive: also that the claim to recover possession of the Lyallpur lands and the claim to a declaration as regards the other lands were claims in respect of the same cause of action [*cf. Payana v. Pana Lana* (1)]. Their Lordships think that both assumptions are highly debateable. But in any case the claim of the present appellants as reversioners of Ishar Singh would not have been barred so far as regards the question whether Ishar Singh's will gave to his widow an absolute interest or

an interest for her life. Moreover, so long as the suit of 1906 was undisposed of it was always possible that the Court, if it thought that there was anything in the point as to O. II, r. 2, would give leave to the plaintiff to amend by including a claim to recover possession of the ornaments and Lyallpur lands. It does not appear that the lawyers advising Bishan Devi thought anything of the point now taken by the High Court and with all respect to the learned Judges their Lordships cannot regard it as a good one.

By the decree of June 11, 1907, the District Judge had purported to direct that the terms of the compromise should be carried out as a whole. He had not in terms excluded the Lyallpur land from the operative part of the decree and he had not recited the contents of the deed. Though it is clear that his decree was made upon the petition and that both documents would become part of the same record, he had neither marked and exhibited the deed nor scheduled it or a copy of it to the decree. He had referred to the deed by date and in a manner which has given rise to no doubt or difficulty. No proceedings were taken at any time during the next 20 years for having the decree set aside whether on the ground of some defect in the agreement of compromise or some error or irregularity in the decree itself. On the contrary the decree was enforced as to one of the terms of the compromise by execution proceedings taken on behalf of Bishan Devi and it may well be a question whether after taking this advantage under the decree she would have been entitled in equity to have the decree set aside. Under the Registration Act (III of 1877) no question of registration arises as regards decree [s. 17 (i)]. In these circumstances their Lordships agree with the argument of Sir Hari Singh Gour on behalf of the appellants that the first question is one of jurisdiction in the strict sense of the term. Had the learned District Judge at Peshawar jurisdiction to pass this decree as regards the lands at Lyallpur or is his decree so far as regards these lands a nullity which Bishan Devi was entitled to disregard without taking any proceedings to have it set aside or varied? As the learned Judges of the High Court thought that the claim to the Lyallpur lands came within O. II, r. 2, they must have considered that this claim was within the jurisdiction of the District Judge. In any

(1) 41 I A 142; 26 Ind. Cas. 228; 18 C W N 617; 17 New. Law Rep. 56; 83 L J P C 131; (1914) A C 618; 110 L T 913 (P O).

case when it was agreed that Bishan Devi should have the Lyallpur lands for her life, there was no doubt or difficulty as to the jurisdiction of the District Judge of Peshawar to include these lands within the declaration made as to the other lands and assets. It was no longer a question of a decree for possession but merely of a judicial determination as to the reversionary rights of Sundar Singh or his descendants. Whether the District Judge acted irregularly and failed to comply strictly with s. 375 of the Civil P. O., of 1882 matters nothing. He acted by consent and within his jurisdiction: his decree was enforced in execution by Bishan Devi and no proceedings have at any time been taken to have it set aside. He might have acted more strictly in compliance with the terms of s. 375 had he first amended the plaint by including the reversionary interest in the Lyallpur lands within the declaration sought, but the mere fact that he could have done so shows that he was not devoid of jurisdiction.

In these circumstances it is clear that in 1928 Bishan Devi was not entitled to treat as a nullity this judicial determination to the effect that she had only a life interest in the lands at Lyallpur.

Their Lordships, considering the compromise of 1907 (as the Courts in India have considered it) as a contract, are further of opinion that it was valid and binding upon Bishan Devi. The learned Judges of the High Court held that the District Judge had not acted correctly under O. XXIII, r. 3, Civil P. O., (meaning s. 375 of the Code of 1882) and had not ordered the compromise to be recorded. Their Lordships have already noticed that the decree directs effect to be given to the whole compromise and have dealt with the position so created. But in any view the decree in their Lordships' opinion recorded the compromise though the compromise was not recited textually either in the body of the decree or in a schedule thereto. In *Hemanta Kumari v. Midnapur Zemindary Co., Ltd.* (2), the Board was careful to avoid laying down any method of compliance with s. 375 of the Code of 1882 as the only method. Lord Buckmaster was at pains to say that "their Lordships are not aware of the exact system by which

documents are recorded in the Courts in India," and it was not intended by pointing out one "perfectly proper and effectual method" to alter or nullify the rights of parties which for many years past had depended on the previous Indian practice being treated as valid. That s. 375, was sufficiently complied with by a reference to the compromise being made in the decree appears from the judgment delivered by Lord Watson on behalf of the Board in *Pranal Annee v. Lakshmi Annee* (3), where it was said that

"the order of the learned Judge if it had referred to or narrated these terms of compromise would have been judicial evidence available to the appellant that the respondents had agreed to transfer to her the moiety of the land now in dispute." (See also *Hemanta Kumari's case* (2), (*supra*) at p. 247 of the report).

The only remaining question is whether Bishan Devi entered into the compromise voluntarily and with understanding of its effect. It does not appear that she was *pardanashin* in the strictest sense, and her evidence is that of an intelligent woman. She took the benefit of the compromise and acted on it for many years before repudiating it. As she not only got rid of the claim of Sundar Singh to be sole owner of her husband's lands and other assets, but enforced one of the terms of the compromise against him, there is more than sufficient *prima facie* evidence that she understood the transaction. It is satisfactorily proved that the terms of the compromise were settled after much haggling in the course of which Jagat Singh conveyed her instructions to the retired District Judge Bhagat Narain Das, who was acting as conciliator between the parties and who witnessed her signature to the petition of compromise.

The case that she signed a blank paper is, in their Lordships' opinion, disproved. They reject as worthless the evidence of Jagat Singh on this point and also the evidence to the effect that she was brought to agree by his threat to cease acting for her in the suit. The allegation that undue pressure was brought upon her by certain members of the *baradri* (brotherhood) is the only matter which requires serious consideration upon this part of the case. It is said that she was told that certain members of the family would not take part in the marriage ceremonies of her sister's son, Nidhan Singh (brother of Jagat Singh), unless she compromised with Sundar Singh. But as the Subordinate

(2) 46 I A 240 (247); 53 Ind. Cas. 534; 37 M. L. J. 575; 17 A. L. J. 1117; 24 O. W. N. 777; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; A. I. R. 1919 P. C. 79 (P. O.).

(3) 16 I A 101 (106); 1 Bom. L. R. 394; 21 M. L. J. 108; 3 O. W. N. 464; 9 M. L. J. 147; 7 Sar. 516 (F. O.).

Judge noticed there is no reason to think that this threat if made would have greatly troubled Bishan Devi. Her own evidence is that she said at the time that she did not care and that "if they would not let the marriage take place let them do so." The learned Judges of the High Court do not appear to find that undue influence was used but proceed upon the view that Bishan Devi is not proved to have understood the compromise or to have voluntarily entered into it. After 20 years and more, when Bhagat Narain Das is dead, direct oral evidence of the explanation of the petition can hardly be expected. The High Court, largely because of the argument as to the effect of O. II, r. 2, on the lands at Lyalpur, thought that the compromise was one-sided. Also they mistakenly thought that the sum of Rs. 8,150 was to be paid to Bishan Devi out of the Rs. 13,000 (which is not the case of either party). The Rs. 13,000 consisted of Govt. Promissory Notes which were to be put in the name of the sons of Sundar Singh, and the sum of Rs. 7,535 realised in execution was a different matter. Their Lordships agree with the trial Judge in holding that Bishan Devi entered into the compromise voluntarily. She appears to have been surrounded with legal advisers and in Bhagat Narain Das, admittedly a man of high standing and good reputation, had a family friend specially competent to give her sound and practical advice.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be set aside and the decree of the Subordinate Judge restored. The first and second respondents will pay the appellant's costs in the High Court and of this appeal,

D. *Appeal allowed.*

Solicitors for the Appellants—Messrs. Hy. S. L. Polak & Co.

Solicitors for the Respondents.—Messrs. T. L. Wilson & Co.

PRIVY COUNCIL

Appeal from The Court of Appeal at
Johore Bahru
October 12, 1939

LORD THANEERTON, LORD FAIRFIELD
AND LORD SALVESSEN

S. R. M. S. CHETHAMBARAM
CHETTIAR—APPELLANT

versus

LOO THON POO—RESPONDENT

Interest—Interest added to amount due when new

transaction is agreed between parties which includes payment of interest as acknowledged debt—Whether objectionable—Usurious interest—State of Johore—24 per cent. interest held excessive and unreasonable when loan was amply secured—Precedents—Privy Council appeal from State of Johore—English decisions, binding effect of.

Where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. *Lyle v. Chappell* (1) and *Paton v. The Inland Revenue Commissioners* (2), relied on.

Where in a State of Johore in certain transactions of loan and charge the interest charged was 24 per cent. such interest being capitalized on each transaction and made payable by monthly instalments, all the loans and charges being amply secured and the contract contained a very harsh term giving power to the money-lender to enforce payment of the loan and interest if any instalment became due and unpaid:

Held, that the rate of interest at 24 per cent was unfair and unreasonable between the parties.

English decisions are not binding, either in fact or in law on a question arising in an appeal from a judgment in the State of Johore. Nevertheless, the reasoning of Judges in the English Courts may prove helpful in solving a similar problem arising in that State.

Messrs. C. T. LeQuesne K. C. and H. H. Maddocks, for the Appellant.

Messrs. J. N. Gray K. C. and C. D. Myles, for the Respondents.

Lord Fairfield.—This is a consolidated appeal from the decision of the Court of Appeal at Johore Bahru in the State of Johore reversing the decision of the trial Judge, Mr. Justice Mills.

It may be convenient to say at once that their Lordships are satisfied that the judgment of the trial Judge was wrong, that its reversal by the Court of Appeal was right and ought to be affirmed, except in one respect which will be dealt with later in this judgment.

It will save their Lordships the trouble of stating the names of appellants and respondents, where they differ, if they refer to the appellants collectively as the money-lenders and the respondents as the borrowers.

By originating summonses dated November 23, 1936, the money-lenders made application to the Court of the Judge at Johore Bahru for an order for the borrowers to show cause why the several rubber estates which had been charged to the money-lenders by certain instruments of charge should not be sold at public auction, subject to the terms stated in each summons.

The borrowers by their affidavit in

answer asked the Court to say that the several transactions to which the originating summonses related were usurious and unfair, and that the interest charged was excessive; they also complained that compound interest was charged although there was ample security and they asked for an order that the transactions should be re-opened under the Usurious Loans Enactment.

The borrowers also complained that their signatures to the charges were obtained by undue influence. As this claim was abandoned when the case came before the Court of Appeal it is unnecessary for their Lordships to say anything about it. The loans and charges with which the present appeal is concerned are identified in the evidence by the letters (e), (n) and (r). The borrowers also appealed with regard to loans identified by letters (o), (p) and (q). It was agreed that the loans identified by the letters (o), (p) and (q) should stand or fall by the decision in this appeal with reference to the transactions identified by the letters (e), (n) and (r).

By the Usurious Loans Statute in force at the date of each of the impeached transactions it was provided as follows:—

"(1) Where, in any proceeding to which this Enactment applies, whether *ex parte* or otherwise the Court has reason to believe (a) that the interest is excessive and (b) that the transaction was between the parties thereto substantially unfair, the Court may exercise all or any of the following powers;

(1) re-open the transactions; take an account between the parties and relieve the debtor of all liability in respect of excessive interest.

(2) notwithstanding any agreement purporting to close previous dealings and to create a new obligation re-open any account already taken between them, and relieve the debtor of all liability in respect of any excessive interest and if anything has been paid or allowed to account in respect of such liability, order the creditor to repay any sum which it considers to be repayable."

In all the transactions of loan and charge which fall to be considered in the present appeal the interest charged was 24 per cent. Such interest charged at that rate was on each transaction capitalised and made payable by monthly instalments.

The only evidence before the trial Judge which affects the question whether 24 per cent. was or was not excessive and unfair as between the parties consisted of (1) the affidavit of Loo Thon Poo, one of the borrowers, (2) the affidavit of Vaithyalingham, the valuer, which was not contradicted by any affidavit on the part of

the money-lenders, and (3) the affidavit of Cheong Hock Chye which also was unchallenged by any affidavit in opposition. In the last mentioned affidavit it was stated by the deponent that in the case of trust securities where a loan is not permissible if it exceeds two-thirds of the value of the property charged as at the date of the loan, the rate of interest charged varied from 6 to 9 per cent. simple interest, but was never more than 9 per cent. In the case of other securities it is stated in this affidavit that interest charged had been a little more but not very much more than 9 per cent., both in Singapore and the State of Johore. The facts stated in this affidavit were not challenged by any affidavit in opposition filed by or in behalf of the money-lenders. If this evidence be accepted the inference is plain that where the security is not a trust security the interest usually charged on a fully secured loan in the State of Johore had only been a little in excess of 9 per cent. All the loans and charges with which this appeal is concerned, namely, (e), (n) and (r), were amply secured by charges on rubber estates which had been well-looked after and kept in good order.

In their Lordships' opinion the trial Judge was wrong in concluding that the charge of 24 per cent. interest was not unreasonable and excessive and was not unfair as between the parties. They agree with the Court of Appeal that his decision in this respect was wrong and that the Court of Appeal was right in reversing it. Their Lordships have come to this conclusion for the following reasons:—

(1) The trial Judge was wrong in treating the reported decisions of the Courts of Johore and India as evidence of the facts and inferences of fact stated in these reports.

(2) The learned Judge failed to give effect to the unchallenged evidence of Cheong Hock Chye as regards the rate of interest usually charged in the State of Johore.

(3) The learned Judge failed to attach sufficient weight to the consideration that in all cases the loans were amply secured.

(4) In considering whether the several transactions with which the proceedings before the trial Judge were concerned were substantially unfair between the parties the trial Judge failed to consider and give effect to the fact that in all these transactions the contract contained a very harsh term giving power to the money-lenders to

enforce payment of the loan and interest, if any instalment became due and unpaid.

Their Lordships are accordingly of opinion that the judgment of the Court of Appeal was right, except in so far as it required the interest throughout to be reckoned as simple interest.

Their Lordships also think it right to make some observations on one of the passages contained in the judgment of the Court of Appeal. In the second paragraph of page 55 of the record the Acting Chief Justice in delivering the oral judgment of the Court of Appeal said:

"Before us Counsel agreed that in Johore 18 per cent. was in the past quite a common rate of interest on charges, but now by Enactment No. 4 of 1937, which came into force on March 16, 1937, s. 3 of the Usurious Loans Enactment, it is provided that until the contrary is proved if the interest exceeds 12 per cent. per annum in the case of secured, and 18 per cent. per annum on unsecured loans, the Court shall presume that the interest charged is excessive and the transaction substantially unfair."

Before the trial Judge the borrowers' Counsel said: "We submit to 18 per cent, because it is the highest allowed but the Court may think it too much." It seems probable that the Counsel for the borrowers in the Court of Appeal meant no more than what he had stated in the argument before the trial Judge. Even if this be an incorrect interpretation of what Counsel said in the Court of Appeal it does not follow that because 18 per cent, had been in the past quite a common rate of interest on charges it could not be regarded as excessive and unfair, it is not unusual for borrowers to submit to a rate of interest which is excessive and unfair rather than run the risks of litigation, including it may be the risk of having to incur the expense of an appeal to His Majesty in Council. If by the words quoted above the Court of Appeal meant that the Enactment of 1937 should be used to construe the earlier enactment they were certainly wrong, but they may merely have meant to use the later statute as some evidence that 24 per cent. was considered excessive by a representative section of the Protectorate, in which case their observations quoted above would not be liable to serious criticism.

Their Lordships ought now to consider the evidence relating to the several loans and charges with which this appeal is concerned in order to determine on which of these transactions the question arises whether the charge of compound interest, that is to say interest on interest, ought to be allowed. In the case of the transaction

of loan and charge identified as (e) the amount of cash paid to the borrowers by the money-lenders was £3,000, the capitalised interest was £600 payable by monthly instalments. No part of the capital or capitalised interest on this loan was paid by the borrowers. These sums, whether capital or interest, were included in loan (f) and again in loan (g); and in loan (n) a balance of interest on (e) was included as still undischarged. The evidence relating to all transactions by way of loan and charge are conveniently summarised in Ex. O. Schedule A, which is to be found on pp. 88 and 89 of the record. No. 5 in this schedule relates to transaction (e). No. 11 relates to transactions (l), (m) and (n) and No. 12 to transactions (o), (p), (q) and (r). It is clear that transactions (l), (m) and (n), and (o), (p), (q) and (r) included interest charged on interest.

Their Lordships are of opinion where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. As one member of this Board, when sitting in the Court of Appeal, pointed out in the case of *Lyle v. Chappell* (1), it ought not to make any difference to the validity of a transaction by way of a renewal of a loan, whether the parties go through the form of payment by the borrower of the whole amount due and a relending of the same amount by the money-lender, or the transaction is carried out without any such payment by treating the amount of principal and interest still due as a debt acknowledged by the borrower together with an undertaking by the borrower to pay the amount of the agreed debt.

That this view is right in principle is confirmed by the following passage in the speech of Lord Atkin in *Paton v. The Inland Revenue Commissioners* (2) where his Lordship used these words in relation to a case involving six monthly settlements:

"If you settle that is agree the balance at the end of six months there is nothing to prevent your making a fresh start with the total debt which no doubt includes interest and agreeing to forbear from suing for the whole debt at a rate of interest meantime."

(1) (1932) 1 K B 691, (706); 101 L J K B 185; 146 LT 236; 48 T L R 119.

(2) (1938) A C 341, (348); 107 L J K B 354; 158 L T 426; 82 S J 212; 54 T L R 504; (1938) 1 A E R 786.

Their Lordships do not fail to bear in mind that English decisions are not binding either in fact or in law on a question arising in an appeal from a judgment in the State of Johore. Nevertheless, the reasoning of Judges in the English Courts may prove helpful in solving a similar problem arising in that State. It is only in this sense that their Lordships rely in the authorities referred to above.

The appellants cited the decision of Channell, J. in *Carrington Ltd. v. Smith* (3) in support of their appeal, and the qualified approval of that decision by the Court of Appeal in *Reading Trust v. Spero* (4). It is apparent from the judgment of Lord Fairfield (then Lord Justice Greer) and from that of Lord Justice Slesser, that Channell, J. was right in taking into account the fact that a willing and intelligent borrower had agreed to the interest charged, but that this was only one of the circumstances to be taken into account and was not of itself conclusive.

Their Lordships are not satisfied by the evidence in the present case that the borrowers fully understood what they were agreeing to and in any case their Lordships are of opinion they ought not to disturb the finding of the Court of Appeal that 15 per cent. interest was the right interest to allow under all the circumstances proved at the trial.

Their Lordships are of opinion that the order of the Court of Appeal in so far as it relates to the three transactions (e), (n) and (r) with which alone this appeal is concerned, should be affirmed. The order made by the Court of Appeal was as follows:—

"These appeals coming on for hearing this 5th day of April, 1937, before the Honourable Mr. Justice Howes, Acting O. J. S. S. The Honourable Mr. Justice Horne and the Honourable Mr. Justice Laville in the presence of the Honourable Dato Roland Braddell and Mr. S. O. Goho of Counsel for the Appellants-Chargees and the Honourable Mr. R. Williamson and Mr. M. V. Pillai of Counsel for the Respondents-Chargees and all parties having agreed to hear both appeals as one appeal, upon reading the Memorandum of Appeal filed herein and what was alleged by Counsel it is ordered that the appeal do stand for judgment and this appeal standing for judgment this May 1, 1937, in the presence of Mr. S. O. Goho and Mr. C. G. Toh of Counsel for the Appellants-Chargors and Mr. M. V. Pillai of Counsel for the Respondents-Chargees and this Court being of the opinion that interest charged by the Chargees in respect of the advances made to the Chargors herein was excessive and usurious under all the circumstances of the case

and also being of the opinion that the judgment of the trial Judge dated January 23, 1937 given herein was wrong doth hereby allow this appeal and set aside the order of the trial Judge mentioned above and doth declare that all the transactions and accounts whatsoever, arising as from June 18, 1927, Between the Chargors (Appellants); and the Chargees (Respondents) ought to be re-opened and set aside, and that the Chargors (Appellants) ought to be relieved from payment of any sum in excess of the sums actually advanced by the Chargees to the said Chargors and interest thereon at the rate of 15 per cent. per annum simple interest; and that if any such excess has been paid by the Chargors, the Chargees ought to repay the same to the Chargors; and the Court does order and Judge the same accordingly. And it is ordered that the following account be taken, that is to say, an account of all sums actually advanced by the Chargees to or for the use of the Chargors on and from June 18, 1927 and of all sums, received by the Chargees from the Chargors in respect of any such advance, and that on taking such account the Chargors be charged with interest at the rate of 15 per cent. per annum (simple interest) on the sums from time to time owing to the Chargees; and that the balance due from either party to the other be certified. And if any sum is found due to be paid by the Chargors to the Chargees such sums shall stand charged upon the lands of the Chargors now charged to the Chargee, in the same proportion as the amounts now charged on the said lands are distributed thereon, and such sums shall carry interest at the rate of 12 per cent per annum until payment. And if the amount so certified and the interest due thereon is not paid on or before July 1, 1937, the said lands shall be sold by public auction, under the direction of the Court, with liberty to apply for such direction as may be necessary."

Their Lordships are only concerned with the loans and charges identified by the letters (e), (n) and (r); so far as these transactions are concerned their Lordships are of opinion that the order of the Court of Appeal should be affirmed, but varied by striking out the words "simple interest." This will have the effect of making the charge of 15 per cent. payable on the sums from time to time acknowledged to be owing by the borrowers to the lenders and will thus be allowing interest on interest contrary to the views expressed by the Court of Appeal in their judgment, and their Lordships will humbly advise His Majesty that the appeal should be dismissed subject to the variation with regard to interest already mentioned.

With regard to the costs, their Lordships are of opinion, that the costs of the appeal to His Majesty will be reasonably met by an order allowing the respondents nineteen tenths of their costs, and their Lordships will advise His Majesty accordingly.

D.

Order accordingly.

Solicitors for the Appellants.—Messrs. Nisbet Drew & Lousborough.

Solicitors for the Respondents.—Messrs. Peacock & Goddard.

(3) (1908) 1 K B 79; 75 L J K B 49; 93 LT 769; 54 W R 424; 22 T L R 109.

(4) (1930) 1 K B 492; 99 L J K B 186; 112 L T 361; 74 SJ 12; 46 T L R 117.

PRIVY COUNCIL

Appeal from the Supreme Court of Ontario
(Appellate Division)

October 12, 1939

LORD THANKERTON, LORD RUSSELL OF
KILLOWEN, LORD WRIGHT, LORD ROMER,
SIR LYMAN POORE DUFF (CHIEF JUSTICE
OF CANADA)

FRANCIS DAY & HUNTER LTD.—
APPELLANTS

versus

TWENTIETH CENTURY FOX
CORPORATION, LTD. AND OTHERS—
RESPONDENTS

Copyright—Musical composition—Talkie film adopting title of song but not repeating in any form its words—Whether infringement of performing right in musical composition—Passing off—Such use of title, if constitutes “passing off.”

There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. A musical composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. But where not a word of the song is repeated in any form in the talkie film except that the title is thrown on the film at the outset, this does not constitute infringement of performing right in musical composition.

In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. Where the theme of the film is different from that of the song there is no ground in copyright law to justify the claim to prevent the use of the title of the song for the film which is too unsubstantial to constitute an infringement, especially when used in so different a connection.

It cannot be said that in no circumstances can there be a “passing off” by the use of the same title for a literary, artistic or musical work though it is difficult to imagine such a case where there are no circumstances calculated to mislead other than the mere title. A title may, however, be used in the case of a book or newspaper under such conditions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up, and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though it is commoner in that class of case. It is not impossible that there might be “passing off” of such a nature that persons might pay to go to a performance of the defendants' work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element of likelihood of deception, whether designed or not, as to involve an invasion of the plaintiff's Common Law rights and a disturbance of his business interests. But the thing said to be passed off must resemble the thing for which it is

passed off. A frying pan cannot be passed off as a kettle.

Where a talkie film uses the title of a song but the theme of the film is different from that of the song and the song is not sung at any performance, there is no “passing off.”

Messrs. K. E. Shelley, K. C. and P. Stuart Bevan, for the Appellants.

Messrs. A. J. Thompson, K. C. and E. J. Mac Gilliray, K. C., for the Respondents.

Lord Wright.—In 1892 a song entitled “The Man Who Broke the Bank at Monte Carlo” was published in London. It consisted of three verses, with a chorus and was written and composed by Fred Gilbert. Many people remember the original publication. Both words and music were of the most common place character, but the music went with a jaunty swing which gave it great vogue and popularity, especially when performed by Charles Coborn. The song consisting of words and music was duly registered at Stationers Hall in London and acquired copyright under the Copyright Act of 1842. But the performing right was not acquired, because of the failure to comply with the conditions imposed by the English Copyright (Musical Compositions) Act, 1882, which required that the proprietor of the copyright if he desired to acquire and retain the right of public representation or performance should print upon the title page of every published copy a notice to the effect that the right of public representation or performance was reserved.

In the song the singer recounts how he went to Monte Carlo to raise his winter's rent, but was so successful at the tables that he had lots of money, went to Paris, and swaggered about as a millionaire. The words of the title are repeated at the end of the chorus.

Gilbert, the writer and composer died intestate in 1903. Under the then existing law in England the copyright would have expired in 1934, but under the Copyright Act, 1911, the period was changed into one of 50 years from the author's death, that is until 1953. For the residue of this extended period, that is from 1934 to 1953 the copyright vested not in the assignees of the right but in the author or his personal representatives. In the present case these were two daughters. One of these in 1935 transferred one-half of her right to the appellant company, whose title so far as it goes is not questioned in these proceedings.

Sometime about 1935 there was exhibited in various theatres in Canada a motion picture entitled "The Man Who Broke the Bank at Monte Carlo." The plot of that picture was based on a comedy in three acts by Ilia Surgutchoff and F.A. Swann entitled "The Gamble," but also at different times called "The Man Who Broke the Bank at Monte Carlo," "Le Jeu" and by other titles. The motion picture represented the plot of the comedy, which consisted of the story of an exiled Russian Prince, working as a taxi driver in Paris, who went to Monte Carlo to try his luck with money subscribed by his compatriots in Paris. He had a wonderful run of luck. Then followed an elaborate story of his love affair with a woman. He went back to Monte Carlo, was unsuccessful and lost all his money. He suspected that the object of his affection was guilty of double dealing. He returned to Paris and to his taxi cab. Eventually he and the girl settled their difficulties and all ended happily.

To an unprejudiced observer no two things could appear more dissimilar than this song and this elaborate motion picture, except for the bare fact that each bears the title "The Man Who Broke the Bank at Monte Carlo." The appellants, however in 1936 brought an action against the two respondents, the former of whom had distributed and rented the film in Canada, while the latter exhibited it in its cinematograph theatres in Canada. The claim in the action was for damages for infringement of the appellants' copyright in the song by performance in public. But without any formal amendment the scope of the action became extended without objection so as eventually to include also a claim for infringement of the literary copyright and for "passing off."

In the Supreme Court of Ontario, McEvoy, J., who tried the action decided against the appellants in respect of the performing right, but decided in their favour and awarded damages for the use of the "title and theme" of the musical work. He said nothing on the issue of "passing off." In the Appellate Division, the Court of Appeal agreed with McEvoy, J., in rejecting the claim so far as regards the performing right, but reversed his decision in respect of the literary copyright, and held that there had been no infringement. The Court also rejected the claim for "passing off." It will be neces-

sary in this appeal to discuss the three heads of claim independently.

The claim for infringement of the appellants' performing right in the song fails in their Lordships' opinion on grounds both of law and of fact. As to the law, the appellants' claim was expressly based on the Imperial Act of 1842, which gave to the owner of copyright under that Act, a right to protection in Chanda. But it was contended on behalf of the respondents that apart from difficulties arising from the course of Canadian copyright legislation which need not here be discussed, the appellants whose claim in the action was based solely on the Act of 1842, could not in any event claim the protection of that Act because as has been stated above, they and their predecessors in-title had failed to publish on each copy of the song the printed notice required by the Copyright (Musical Compositions) Act, 1882. Now it is true that the Act of 1882 did not in terms extend to Canada, but in their Lordships' judgment it did so by necessary implication and effect. It was in the nature of an amendment to the Act of 1842 and had the effect of regulating the rights under that Act in respect of public performance. It imposed a new condition for the acquisition and retention of the performing right, whether in England or in any other place where the copyright was based upon and derivative from the English right. Thus the Act of 1842 cannot be relied on where performing right is in question according to its original bare terms but only as qualified by the Act of 1882.

On this narrow ground of law, apart from other considerations, the appellants must fail in their Lordships' opinion. This agrees with the decision of McEvoy, J. and the Court of Appeal. But in truth the appellants' claim fails on the facts. There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. But it is idle to suggest here that by anything the respondents have done they have performed the song in any sense. The motion picture it is true, is what is called a talkie film. But not a word of the song is repeated in any form except that the title is thrown on the film at the outset. It will be considered later if that constituted an infringement of the literary copyright in the film. But to say that this bare fact was a public performance of a

musical composition is abhorrent to common sense. A musical composition is performed by audible reproduction, by the voice or by musical instruments or by mechanical methods of reproduction. Nothing of the sort can be predicated here.

The claim for infringement of the literary copyright fails equally, but for other reasons. It is not claimed that there has been any copying of the letterpress or musical notation, except the words "The Man who Broke the Bank at Monte Carlo" which constituted the title of the song, and appear as the title of the film. What is relied on as infringement is the use of these words as the title of the film. It is clear that they have been used by the respondents as the title of the film both in the actual production and in the advertisements issued on behalf of the respondents. The respondents, however, say that the use of these words is too unsubstantial a matter to constitute an infringement of copyright and that there is no copyright in a title. They also rely on the recent decision of this Board in *Mansell v. Star Printing and Publishing Co. of Toronto*. (1). That decision was by itself held fatal to the appellant's claim by the Court of Appeal. That Court held that the effect of the decision was that under the Canadian Copyright Act, 1921, which came into force in 1924 all rights of copyright existing in Canada in virtue of Imperial legislation might be converted into rights existing by virtue of Dominion legislation but only by complying with the conditions under the Act of 1906, which was not done either in *Mansell* or in the present case. In the words of Middleton J. A. "It was Canadian rights only that were preserved. All inchoate rights existing by virtue of Imperial legislation came to an end." But Counsel on behalf of the appellants sought to distinguish the decision in *Mansell* and contended that it did not apply in the present case. In *Mansell*, it was contended, what was in question was copyright in pictures, to which no copyright attached under the Act of 1842. It was first granted in England under the Fine Arts Copyright Act of 1862, but that Act did not apply to Canada. There could, therefore, be no copyright in such works in Canada under that Act. There was no copyright in such works until the passing of the Canadian Copyright Act of 1906, and then only subject to the conditions imposed in that Act

which had not been complied with. In the present case, however, as the appellants contended, their only claim to copyright was based on the English Act of 1842, the rights under which did not depend on the performance of conditions under any Canadian Act; that copyright, it was said, subsisted at the date specified as the date of the commencement of the Act of 1921, and by the terms of the Canadian Act of 1921 rights under that Act took the place of the rights under the English Act of 1842, so that at the material dates these latter rights were vested in the appellants in the circumstances stated above. In this way, it was said, the appellants did not rely upon and did not need to rely on any Dominion copyright legislation except in so far as the Act of 1921 gave a substituted copyright for the right existing under the Act of 1842.

Their Lordships do not think it necessary in the present appeal to determine this controversy, which raises questions of difficulty and importance on the law, because the appeal can, in their opinion, be decided on another ground. Assuming, but not deciding, that the appellant company is entitled to the copyright in Canada which it claims, it is, in their Lordships' judgment, not entitled to succeed in its claim that the respondents have infringed that right. The copying which is complained of is the use of the title, and that is too unsubstantial in the facts of this case to constitute an infringement. The appellant's contention was put as high as that copyright in a title infringed by the application of that title to a work of a different character from that of the work to which it was originally applied. In the present case the title was originally applied to a musical composition, whereas it has been applied by the respondents to a motion picture or a film. The argument of the appellant company would be the same, it seems, if the application of the title complained of had been to a picture or a statue. On this reasoning it would be said that the title "Adam" applied to a work of statuary would be infringed if that title were used as that of a novel. These and other anomalous consequences justify the broad principle that in general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in parti-

(1) (1937) AC 872; 108 LJ PC 147; 157 LT 445; 81 SJ 764; 53 TLR 1026; (1937) 3 AER 912.

cular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. As Jessel, M. R., said in *Dicks v. Yates* (2), [which as Lindley, L. J., said in *Licensed Victuallers Newspapers Co. v. Bingham* (3), virtually overruled on this point *Weldon v. Dicks* (4)], there might be copyright in a title "as for instance a whole page of title or something of that kind requiring invention." But this could not be said of the facts in the present case. There may have been a certain amount, though not a high degree, of originality in thinking of the theme of the song, and even in choosing the title though it is of the most obvious. To "break the bank" is a hackneyed expression, and Monte Carlo is or was the most obvious place at which that achievement or accident might take place. The theme of the film is different from that of the song and their Lordships see no ground in copyright law to justify the appellants' claim to prevent the use by the respondents of these few obvious words which are too unsubstantial to constitute an infringement especially when used in so different a connection.

The appellants' Counsel, however, have strenuously contended that though this might be the position under English or Canadian law before 1931, it was changed in Canada by an amendment in that year of the Canadian Act of 1921, which added a new definition to those contained in s. 2 of the latter Act, namely "(v) work shall include the title thereof when such title is original and distinctive." It was in virtue of this definition that McEvoy, J., held that there was infringement and he awarded damages to the appellant company. The Court of Appeal reversed that holding. Middleton J. A., did not think it necessary to decide whether the amendment applied to existing copyrights. "It is admitted" he said "that prior to this Act no such right existed." He did not think that for purposes of this case the Act of 1931 had changed the law.

Their Lordships are prepared to assume for purposes of this appeal that the amendment applied to existing copyrights: they will likewise assume that the title was original in the sense that it had not been

(2) (1881) 18 Ch. D 76; 50 L J Ch. 809; 44 L T 660.

(3) (1888) 38 Ch. D 139; 58 L J Ch. 36; 59 T 187; 38 W R 433.

(4) (1879) 10 Ch. D 247; 48 L J Ch. 201; 39 L T 467; 27 W R 639.

copied from another work. They are content for purposes of this appeal to adopt the definition given by Maclean, J., in *Kantel v. Grant Nisbit & Auld Ltd.* (5), though they wish to reserve the question how far that definition can be accepted as sufficient in other cases. It is however, difficult to define satisfactorily the word "distinctive," since it cannot mean merely that the title is used to identify the particular work. In this connection regard must be had to s. 3 of the Act of 1921 which defines copyright as the "right to produce or reproduce the work or any substantial part thereof". The definition (v) does not, in their Lordships' judgment, mean that the title of a work is to be deemed to be a separate and independent "work." Work is to include "the title thereof" that is to say, the title is to be treated as part of the work, provided that it is original and distinctive whatever these words may connote. When that definition is read with s. 3, the result is that to copy the title constitutes infringement only when what is copied is a substantial part of the work. This view would agree in effect with what was said by Jessel, M. R., in *Dick v. Yates* (2) (*supra*) in the words quoted above and would apply to a case such as a title covering a whole page of original matter, or something of that nature, but would not justify such a wide extension of copyright as the appellant company has contended for, or the holding of McEvoy, J., on this point. It is said that so to construe the definition is to treat it as adding nothing to the law. But the definition may have been inserted to settle doubts and to avoid it being said that in no circumstances could a title receive protection. In any event their Lordships do not think that the new definition (v) entitles the appellants to succeed in this case.

There remains a third point which has been argued on behalf of the appellants; namely, that the respondents have been "passing off" the exhibition of their motion picture as a performance of the song. This startling claim was not pleaded and is dealt with only by the Court of Appeal who disposed of it in summary fashion; "Certainly the moving picture was not represented as the copyright song. No one could be misled or defrauded by what was here done." In these words Middleton J. A. dismissed the claim.

Their Lordships do not wish to be taken (5) (1933) Ex. Rep. 84.

to say that in no circumstances can there be a "passing off" by the use of the same title for a literary, artistic or musical work though it is difficult to imagine such a case where there are no circumstances calculated to mislead other than the mere title. A title may, however, be used in the case of a book or newspaper under such conditions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up, and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though it is commoner in that class of case. It is not impossible that there might be "passing off" of such a nature that persons might pay to go to a performance of the defendants' work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element of likelihood of deception, whether designed or not, as to involve an invasion of the plaintiff's common law rights and a disturbance of his business interests. But in their Lordships' opinion it is enough to state these elementary principles to see how inapplicable they are to the subject-matter of this appeal. The member of the public who is supposed to be likely to be deceived, must, to start with, be assumed to know what he was wanting to see or hear. Thus in the present case he must be presumed to know that what he wanted was to hear the song "The Man Who Broke the Bank at Monte Carlo." It seems inconceivable that when or if he bought a ticket for the motion picture, he imagined he was going to hear a performance of the familiar song. The two things are completely different, and incapable of comparison in any reasonable sense. The thing said to be passed off must resemble the thing for which it is passed off. A frying pan cannot be passed off as a kettle. In Canada, what was advertised was the film. There was no hint that the song was going to be sung. Indeed it was not sung at any performance. If it had been sung, it would presumably, on the assumptions made by their Lordships, have been an infringement of the performing right, but, if that were possible, it would have made the claim for passing off even more preposterous, because the assumed victim would have got what he desired, namely, a performance of the song.

On all these grounds their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the costs of the appeal.

D. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. Syrett & Sons.

Solicitors for the Respondents.—Messrs. Blake & Redden.

FEDERAL COURT

Appeal from the Patna High Court.

March 18, 1940

MAURICE GWYER, C. J., S. M. SULAIMAN,

AND S. VARADACHARIAR, J.J.

Raja PRITHWI CHAND LALL

CHOUDHRY—APPELLANT

versus

Rai Bahadur SUKHAJ RAI AND OTHERS—
RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLV, r. 17 added by Government of India (Adaptation of India Laws) Order, 1937—No certificate—Application under O. XLV, if proper—Bihar Money-lenders Act (III of 1938), s. 12—Discretion under—High Court not asked to use—Federal Court, if can be requested—Practice—Duty of Counsel to give correct statement of facts—Legal practitioner.

Rule 17 which has been added to O. XLV by the Govt. of India (Adaptation of India Laws) Order, 1937, assumes that a certificate under s. 205 of the Constitution Act has already been given.

Where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an application under O. XLV.

Federal Court would reject a request to exercise for the first time a discretion which the High Court could have been, but was not asked to exercise under s. 12 of the Bihar Money-lenders Act, (1938), a section which, the High Court has not at any time held to be void, as it has held other sections of the same Act to be.

When Counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice.

Messrs. Rajeshwari Prasad, Raghubir Singh, A. C. S. Chari and A. H. Fakhruddin, (Advocates of the Federal Court), instructed by Mr. G. Sahay, Agent, for the Appellant.

Mr. Kripa Narain, (Senior Advocate, Federal Court), with Mr. Radhe Mohan Lal, (Advocate, Federal Court), instructed by Mr. Tarachand Brijmohan Lal, Agent, for the Respondents.

Judgment.—This appeal must be dismissed. It appears that in the proceedings before the High Court the point which the Counsel for the appellant now seeks to raise was never mentioned and it is not clear on what grounds the certificate under s. 205 of the Constitution Act was obtained from the High Court. The application made under O. XLV of the Civil P. C., to the High Court was quite irregular, because r. 17, which has been added to O. XLV by the Govt. of India (Adaptation of India Laws) Order, 1937, assumes that a certificate under s. 205 of the Constitution Act has already been given. No such certificate was in existence when the application was made. It may be that where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an application, under O. XLV. We do not know what question of interpretation of the Constitution Act was in the opinion of the High Court involved in the case and the record throws no light upon the point.

Counsel for the appellant told us that the only point which he desired to argue was the application of s. 8 of the new Bihar Act of 1939 (Act VII of 1939). It is the first time in any Court that the appellant has sought to make such a submission, either under s. 8 of the Act of 1939 or under the corresponding section of the earlier Act of 1938. In his petition of appeal he does not even refer to that section, but to different sections altogether. We were told that this was a printer's error, but we have seen a typescript copy of the petition, with references to those sections inserted in manuscript and initialled by the appellant's agent. We were asked to allow the petition to be amended, but in the circumstances we see no reason for allowing any amendment, and even if we had done so, we should certainly have rejected a request that we should exercise for the first time a discretion which the High Court could have been, but was not asked to exercise under s. 12 of the earlier Act, a section which, so far as we are aware, the High Court has not at any time held to be void as it has held other sections of the same Act to be.

We have one other observation to make. Counsel for the appellant in answer to questions put to him by the Court, made what purported to be statements of fact relating to matters arising out of the

litigation, which on further enquiry were found to be no more than surmises or guesses on his part. When Counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice, and we trust that we shall not have occasion to draw attention to it again.

The appeal is dismissed with costs.

D. *Appeal dismissed.*

OUDH CHIEF COURT

Second Civil Appeal No. 26 of 1938

March 11, 1940

ZIA-UL HASAN, J.

ORI LAL—DEFENDANT—APPELLANT

versus

Mst. RAHIM ZADI—PLAINTIFF—

RESPONDENT

Court Fees Act (VII of 1870), s. 7—Suit instituted on March 1, 1937 i. e., before amendment of Act in 1938—Law applicable—Plaintiff in possession of house in suit, requiring cancellation of sale deed alleged to be obtained by fraud—Court-fee payable.

Suit brought on March 1, 1937, before the amending Court Fees Act of 1938 was passed, will be governed by the provisions of the Act as it stood unamended.

The provisions of the Court Fees Act as it stood before the amending Act was passed and even those of the amending Act clearly show that the Legislature has made a distinction in the amount of court-fee between suits for possession of immovable property and those seeking reliefs other than possession in respect of immovable property, the court-fee required in the case of the latter suits being much less than that required in suits for possession.

Where the plaintiff is herself in possession of the house in suit and all that she requires is cancellation of the sale deed which she said was obtained from her by fraud and undue influence, in such a suit, she can not be required to pay *ad valorem* court-fee on the market value of the house which is the court-fee payable on a suit for possession. The plaintiff can therefore be allowed to pay court-fees only on declaratory relief. 180 Ind. Cas. 61 (1) and *Samiya Malavi v. Minammal* (2), distinguished.

S. O. A. against the order of the District Judge of Gonda, dated October 29, 1937.

Mr. S. N. Srivastava, for the Appellant.
Mr. Mohd. Ayub, for the Respondent.

Judgment.—This is a defendant's second appeal against a judgment and decree of the learned District Judge of Gonda, decree-

ing the appeal of the plaintiff-respondent against the rejection of her plaint by the Munsif of Gonda.

The plaintiff-respondent owned two houses one of which was bigger than the other. She sold one of these houses to the appellant by a sale deed dated June 13, 1936. The suit from which this appeal arises was brought by her for cancellation of the sale deed on the ground that she meant to sell the smaller house to the defendant but that she came to know that the defendant had by fraud and undue influence got the bigger house entered in the sale deed. The relief claimed in the plaint as it originally stood was as follows—

Relief (a).

"It may be declared that the sale deed executed by the plaintiff in favour of the defendant was obtained by fraud and undue influence and that thereby no interest had accrued to the defendant in the pucca house No 275 and 924."

It appears that No. 924 was a mistake for No. 934 and the correct number was subsequently entered. In para. 11 of the plaint she stated that the value of the house was Rs. 1,500, but that as the suit was a declaratory one, a court-fee of Rs. 15 was being paid.

The defendant objected to the valuation of the suit by the plaintiff on the ground that it was exaggerated. A Commissioner was appointed to find out the value of the house in suit and his report was that the house was worth Rs. 1,500. After that the plaintiff-respondent put in an application for amendment of the plaint so as to reduce the valuation of the suit to Rs. 200, the amount of the sale consideration entered in the sale deed.

The learned Munsif rejected this application and was of opinion that the plaintiff should pay an *ad valorem* court-fee on Rs. 1,500 the valuation originally put by her on the house. As the plaintiff was unable to pay *ad valorem* court-fee on Rs. 1,500 her plaint was rejected. The plaintiff appealed against the order rejecting her plaint and the learned District Judge held that the correct court-fee payable by the plaintiff was on Rs. 200. He therefore accepted the appeal and allowed the claim to be amended and held that the court-fee of Rs. 15 paid by the plaintiff was sufficient. With these findings the suit was remanded to the trial Court for decision on the merits. Against this order the present appeal has been brought by the defendant.

I am of opinion, that the order of the learned District Judge is perfectly correct. As the suit was brought on March 1, 1937,

before the amending Court Fees Act of 1938 was passed, it will be governed by the provisions of the Act as it stood unamended. If the relief claimed by the plaintiff be considered to be a declaratory relief the court-fee paid by her was quite sufficient. If on the other hand, as is contended by the learned Counsel for the appellant, the suit be considered to be one to obtain a declaratory decree with a consequential relief then under s. 7 (iv) (c) of the old Act, the amount of the court-fee should be determined according to the amount at which the relief sought is valued in the plaint and as the value now in the plaint is Rs. 200 the court-fee of Rs. 15 is the proper court-fee to be paid in the case. It is contended that the plaintiff should not have been allowed to change the valuation originally put by her on the suit, but Rs. 1,500 which was the value of the house in suit was not the proper valuation to be put on the suit. The provisions of the Court Fees Act as it stood before the amending Act was passed and even those of the amending Act clearly show that the Legislature has made a distinction in the amount of court-fee between suits for possession of immovable property and those seeking reliefs other than possession in respect of immovable property, the court-fee required in the case of the latter suits being much less than that required in suits for possession. It has been found by the lower Appellate Court that the plaintiff is herself in possession of the house in suit and all that she requires is cancellation of the sale deed which she said was obtained from her by fraud and undue influence. In such a suit, therefore, she could not be required to pay *ad valorem* court-fee on the market value of the house which is the court fee payable on a suit for possession. The order of the learned District Judge, therefore, allowing the plaintiff to amend her plaint by putting a more correct valuation on her suit was in the circumstance of the case perfectly proper. The learned Counsel for the appellant has relied on the cases of *Baij Nath Singh v. Sri Nath Kuar*, (1939 O. W. N., 184) (1) and *Samiya Mavali v. Minammal*, (I. L. R. 23 Mad., 490) (2), but neither of these cases supports the contention put forward by the appellant in the present case. In fact in 23 Mad., 490 (2) which was similar to the present case, it was held :—

"We think s. 7 (iv) (c) must be taken to apply. (1) 1939 O W N 184; 180 Ind. Cas. 61; 1939 O L R 109; 11 R O 225; A I R 1939 Oudh 125; 14 Luck 536.

(2) 23 M 490.

The case is, therefore, one in which the valuation given by the plaintiff is the valuation to be accepted."

This so far from supporting the contention of the appellant goes against him.

I consider the order of the learned District Judge quite correct and dismiss this appeal with costs.

b.

Appeal dismissed.

LAHORE HIGH COURT

Criminal Appeal No. 730 of 1939

November 1, 1939

BLACKER, J.

ARNOLD MONTEATH MATHEWS—

CONVICT—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 297, 423 (2)—Trial by jury—Misdirection—Duty of Court—Charge of cheating—Failure to explain to jury necessary ingredients—Whether misdirection—Interference by High Court—'Erroneous' in s. 423 (2), meaning of—Criminal trial—Verdict of jury—Verdict erroneous on one of the charges only—Whole trial, if must be set aside.

In a trial by jury it is the duty of the Judge to explain to the jury the necessary ingredients which the prosecution has to prove before the charges can be held to be established. This is particularly necessary in a case where the main charges are of cheating. Where the cheating consisted mainly of false representations to the complainant by the accused that he would arrange to have certain contracts obtained for himself and for the complainant and the allegation of the prosecution is clearly that at the time he made these representations they were false in the sense that he had no intention of fulfilling them, it is clearly necessary to point out to the jury the difference between a promise which is not intended to be kept at the time it is made and a promise which is intended to be kept at the time it is made but is subsequently broken. In the latter case the offence would not necessarily be one coming under the legal definition of cheating. Failure to do so amounts to misdirection.

If the High Court finds in a case of trial by jury that there is a misdirection it has to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice. If it cannot so find, it cannot interfere. One meaning of word 'erroneous' s. 423 (2), Criminal P. O., is that if the Court after examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision it will not interfere. It is, however, clear from s. 423 (2), that even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict or verdicts unless these verdict or verdicts are "erroneous" by reason of such misdirection and before the High Court interferes it must also find that there has been a failure of justice under s. 537. *Emperor v. Edward William Smither* (3), 81 Ind. Cas. 249 (4), 88 Ind. Cas. 178 (5), 148 Ind. Cas. 553 (6) and 139 Ind. Cas. 873 (7), relied on, *Wafadar Khan v. Queen-Empress* (1), distinguished and commented upon.

Where the verdict of the jury on one of the charges only is found by the High Court to be erroneous, it can set aside that verdict and uphold conviction on other charges on which the verdict is not found to be erroneous. It need not set aside the whole trial.

Cr. A. from an order of the Sessions Judge, Lahore, dated June 12, 1939.

Mr. K. L. Gauba, for the Appellant.

Mr. Nazir Hussain, Assistant Legal Remembrancer, for the Crown.

Judgment.—The appellant in this case was tried by the learned Sessions Judge of Lahore with the aid of a jury on three charges. It appears to me to be necessary to set out these charges in full. They are as follows:

First.—That you, on or about August 20, 1937, at Simla, cheated Lala Sita Ram, P. W., of Rs. 1,500 on false representations that you would arrange to have coolie contracts for the said Sita Ram in partnership with yourself at Railway Stations Howrah and Sealdah and that you knew that the Railway Board Officers would do you a favour as you had been Publicity Officer in the said department, and thereby committed an offence punishable under s. 420, I. P. O., and within the cognizance of Court of Session.

Secondly.—That you, on or about October 5, 1937, at Simla, cheated Lala Sita Ram, P. W., of Rs. 1,500 on false representations that you would arrange to have coolie contracts for the said Sita Ram in partnership with yourself at Railway Stations Howrah and Sealdah and that you knew that the Railway Board Officers would do you a favour as you had been Publicity Officer in the said department, and thereby committed an offence punishable under s. 420, I. P. O., and within the cognizance of Court of Session.

Thirdly.—That you, on or about October 5, 1937, at Simla, fraudulently used as genuine a certain document, to wit, agreement, Ex. P. U., which you knew or had reason to believe at the time you used it to be a forged document, and thereby committed an offence punishable under s. 471 read with s. 467, I. P. O., and within the cognizance of Court of Session."

On each of these three charges the jury returned a verdict of guilty and the learned Sessions Judge passed a sentence of one year's rigorous imprisonment on each of the two charges under s. 429, I. P. O., and two years' rigorous imprisonment on the charge under s. 467/471, I. P. O.; the sentences to run concurrently.

On appeal before me the learned Counsel for the appellant has adopted three lines of argument. The first is that there has been a misdirection, the second that evidence has been improperly excluded and thirdly, that on the evidence the conviction was in fact erroneous.

Coming to the first question, the point taken by Counsel is that in order to comply with s. 207, Criminal P. O., the Judge,

should concisely but lucidly explain to the jury the ingredients of the section under which the accused is being charged and should also explain the meanings of any terms in the section which are not likely to be immediately understood by a layman. There is plenty of authority in support of the view put forward by Counsel for the appellant. I think that in the present case it was clearly the duty of the Judge to explain to the jury the necessary ingredients which the prosecution had to prove before the charges could be held to be established. This is particularly necessary in a case like the present where the main charges are of cheating. The criminal definition of cheating is not exactly what an ordinary layman in the ordinary use of the English language would understand by the term. In the present case the cheating consisted mainly of representations to the complainant by the accused that he would arrange to have certain contracts obtained for himself and for the complainant and the allegation of the prosecution is clearly that at the time he made these representations they were false in the sense that he had no intention of fulfilling them. In a case of this sort, it is clearly necessary to point out to the jury the difference between a promise which is not intended to be kept at the time it is made and a promise which is intended to be kept at the time it is made but is subsequently broken. In the latter case the offence would not necessarily be one coming under the legal definition of cheating. Similarly, on the third charge he had to explain to the jury what was a forged document and what constituted a criminal use of it. The learned Sessions Judge did not point this out to the jury and to that extent therefore I am compelled to find that there has been a misdirection. It is however clear from s. 423 (2), Criminal P. C., that even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict or verdicts unless these verdict or verdicts are "erroneous" by reason of such misdirection. It is further clear from s. 537, Criminal P. C., that before the High Court interferes it must also find that there has been a failure of justice.

The question therefore which arises in this case is whether the Court can itself consider the evidence and decide upon the merits of the case, whether the decision is correct in spite of the misdirection and, if so, confirm a conviction, or whether the only course open to the Court in such a

contingency is to set aside the verdict and order a re-trial.

For some time the view held, particularly in the Calcutta High Court, appears to have been that the Court could not go into the case itself but could only order a fresh trial. In *Wafadar Khan v. Queen-Empress* (1) it was held that "erroneous" was not synonymous with "wrong in fact." The Bench appear to have interpreted the word as meaning "vitiated by the error of misdirection." The principle was laid down in this and other rulings of the Calcutta High Court, on the supposed analogy of a Privy Council case from New Zealand, that to hold otherwise would be to substitute the decision of the Court for the verdict of the jury. It seems to me, however, if I may say so with all respect, that the Privy Council case dealt with a system of jurisprudence which was apparently quite different from that obtaining in India and with a statutory provision the language of which was not really similar to that of s. 423 (2), Criminal P. C. It is clear that the Criminal P. C., in several places does put a Judge into the position of having to substitute his decision for that of a jury and the view held by the High Court in *Wafadar Khan v. Queen-Empress* (1) seems, if I may say so with all respect, to savour of arguing in a circle. If the question for decision is whether the meaning of the words of the Indian Statute are that a Judge can or cannot substitute his decision for that of a jury I would suggest that it is begging the question to say that he cannot do so because that would amount to his doing so.

Wafadar Khan v. Queen-Empress (1) was followed in some cases in Calcutta and was followed in 1917 in Allahabad in *Emperor v. Ikram-ud-Din* (2). It was however very soon dissented from by the Madras High Court in *Emperor v. Edward William Smither* (3) a judgment of 1902. In 1925 the Sind Court also took the other view in *Topan Das v. Emperor* (4) and in 1926 the Nagpur Court in *Rmprasad v. Emperor* (5) took the same view as Sind and Madras. Bombay has also held that the Judge has full powers to go into the case in such circumstances once he finds that there has

(1) 21 C 955.

(2) 39 A 348; 39 Ind. Cas. 331; A I R 1917 All. 173; 15 A L J 205.

(3) 26 M 1; 2 Weir 531.

(4) A I R 1925 Sind 116; 81 Ind. Cas. 249; 25 Cr. L J 761.

(5) A I R 1926 Nag. 53; 88 Ind. Cas. 178; 26 Cr. L J 1090.

been a misdirection. *Ramchandra v. Emperor* (6). Even the Calcutta High Court has also come round to this view in a recent case reported in *Saroj Kumar v. Emperor* (7). The latter and better view therefore seems to me to be that if the Court finds there is misdirection it has to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice. If it cannot so find it cannot interfere.

It next remains to be seen what is meant by the term "erroneous." The general trend of the authorities to which I have referred appears to suggest that it is practically synonymous with "incorrect," which is the normal dictionary meaning. I would however suggest that it is possible, perhaps to go a little further and say that one meaning of s. 423 (2) would appear to be that if the Court after examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision it will not interfere. Before however I deal with the evidence there is another point which I must consider. The defence applied for the summoning as a defence witness of His Excellency Sir Henry Craik Bart, the Governor of the Punjab. It would appear that at first the Judge was inclined to call this evidence but subsequently found that he could not do so in view of the statutory provision of s. 306 of the Govt. of India Act of 1935. Counsel has argued that the learned Judge's interpretation of this section is incorrect. I do not consider it is necessary to decide this point as after ascertaining from Counsel what evidence Sir Henry Craik was expected to give I am very clearly of opinion that that evidence would have been quite irrelevant in the present proceedings. The mere fact that at some previous period of time the appellant may actually have been thinking of trying to get one of these contracts would raise no justifiable inference that on either of the relevant dates in this case he had any intention of doing so. In fact it is clear that this is just the type of irrelevant evidence which a Judge should not allow to come before the jury. I may also further say that one or two possibly unguarded remarks by Counsel for the appellant whilst dealing

(6) A I R 1933 Bom. 153; 148 Ind. Cas. 553; (1933) Cr. Cas. 465; 35 Cr. L J 747; 35 Bom. L R 174; 6 R B 307.

(7) A I R 1932 Cal. 474; 139 Ind. Cas. 873; (1932) Cr. Cas. 464; 33 Cr. L J 854; 59 O 1361; 55 O L J 439; Ind. Rul. (1932) Cal. 667.

with this point rather suggested that the real reason for summoning Sir Henry Craik as a defence witness may have been a desire to attempt to prejudice the jury by giving them the impression that the appellant enjoyed the support and patronage of so distinguished and important a personage.

I now come to the main point in the case, and that is whether having found that there is in fact a misdirection I should or should not set aside the verdicts given by the jury. For this purpose I have been through the evidence. It is clear that in coming to the verdicts to which they did come the jury must have accepted as true the version of the transactions given by Lala Sita Ram, the complainant, and rejected those given by the appellant and his wife, who was a co-accused. (After discussing evidence his Lordship proceeded.) The Crown Counsel's contention is that the tone of Ex. P-A and the language of the second paragraph of Ex. P-G showed clearly that the appellant had already formed the intention of cheating Sita Ram on this relevant date. Exhibit P-A is possibly not very strong by itself, but Ex. P-G is important. The middle paragraph of this letter to the Secretary of the Railway Board states that certain members of the Railway Board had already promised to help the writer to get this contract. The evidence on the subsequent transactions leaves no real doubt that this statement was in fact false and the question arises how Mathews could send such a letter to the Railway Board knowing that it would immediately be seen to contain a completely false statement. One answer to this might be that he had had no intention of sending or actually posting this letter but was forced to do so by the fact that Sita Ram insisted to accompany him to the post office. Having posted it he made an effort, which proved successful, to get it back intact. However this may be, the question still remains whether if the jury had had it clearly put to them that with regard to the first charge they had to find that the representations were at that time false, they might or might not have drawn the inferences which are suggested by this evidence. I think that it must be conceded that, although I myself see no real doubt on this point, it is impossible to say that the jury might not have felt some such doubt. With regard to the second and third charges, however, the matter is very clear. Here there is a mass of evidence which, if the jury believed it and it is clear from their verdicts that they did

believe it they could not have failed without being completely perverse or completely foolish, to hold that on October 5, at any rate the representations were definitely false to the knowledge of the appellant and that the document Ex. P-U was used by him at a time when he knew perfectly well that it was a forged document. The result therefore will be seen to be that with regard to the verdict on the first charge, it cannot be stated with absolute certainty that if there had not been this misdirection, the jury must have come to the same conclusion. With regard to the second and third charges it is clear that notwithstanding the misdirection the verdict of the jury cannot be held to be erroneous and that they must have come to the same verdict if they had been directed as they should have been.

Counsel for the appellant has argued that on such a finding I should set aside the whole trial and set aside all three verdicts and send the whole case back for re trial. This view, however, I am not prepared to accept as it does not seem to be supported either by the language of the statute or by the authorities. My decision therefore in this appeal is that for the reasons given I set aside the verdict and the conviction and the sentence on the first charge, but uphold the verdicts with the consequent convictions on the second and third charges. With regard to the first charge in view of the fact that the sentences were concurrent I do not consider it necessary to direct that there shall be a fresh trial. The offences committed were certainly serious, but I think that a total period of one year's imprisonment would meet the ends of justice and therefore I reduce the sentence on the third charge to one year's rigorous imprisonment. The concurrent sentence on the second charge is maintained. The appellant will surrender to his bail.

S.

Order accordingly.

BOMBAY HIGH COURTCriminal Revision Application No. 362
of 1939

December 6, 1939

BEAUMONT, C. J. AND SEN, J.
ASGARALLI MAHAMMEDALLI
HERALWALA—ACQUSED

versus

EMPEROR—OPPOSITE PARTY

Bombay Prevention of Gambling Act (IV of 1887),
s. 6—Powers arising under s. 6 are outside Bombay
District Police Act (IV of 1890)—Powers under, if

can be conferred on Additional Superintendent of Police by Provincial Government—Issue of warrant by such officer—Legality—S. 17, Bombay General Clauses Act (I of 1904), if applies to such case.

Section 6, Bom. District Police Act, does not confer on the Prov. Govt. the right to confer on the Additional Superintendent of Police powers arising outside the Bom. District Police Act, and the powers arising under s. 6, Bom. Prev. of Gam. Act are outside the Bom. District Police Act. The words "specially empowered by Govt. in this behalf" in s. 6, Bom. Prev. of Gam. Act only cover the Assistant or Deputy Superintendent of Police. So that a Magistrate of the First Class or a District Superintendent of Police can exercise the power without any special authority from Govt.; but there is nothing said about an Additional Superintendent of Police. Although the Additional District Superintendent of Police is carrying out all the powers under the Bom. District Police Act, of a District Superintendent of Police, he is not in fact a District Superintendent of Police, and he cannot be given power to issue a warrant under s. 6. Section 17, Bom. General Clauses Act, 1904, does not apply to this case at all.

Hence the Additional Superintendent of Police, Panch Mahals District, has no power to authorize the issue of a search warrant under s. 6, and where the conviction turns upon the presumption arising under s. 7 on a search under s. 6, the conviction must be set aside, as the presumption does not arise.

Cr. R. A. against the conviction and sentence passed by the Sessions Judge, Broach and Panch Mahals.

Mr. I. I. Chundrigar, for the Accused.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Crown.

Beaumont, J.—This is an application in revision against the conviction of the applicant under s. 4, Bom. Prev. of Gam. Act of 1887. The applicant was convicted by the Resident Magistrate, First Class, Godbra, and the question of law which arises is whether a special warrant can be issued under s. 6, Gam. Act, by the Additional Superintendent of Police of Broach and Panch Mahals. The position of such Additional Superintendent of Police is this. Originally Broach and Panch Mahals were separate revenue districts, but in 1933 they were amalgamated. But, as appears from the Govt. Resolution of January 3, 1934, it was, not considered advisable to amalgamate the two Police charges, and accordingly it was provided that the Panch Mahals should be retained as a separate Police charge under the control of an Additional Police Superintendent; and that position is still maintained.

Now an Additional Superintendent of Police can be appointed by Govt. under the Bom. District Police Act of 1890, s. 6, as amended by an Act of 1920. Section 6 as amended provides that a Prov. Govt. may

appoint for each district a Superintendent, an Additional Superintendent and such Assistant and Deputy Superintendents of Police as it may think fit; and an Additional Superintendent of Police may, by a general or special order of Govt. be empowered to exercise and perform in the district for which he is appointed or in any part thereof, all or any of the powers and duties under this Act of a Superintendent of Police. I presume that the Additional Superintendent of Police of Broach and Panch Mahals has been given by Govt. all the powers and duties of a Superintendent of Police under the Bom. District Police Act in respect of the District of Panch Mahals, but s. 6, Bom. District Police Act does not confer on the Prov. Govt. the right to confer on the Additional Superintendent of Police powers arising outside the Bom. District Police Act, and the powers arising under s. 6, Bom. Prev. of Gam. Act are outside the Bom. District Police Act. The provisions of s. 6, Gam. Act, are these:—

"It shall be lawful for a Police Officer elsewhere (than in the City of Bombay) not below the rank of a Sub-Inspector of Police authorized by special warrant issued in each case by a Magistrate of the First Class or a District Superintendent of Police or by an Assistant or Deputy Superintendent of Police specially empowered by Govt. in this behalf."

I think the words "specially empowered by Govt. in this behalf" only cover the Assistant or Deputy Superintendent of Police. The repetition of the word 'by' seems to indicate that. So that a Magistrate of the First Class or a District Superintendent of Police can exercise the power with out any special authority from Govt.; but there is nothing said about an Additional Superintendent of Police. Although the Additional District Superintendent of Police is carrying out all the powers under the Bom. District Police Act, in respect of Panch Mahals of a District Superintendent of Police, he is not in fact a District Superintendent of Police, and he cannot be given power to issue a warrant under s. 6, Bom. Prev. of Gam. Act. The learned Govt. Pleader seeks to get out of the difficulty by relying on s. 17, Bom. General Clauses Act, 1904, which is somewhat obscurely worded, but provides that for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, it is sufficient to mention the official title of the officer at present executing the functions. Well, the officer at present exercising the functions is the Additional Superintendent of Police, but the only officer mentioned in the

section is the District Superintendent of Police. Therefore, it seems to me clear that s. 17, Bom. General Clauses Act, 1904, does not apply to this case at all. The difficulty which has arisen is no doubt purely technical but, in my opinion, the Additional Superintendent of Police, Panch Mahals District, has no power to authorize the issue of a search warrant under s. 6, Bom. Prev. of Gam. Act; and as the conviction in this case turned upon the presumption arising under s. 7, Gam. Act on a search under s. 6, the conviction must be set aside, as the presumption does not arise. The fine, if paid, to be repaid.

Sen, J.—I agree.

D.

Order set aside.

RANGOON HIGH COURT

Second Appeal No. 293 of 1938.

February 28, 1939

MACKENBY, J.

S. L. S. K. R. CHETTYAR FIRM BY AGENT
M. PITCHAY—APPELLANT

versus

FAROK AHMED—RESPONDENT

Co-sharers—Mortgage by one co-heir of his own share as well as that of others without their consent—Suit by mortgagee—Appointment of Receiver—Rights of enjoyment of other co-heirs, if prejudiced—Suit by other co-heirs for declaration of rights as co-owners—Whether must seek remedy against Receiver—Mortgagee's claim in such suit for charge on their shares—Relevancy.

The possession of one co-heir is possession not only for himself but also for other co-heirs. The fact that he had without their consent, purported to mortgage not only his own share but also theirs is not in itself an indication that his possession had become adverse to theirs. The mere fact that a Receiver was appointed in the mortgage suit brought by the mortgagee against the mortgagor co-heir would not prejudice them in the enjoyment of their right they being persons with paramount rights, not parties to the action and actually in possession of those rights. *Evelyn v. Lewys* (1), relied on.

In a suit for the declaration of their rights as co-owners, they need not seek any remedy against the Receiver. The claim of the mortgagee in such a suit that he had a charge on their property which they must redeem is entirely irrelevant. The co-heirs need not ask for the further relief of partition. 65 Ind. Cas. 8 (2), relied on.

S. A. against the decree of the District Court Insein, in C. R. A. No. 5 of 1938.

Mr. P. K. Basu, for the Appellant.

Mr. Dingali, for the Respondent.

Judgment.—The facts of the case are set out in the judgment of the lower Appellate Court. It cannot be disputed that the possession of Sidiq Ahmed of this property was possession only for himself but also for his co-heirs. The fact that he had without their consent, purported to mort-

gage not only his own share but also theirs is not in itself an indication that his possession had become adverse to theirs; they had apparently received no notice of the mortgage. By purporting to mortgage their share Sidiq Ahmed did not necessarily declare that in his view they no longer had any interest in the property; his conduct might mean no more than that he desired to take advantage of his mortgagee's ignorance of the fact that they were co-heirs. When a Receiver was appointed in the mortgage suit brought by the appellant against Sidiq Ahmed that appointment could not prejudice them in the enjoyment of their right they being persons with paramount rights, not parties to the action and actually in possession of those rights: see *Evelyn v. Lewys* (1). In a suit for the declaration of their rights as co-ownerse they need seek no remedy against the Receiver, and they did not in fact ask for any remedy against him. The person who was impugning their title was the appellant who was seeking to bring their property to sale after obtaining a mortgage decree against Sidiq Ahmed. At the time they filed their suit the sale had not taken place. The suit was filed on February 27, 1936, and the sale took place on February 29, 1936. In the suit for the declaration of their title the appellant not only denied the title of the respondents but further alleged that even if they were part owners of the property he had a charge on their property which they must redeem. This allegation was denied by the plaintiffs and the trial Court was at some pains to decide the matter. Of course such a matter was entirely irrelevant to the suit, and it was unfortunate that the trial Court whilst finding that the plaintiffs respondents were owners of a certain share of this property, should have refused to grant them a decree because they would not admit the charge claimed by the defendant-appellant. It has been urged on behalf of the appellant that the suit was in reality a suit under O. XXI, r. 103, Civil P. O. This is quite an untenable argument. At the time the suit was filed there had been nothing in the nature of a sale and the plaintiff had not been ousted from possession. It has been suggested that the respondents ought to have asked for the further relief of partition. It is however not apparent why it is necessary to them to ask for this further relief. At the stage at which matters still stood at the time they filed their suit, there

(1) (1844) 3 Bore 412; 64 R R 381.

was no reason why they should not be content to remain in joint possession of the property with Sidiq Ahmed: see also *Joy Narayan Sen v. Srikantha Roy* (2).

This appeal is dismissed with costs, Advocate's fee five gold mohurs. (Leave to appeal under cl. 13 of the Letters Patent was refused as no important point was involved.)

S. Appeal dismissed.
(2) 26 O W N 208; 65 Ind. Cas. 8; A I R 1922 Cal. 8; 33 O L J 592.

SIND JUDICIAL COMMISSIONER'S COURT

Reference No. 24 of 1937

May 30, 1939

DAVIS, J. C. AND TYABJI, J.
COMMISSIONER OF INCOME-TAX,
BOMBAY PRESIDENCY, SIND AND ADEN
—APPLICANT

versus

KARACHI INDIAN MERCHANTS
ASSOCIATION—ASSEESSES—

OPPONENTS

Income Tax Act (XI of 1922), s. 10—Association for advancing and protecting business interests of members—Running of Produce Exchange Department and charging of fees from members for services rendered—Whether doing business within meaning of s. 10—Saving from payments by members, if profit or gain.

Where an Association is an Association for the purpose of advancing and protecting the business and trading interests of its members there is a certain mutuality between the Association and its members. The basis of mutuality is not destroyed because one of the objects of the Association is to further not only the particular interests of its members, but of trade and commerce outside the particular city where the Association is formed. Hence the activities of the Association in maintaining and running the Produce Exchange Department and charging fees for the various services rendered by it to its members do not amount to doing business within the meaning of s. 10, Income Tax Act. Such a case does not fall outside that class of cases where a number of individuals for the common good combine to provide by common sacrifices a common organization to do for them more efficiently as a body what they could do individually but less efficiently for themselves and the fact that from the payments made by the members themselves there is a surplus or saving upon the year's working, does not constitute that surplus or saving a profit or gain. 185 Ind. Cas. 323 (1) and *Thomas v. Richard Evans and Co. Ltd.* (3) relied on. *Liverpool Corn Trade Association Ltd. v. Monks* (2), *Carlisle and Siloth Golf Club v. Smith* (4) and *National Association of Local Government Officers v. Watkins* (5), distinguished.

Mr. Partabrai D. Punwani, Advocate-General, for the Applicant.

Mr. Kimatrai Bhojraj, for the Opponents.

Devis, J. C.—Four questions are referred to us under s. 66 (2), Income Tax Act, by the Commissioner of Income-tax, Bombay and Sind, in connection with the assessment of the Karachi Indian Merchants' Association. They are as follows:

"(1) Whether the Assistant Commissioner correctly held that the activities of the Association in maintaining and running the Produce Exchange Department and charging fees for the various services rendered by it to its members amounted to doing business within the meaning of s. 10 of the Act.

(2) Whether the amount of Rs. 16,233 realised by the Association by charging a fee of annas eight per each tender of 25 tons under bye-law 36 was profits or gain from business on which tax was payable under the above section or any other section of the Act.

(3) Whether the amount of Rs. 13,686 derived by sale of samples for qualitative analysis under bye-laws 45 *et seq.* in connection with the above Department constituted profit or gains on which tax was payable under the said s. 10 or any other section of the Act.

(4) Whether the amount of Rs. 3,625 levied by the Association from its members by way of penalty for trading in contravention of its rules and regulations constituted profit or gains on which tax was payable under s. 10 or any other section of the Act."

The case falls to be decided on much the same lines as the case in Ref. No. 34 of 1937 [*Commissioner of Income-tax, Sind and Baluchistan v. Karachi Chamber of Commerce* (1)] which I have just dealt. The Association is an Association for the purpose of advancing and protecting the business and trading interests of its members. That there is a certain mutuality between the Association and its members appears admitted by the learned Commissioner himself for the subscriptions have been found not liable to taxation. The argument therefore that the basis of mutuality is destroyed because one of the objects of the Association is to further not only the particular interests of its members but of trade and commerce outside Karachi appears to have little weight. The primary purpose of the Association is to protect and further the interests of its own members and in furthering trade interests outside Karachi the Association is furthering the interests of its members.

For the purpose of advancing the interests of its members, the Association has established a clearing house and for those specially interested in the grain trade it has established a produce exchange department, and this clearing house and this department are financed by the fees paid by the members who utilize its

(1) A I R 1939 Sind 308; 185 Ind. Cas. 323; 12 R S. 157.

services. One item, which is the subject of dispute, Rs. 16,233, is derived from a fee of annas eight per tender of 25 tons charged from members by the clearing house on delivery orders; the second item of Rs. 13,686 is derived from the sale of samples tendered against the delivery contracts which members must submit for analysis to the clearing house, but it appears to me that no distinction can be drawn between the samples, the property of the members or their money value, when as matter of mutual convenience and agreement these samples are sold. The third item is a sum of Rs. 3,625 derived from penalties for trading in contravention of the rules and regulations of the Association, and which appear to me to be merely a domestic matter between the members and the Association and to go into the coffers of the Association as the property of the members. This case is not complicated by services to the public as in Ref. No. 34 of 1937 [*Commissioner of Income-tax, Sind and Baluchistan v. Karachi Chamber of Commerce* (1)]. Rs. 5 were recovered from a non-member and one other small amount from another non-member, but those two payments are too trivial to affect the case.

The Association has no share-holders, no share capital and no dividends can be declared. It is this that distinguishes it from the case in *Liverpool Corn Trade Association Ltd. v. Monks* (2). The "Association" means the Karachi Indian Merchants' Association incorporated under s. 26, Indian Companies Act, and consists of those Indian dealers, merchants, manufacturers, firms and so on, referred to in Art. 4 of the Articles of Association. The incorporated body, the legal entity and the members of the Association are, therefore, identical. The Association does business only for its members, and is paid by them in proportion to the services rendered. It is difficult to see then how this case falls outside that class of cases where a number of individuals for the common good combine to provide by common sacrifices a common organization to do for them more efficiently as a body what they could do individually but less efficiently for themselves: see *Thomas v. Richard Evans and Co., Ltd.* (3), and the fact that from the payments made by the members themselves there is a surplus.

(2) (1926) 2 K B 110; 95 L J K B 519; 134 L. T. 756; 10 Tax Cas. 442; 42 T L R 393.

(3) (1927) 1 K B 33; 95 L J K B 990; 135 L T 673; 42 T L R 703.

or saving upon the year's working, does not appear to me to constitute that surplus or saving a profit or gain, and if it is not a profit or gain, then it appears to me to matter not whether the common purpose of the association is the furtherance of trade or art or sport. Whether a surplus or saving is a profit or gain does not depend upon the objects of the association, but upon the origin of this surplus or saving, upon the existence of a common endeavour and a common fund. It is the principle of self-help in practice.

We have not had referred to us any question of brokers' fees nor any question of interest upon members' deposits, but we think this case can be clearly distinguished from the case in *Liverpool Corn Trade Association Ltd. v. Monks* (2) where there was a separate legal entity, a capital of Rs. 60,000 and where even the subscription of its members were taxable as income; and is akin to the two cases in *Carlisle and Siloth Golf Club v. Smith* (4) and *National Association of Local Govt. Officers v. Watkins* (5). It is true that in that case Finlay, J., (as he then was) remarked at the outset of the case that the Association was unincorporated and that that was a matter of fundamental importance, but it does not follow that the learned Judge would have come to the same conclusion in a case where the individual members of the Association as such utilize the services of their own organization for which they themselves pay and which as an association they themselves provide. For these reasons, and for the reasons more fully set out in Ref. No. 34 of 1937 [*Commissioner of Income-tax Sind and Baluchistan v. Karachi Chamber of Commerce* (1)], I would answer all four questions referred to us in the negative. The assessee is entitled to the costs, including the fee of Rs. 100.

Tyabji, J.—I concur.

B. Answered in negative.

(4) (1912) 2 K B 177; 81 L J K B 581.

(5) (1934) 18 T O 499.

RANGOON HIGH COURT

Criminal Revision Application No. 302-B
of 1939

September 20, 1939

MOSELY, J.

U PIKE—APPLICANT

versus

MA KHIN THEIN—OPPOSITE PARTY

Penal Code (Act XLV of 1860), s. 500—Defamation—Complaint against Pleader—Presumption—No defamation unless remark is made wantonly or from malicious or private motive.

The Court should presume, when a complaint is made against a legal practitioner for defamation, that the remark was made on instructions and in good faith, and there can be no defamation unless the circumstances show that the remark was made wantonly, or from a malicious or private motive. 92 Ind. Cas. 737 (1), relied on.

Mr. E Maung, (1), for the Applicant.

Order.—The applicant in revision, U Pike, a Lower Grade Pleader, has been charged with defamation in the Court of the Sub Divisional Magistrate, Nyaunglebin. The person who complained of being defamed, Ma Khin Thein, first brought a case against Ma E Khin and others of abuse under s. 504, I. P. C., (Criminal Summary Trial No. 44 of 1939 of the First Additional Magistrate, Daiku). Her complaint there was that Ma E Khin in a quarrel called her, first, a nuisance, and then a prostitute. In the course of that case Ma E Khin's Pleader, U Pike, cross-examined Ma Khin Thein and asked her, first, whether she was a spinster and when she said "Yes," again asked her if she did not before have a husband (*min lin yabude mahoak la*). The Burmese words used may connote a secret intrigue with a man as well as a regularized cohabitation, and I think, would normally be understood as an innuendo. It is admitted in Ma Khin Thein's own complaint, and again in her evidence, that U Pike had received instructions to this effect from his client, Ma E Khin, and Ma E Khin herself, who was a co-accused (discharged), accused of instigating the alleged defamation, said in her examination that she had given this instruction to her Pleader, though she said that she had not instructed him to put the question. As was said in the case referred to by the Magistrate, *McDonnell v. Emperor* (1) (bottom of pp. 530 and 533) by both the learned Judges who heard that case, the Court should presume, when a complaint is made against a legal practitioner for defamation, that the remark was made on instructions and in good faith, (the instructions admittedly were given here and that there can be no defamation unless the circumstances showed that the remark was made wantonly, or from a malicious or private motive. There is nothing to show that that is the case here. The evidence goes to show that the question was asked merely on instructions given. It will therefore be ordered in revision that the charge against the applicant, U Pike, of defamation be quashed.

B.

Revision allowed.

(1) 3 R 524; 92 Ind. Cas. 737; A I R 1925 Rang. 345; 27 Cr. L J 321.

BOMBAY HIGH COURTCriminal Revision Application No. 352 of
1939

December 6, 1939

BEAUMONT, C. J. AND SEN, J.

SONAPPA SHINASHETTY—ACCUSED

No. 2—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

*Penal Code (Act XLV of 1860), ss. 107, 111—
"Abetment" includes conspiracy and aiding—A and B
conspiring to assault C—B inflicting grievous hurt on
C's companion during assault and without any in-
stigation from A—A, if liable under s. 111, for causing
grievous hurt to C's companion.*

The definition of abetment in s. 107, I. P. C., in-
cludes not merely instigation, which is the normal
form of abetment, but also conspiracy and aiding, and
those three forms of abetment are dealt with in the
proviso to s. 111.

Where an act is abetted, and the abetment takes
the form of instigation of an act, and a different act
is done, that different act must be a probable conse-
quence, and committed under the influence of the
instigation; and where the abetment takes the form
of aiding or a conspiracy, the different act must be
a probable consequence and also with the aid or in
pursuance of the conspiracy. To make the accused
liable under s. 111, the Crown must show, not only
that the assault on the complainant was a probable
consequence of the conspiracy to assault the com-
plainant but also that it was done in pursuance of
that conspiracy.

Where A and B conspire to assault C and during
the assault B without instigation from A stabs C's
companion who comes to his rescue, and inflicts
grievous hurt, A is not liable under s. 111 as the
stabbing cannot be said to be in pursuance of the
conspiracy to assault C.

Cr. R. Ap. against the conviction and
sentence recorded by the Presidency Magis-
trate, Fourth Court, Bombay.

Messrs. G. C. O'Gorman and G. K. Gadgil,
for the Accused.

Mr. R. A. Jahagirdar, Govt. Pleader, for
the Crown.

Beaumont, C. J.—This is a revision ap-
plication against the accused's conviction
by the Presidency Magistrate, Fourth Court,
under ss. 326 and 109 read with s. 111,
I. P. C. The case raises a question on the
construction of s. 111. The facts are that
the present applicant and two others con-
sidered that they had a moral claim on a
man named Ichhanna to extract Rs. 10 from
him, and they were proceeding to extract
those ten rupees by force. The present
applicant and a man named Shanta beat
Ichhanna with their fists, and another man
named Sunderrao threatened him with a
knife. Thereupon Ichhanna's companion, the
complainant, intervened, and Sunderrao
with his knife stabbed him on the ear and
inflicted grievous hurt. Sunderrao has been
convicted, and the question is whether the
present applicant is guilty of that assault

on the complainant by virtue of s. 111,
I. P. C. S. 111 provides that when an act is
abetted and a different act is done, the
abettor is liable for the act done in the
same manner and to the same extent as if
he had directly abetted it. Then there is a
proviso in these terms:

"Provided the act done was a probable consequence
of the abetment, and was committed under the
influence of the instigation, or with the aid or in
pursuance of the conspiracy which constituted the
abetment."

It is to be observed that the definition of
abetment in s. 107, I. P. C., includes not
merely instigation, which is the normal
form of abetment, but also conspiracy and
aiding, and those three forms of abetment
are dealt with in the proviso to s. 111. The
section comes to this. Where an act is
abetted, and the abetment takes the form
of instigation of an act, and a different
act is done, that different act must be a
probable consequence, and committed under
the influence of the instigation; and where
the abetment takes the form of aiding or a
conspiracy, the different act must be a
probable consequence and also with the
aid or in pursuance of the conspiracy. The
present applicant certainly did not instigate
Sunderrao to stab the complainant, nor did
he aid in such stabbing; but there was no
doubt a conspiracy to assault Ichhanna. If
the present applicant is to be liable under
s. 111, the Crown must show, not only that
the assault on the complainant was pro-
bable consequence of the conspiracy to
assault Ichhanna but also that it was done
in pursuance of that conspiracy. I do not
see how it can be said that the stabbing of
the complainant was in pursuance of the
conspiracy to assault Ichhanna. The
learned Magistrate did not discuss the
words "in pursuance of the conspiracy." He
only discussed the question whether the
stabbing of the complainant was a probable
consequence of the assault upon Ichhanna,
and he considered that it was. I am not
sure that I should agree with that view;
but, in any case, assuming that it was a
probable consequence, I am unable to see
how it can be said that the stabbing of the
complainant was in pursuance of the con-
spiracy to assault Ichhanna. In my opinion,
the present applicant was not liable to be
convicted under s. 111, I. P. C. The ap-
plication therefore must be allowed. Bail
bond cancelled. Fine, if paid, to be
repaid.

Sen, J.—I agree.

D. Application allowed.

LAHORE HIGH COURT

Second Appeal No. 930 of 1938

May 8, 1939

BHIDE, J.

LABH SINGH AND ANOTHER—PLAINTIFFS
—APPELLANTS

versus

Sardar GURBAKHS SINGH AND ANOTHER
—DEFENDANTS—RESPONDENTS.*Custom—Question of fact—Proof of—Custom (Punjab)—Onus—Kalals of village Dewatwal in District Ludhiana, held do not follow custom in matters of alienation of ancestral property.*

Custom is not a matter of inference but of fact. A custom to be legal must be proved to have been in existence for a time preceding the memory of man. 169 Ind. Cas. 909 (5), relied on.

The burden of proof always lies on the party alleging a custom and the burden is all the more heavy where the tribe to which that party belongs does not usually depend on agriculture but follow a variety of occupations. 175 Ind. Cas. 87 (4), relied on.

Kalals of village Dewatwal in the Ludhiana District, are not primarily an agricultural tribe and are not governed by custom in the matters of alienation of ancestral property. They have not by their association with the agricultural tribes in the village since 1841 adopted their customs. The mere fact that the Kalals in some other places have adopted agricultural custom would be no evidence to support the contention that Kalals of Dewatwal follow custom. Customs are apt to vary with the local history of a tribe.

S. A. from the decree of the District Judge, Ludhiana, dated April 8, 1938.

Mr. Mehr Chand Mahajan, for the Appellants.

Mr. Achhru Ram, for the Respondents.

Judgment.—The plaintiffs sued in this case for a declaration that a mortgage of 18 *bighas*, 10 *biswas* and 2 *biswansis* of ancestral land for Rs. 4,500 made by their brother, defendant No. 1, in favour of defendant No. 2 should not affect their reversionary rights. The suit was resisted by defendant No. 2 on the pleas that the parties (who are Kalals of the village Dewatwal in the Ludhiana District) were governed by Hindu Law and not by agricultural custom and secondly that the alienation was effected for valid necessity and consideration. The trial Court found the issues in favour of the plaintiffs and decreed the suit, but on appeal the learned District Judge reversed the findings of the trial Court on both the points and dismissed the suit. From this decision the present appeal has been preferred. The finding of the learned District Judge on the question of necessity and consideration is one of fact, but the finding is challenged on the

grounds that the learned District Judge has overlooked some of the material evidence with respect to the question of necessity and consideration and that in any case if the parties are agriculturists, the sum of Rs. 300 for the purpose of starting a shop could not be considered to be a valid necessity. I therefore consider it desirable to decide the appeal on both the points. I shall first take the question of custom. As stated above, the parties are Kalals of the village Dewatwal in the Ludhiana District. As pointed out in *Attar Singh v. Sant Singh* (1) a case relating to Kalals of the Ludhiana District, the Kalals are not primarily an agricultural tribe. Although some of them hold lands in the Ludhiana District, they follow other occupations also. At one time there was a proposal to include them amongst agricultural tribes in the Ludhiana District but this proposal was apparently not accepted. The customary law of the Ludhiana District admittedly does not contain any record of the customs of this tribe and the presumption is that they were not recognized as a tribe governed by custom at the time when the customary law was prepared.

The trial Court in deciding the issue as to custom in favour of the plaintiffs relied mainly on the fact that the Kalals in village Ahluwalia have a *patti* of their own, have a share in the *shamilat* and furnish a *lam-bardar*. It has also relied on the fact that in some social matters, such as *karewa*, custom was followed. It has been however, pointed out in several recent decisions of this Court that custom is not a matter of inference but of fact. In the circumstances, it seems very doubtful whether the mere fact that the Kalals own a *patti* in the village Dewatwal would be sufficient to raise any presumption in favour of custom in the present case: *cf. Ishar Das v. Bhagwan Das* (2), at p. 969. The presumption in favour of restraint on alienations of ancestral land in village communities was based on the history of such communities and also on the *riwaj-i-ams* prepared from time to time with respect to such communities in the Central Punjab: *vide Gujar v. Sham Das* (3). In the present instance, as stated above, no *riwaj-i-am* was prepared at all with respect to the Kalals in the Ludhiana District. It is true that they own one-third of the village. But their

(1) 87 P R 1907.

(2) A I R 1935 Lah. 967, (969); 158 Ind. Cas. 451; 17 L 612; 38 P L R 1045; 8 R L 247.

(3) 107 P R 1887.

acquisition dates from the year 1841 only. Kalals not being primarily an agricultural tribe the question therefore is whether they have by their association with the agricultural tribes in the village since 1841 adopted their customs. This would be purely a question of fact and can only be decided on evidence. (After examining oral evidence his Lordship concludes). Taking the oral evidence as a whole I do not think that it establishes that Kalals of Dewatwal are governed by custom in the matters of alienation of ancestral property.

Coming to the documentary evidence, the plaintiffs relied on two instances from other villages, namely, Shahbpur and Kalal Majra. The learned District Judge has pointed out that these villages were founded by Kalals and were compact village communities. Besides, customs are apt to vary with the local history of a tribe and the mere fact that the Kalals in some other places have adopted agricultural custom would be no evidence to support the plaintiffs' claim in the present case. In one case from this village, *Balwant Singh v. Harnam Singh*, decided in the year 1916, it was held that Kalals were not governed by custom. In a recent case decided in the year 1936, *Bishen Singh v. Atma Ram*, a contrary view was taken and it was held that Kalals were governed by custom. The decision of the trial Court was affirmed by the District Judge. The case of *Balwant Singh v. Harnam Singh* was apparently not brought to the notice of the Court which decided the case of *Bishen Singh v. Atma Ram*. The decision in *Bishen Singh v. Atma Ram* appears to be founded mainly on the following considerations: (1) that the Kalals have a *patti* of their own; (2) that their main occupation is agriculture; (3) that they settled in the village at its foundation; (4) that they have cultivated land ever since their settlement; (5) that they hold a large area of land in the village in question; (6) that they hold share in *shamlat*; (7) that they have their own *lambardar*; and (8) that custom generally prevails in the locality. Ahluwalias of Dewatwal follow custom in social matters also.

Most of the above points are relevant only for ascertaining whether the Kalals of Dewatwal form a homogeneous agricultural village community and, if they do, whether it should be presumed that they are governed by custom in the matter of alienation of ancestral property. In the present instance however we know that Kalals are not primarily an agricultural tribe and although

they are owners of one *patti* in Dewatwal they acquired land in this village only in 1841. So the real question which requires decision in this case is, as pointed out above, whether they have adopted agricultural custom in the matter of alienation of ancestral property owing to their association with members of agricultural tribes during the last 100 years or so. The burden of proof always lies on the party alleging a custom and in this case the burden was all the more heavy as Kalals do not usually depend on agriculture but follow a variety of occupations: cf. *Kishen Singh v. Santi* (4). There was no *riwaj-i-am* available to the plaintiff in this case which could shift the onus to the opposite side. The plaintiffs could therefore only establish the growth of the custom relied upon by them, by a long series of instances, since they acquired land in Dewatwal in 1841. It has been held in *Bahadur v. Nihal Kaur* (5) that a custom to be legal must be proved to have been in existence for a time preceding the memory of man following the dictum of Blackstone that "if any one shows the beginning of it, it is no good custom." If this rule is strictly applied, no valid custom could possibly be held to have come into existence since 1841. But even if a less strict view of custom is taken, as no such instances of the alleged custom from this village have been proved during this period, I feel no hesitation in holding on the evidence before me that the plaintiffs have failed to discharge the heavy onus of proving custom which lay on them.

On the above finding it is unnecessary to go into the question of necessity and consideration but I may mention that I agree generally with the finding of the learned District Judge on that point also. The sum of Rs. 1,700 was due to the plaintiffs themselves on a prior mortgage and this item was not disputed. As regards the balance of Rs. 2,800, Rs. 2,500 were alleged to have been borrowed for the marriage of the alienor, there is evidence on the record to show that the alienor had asked Bishen Singh to arrange his betrothal and that he had actually done so. Bishen Singh has not been shown to be not disinterested and there is no good reason for disbelieving his testimony. As regards the balance of Rs. 300 borrowed for starting a shop, the alienor's land had been mortgaged in favour of the

(4) A I R 1938 Lah. 299; 175 Ind. Cas. 87; 10 R L 678.

(5) A I R 1937 Lah. 451; 169 Ind. Cas. 908; 1 L R (1937) Lah. 594; 39 P L R 349; 10 R L 81 (F B).

plaintiff and in the circumstances he may have found it necessary to resort to other occupations to maintain himself. The item is a comparatively small one and not unreasonable for the object in view. I therefore dismiss the appeal with costs.

D.

Appeal dismissed.

MADRAS HIGH COURT

Letters Patent Appeal No. 51 of 1937

March 31, 1939

LEACH, C. J. AND SOMAYYA, J.

P. RM. ST. SUBRAMANIA CHETTIAR

—APPELLANT

versus

FELIX JOSEPH SARPRASADAM

AND OTHERS—RESPONDENTS.

Succession Act (XXXIX of 1925), s. 321—Creditor lending money to executor to obtain probate—Money so used—Creditor, if entitled to charge on estate or to indemnity which executor enjoys.

Where a person lends money to the executor for obtaining probate and the money is so used, the creditor is entitled to stand in the shoes of the executor and can be allowed the benefit of the indemnity which the executor enjoys for the purpose of recovering the money from the estate although he is not entitled to a charge.

L. P. A. against the judgment of Mr. Justice Varadachariar, reported in 170 Ind. Cas. 157.

Mr. K. S. Desikan, for the Appellant.

Messrs. A. V. Narayanaswamy Iyer and V. Subramaniam, for the Respondents.

Leach, C. J.—Santhanathammal, the grandmother of respondents Nos. 1, 2 and 3, died on August 17, 1928, leaving a will by which she bequeathed her properties to her grandsons and others. She appointed respondent No. 4, who is her daughter-in-law and the mother of respondents Nos. 1, 2 and 3, her executrix. On March 6, 1929, respondent No. 4 and her mother, Kanikaimari Ammal, who was defendant No. 5 in the suit out of which this appeal arises, borrowed from the appellant a sum of Rs. 1,700 for the purpose of taking out probate of the will. A promissory note was executed by respondent No. 4 and her mother for this amount and the instrument stated the purpose for which the money was borrowed. Respondent No. 4 executed the promissory note in her capacity as executrix and as guardian of her sons. The probate was obtained, but respondent No. 4 failed to repay to the appellant the money which she had borrowed from him for the purpose. The consequence was that the

appellant was compelled to file a suit in the Court of the District Munsif of Trichinopoly for the recovery of the money. The defendants to the suit were the respondents to this appeal and Kanikaimari Ammal. Respondent No. 4 denied that the money had been paid to her by the appellant, but the District Munsif held that this was untrue. A personal decree was passed against respondent No. 4 and her mother, but the suit was dismissed as against the estate.

The appellant appealed to the District Judge of Trichinopoly against the finding of the District Munsif that the estate was not liable. The respondents to this appeal were respondents Nos. 1, 2 and 3 in the present appeal. The appellant however did not make respondent No. 4 a party. The District Judge allowed the appeal, holding that the appellant was entitled to a charge against the estate. The grandsons of the testatrix then appealed to this Court. The appeal was heard by Varadachariar, J., who restored the decree of the District Munsif. Before Varadachariar, J., the appellant asked that he be allowed the benefit of the indemnity to which the executrix would be entitled in law from the estate if it was shown that the money had been applied, for purposes necessary for or beneficial to the estate. The learned Judge refused to accept this contention on the ground that the pleadings did not justify a decree being passed against the estate. The present appeal has been filed against the judgment of the learned Judge under cl. 15, Letters Patent, a certificate having been granted. The appeal first came before us on February 23, and after hearing the arguments we were unable to share the opinion of Varadachariar, J., that the plaint was not sufficiently widely drawn to allow the appellant to stand in the shoes of executrix. The prayer in the plaint reads as follows:

"I therefore pray that the Court may be pleased to pass a decree directing defendants Nos. 4 and 5 to pay to the plaintiff the amount noted hereunder together with subsequent interest and cost of this suit, defendant No. 4 from out of estate of the deceased Santhanathammal which she is managing as executrix and which belongs to defendants Nos. 1 to 3, and defendants Nos. 4 and 5 personally."

In our opinion there is here a claim for a decree against the estate as well as against respondent No. 4 and her mother. The plaint was written in *Tamil* and the words used may not be as precise as the words which an expert draughtsman in English would use, but we consider that they were sufficiently precise for the purpose. In

these circumstances, we thought it proper to make the executrix a respondent in the appeal. In accordance with our direction she was served with notice of this appeal and became respondent No. 4. The judgment of Varadachariar, J., shows that he would have adopted this course himself had he considered that the plaint was sufficiently widely drawn to permit of an order being made against the estate. The case comes on for hearing with respondent No. 4 before us.

We agree with the opinion of Varadachariar, J., that the District Judge was wrong in holding that the appellant was entitled to a charge, but we consider that he is entitled to stand in the shoes of the executrix, for the purpose of recovering the money from the estate. Section 321, Succession Act, 1925, provides that the expenses of obtaining probate shall be paid next after the funeral expenses and death-bed charges. Mr. Subramaniam on behalf of respondent No. 4 has contended that no order should be passed allowing the appellant to stand in her shoes as the executrix. Why his client has adopted this attitude is not far to seek. She is a woman and although she has been held personally liable it will be difficult if not impossible to execute a personal decree against her. She borrowed the money from the appellant for obtaining probate, and for her to say that the appellant should not be allowed the benefit of the indemnity which she herself enjoys is dishonest. The appellant has provided the money for a necessary purpose and she utilized it for that purpose. It is not disputed that in a proper case a creditor can stand in the shoes of an executor and be given his remedy against the estate. This is a proper case which the appellant should be allowed to stand in the shoes of the executrix, and we will allow the appeal to this extent. The case will be remanded to the trial Court for inquiry as to what rights respondent No. 4 has against the estate in respect of the sum of money borrowed for obtaining the probate. The trial Court will draw up a fresh decree based on its findings in the inquiry arrived at in the light of this judgment. It will not be open to any of the respondents to contend that the money was not borrowed from the appellant for the purpose of obtaining probate, or to contend that this was not a necessary purpose. There are findings, and they are conclusive, that the money was borrowed by respondent No. 4 from the appellant for the purpose of obtaining

probate, and that it was borrowed for a proper purpose. The inquiry will therefore proceed on this basis. The decree against respondent No. 4 and defendant No. 5 will stand in so far as they are personally concerned.

Before Varadachariar, J., respondents Nos. 1, 2 and 3, contended that if the estate was to be made liable the rate of interest mentioned in the promissory note was excessive. In view of the decision of the learned Judge on the other questions arising in the case which led to the restoration of the decree of the District Munsif it was not necessary to go into this question. It has been agreed by the parties that the question of the rate of interest so far as the estate is concerned shall be decided by the District Munsif on remand. As the appellant did not make respondent No. 4 a party in his appeal to the District Judge, and failed to make her a party in this Court we make no order as to costs, either in this Court or in the District Court. The memorandum of objections will be dismissed but there will be no order as to costs.

N.-D.

Case remanded.

ALLAHABAD HIGH COURT

Second Appeal No. 126 of 1937

September 15, 1939

BENNET AND VARMA, JJ.

HARDWARI MAL HARNATH DAS FIRM
— PLAINTIFF—APPELLANT

versus

MUNICIPAL BOARD, DEHRA DUN—

DEFENDANT—RESPONDENT

U. P. Municipalities Act (II of 1916), ss. 128 (1) (xiii), 296—Rules under s. 296, for Dehra Dun Municipality, r. 1 (a)—Goods received by consignee and brought into Municipal limits—Whether imported.

The word 'import' literally means 'carried into' or 'brought into.' When goods are received by a consignee and are brought by him into the municipal limits, he imports them within the meaning of the U. P. Municipalities Act and of the Rules framed under the Act. The words "imported or brought into" cannot be so interpreted as to mean that only those goods can be said to have been imported or brought into the municipal limits of a town which are either kept, consumed or sold by the consignee of the goods within those municipal limits. 148 Ind. Cas. 603 (1) and 160 Ind. Cas. 862 (2), distinguished.

S. A. from a decision of the Sub-Judge, Dehra Dun, dated September 8, 1936.

Mr. B. Mukherji, for the Appellant.

Messrs. N. P. Asthana and Vishwa Mitra, for the Respondent.

Varma, J.—This is a plaintiff's appeal and arises out of a suit brought by him for a declaration that the defendant, the Municipal Board of Dehra Dun, had no authority to levy "terminal tax or octroi" on such goods of the plaintiff as were received by him at the railway station of Dehra Dun and were then taken by him to his shop at Rajpur which is beyond the municipal limits of Dehra Dun, and were neither "kept nor sold" within the municipal limits of Dehra Dun for a perpetual injunction restraining the defendant from levying such a tax on the goods mentioned above and the recovery of a sum of Rs. 86-0-6 which the Municipal Board had realized from the plaintiff between March 28 and August 9, 1933, as terminal tax on such goods. Both the Courts below have agreed in dismissing the suit.

Section 128 (1), cl. (xiii), U. P. Municipalities Act (II of 1916) provides that, subject to any general rules or special orders of the Local Govt. in this behalf a municipality may impose "a tax on goods imported into . . . any municipality . . ." Under the powers conferred on them by s. 296 of the Act, the Local Govt. have framed "Rules for the assessment and collection of terminal tax in the Dehra Dun Municipality." The word 'import' is defined in r. 1 (a), thus: "'Import' shall mean the bringing of goods into the terminal tax limits from outside those limits," and in sub-r. (b) 'importer' is defined as meaning "the person in whose name the railway document is made out and shall include the person in possession of the goods on which the tax is leviable."

Sub-rule (c) provides that "terminal tax shall mean the tax imposed under s. 128 (1) (xiii), U. P. Municipalities Act, 1916, (U. P. Act, II of 1916). . . ."

By r. 3 it is provided that, subject to certain exemptions with which we are not concerned in this case, terminal tax shall be payable on all goods of the description mentioned in the annexed schedule, and at the rates specified therein. It is further provided in this sub-rule that when such goods are imported within the terminal tax limits of the municipality the tax due shall be paid to the railway authorities who shall furnish the importer with a receipt for the amount of the tax paid. There is a note appended to this Rule which provides that

"no tax shall be levied on goods booked through the railway agency to Mussorie, Rajpur and Chakrata or re-booked to any other station."

In the schedule annexed to these Rules, para. 1 reads thus

"A tax on goods brought within municipal limits

when conveyed to Dehra Dun municipality on consignment to that place by rail to be levied at the rates shown in Sch. 'A' below."

It has been held by the Courts below that the plaintiff is not entitled to the declaration sought for the simple reason that on a correct interpretation of the law the Municipal Board are authorized and entitled to levy the tax complained of. They have further held that no refund can be allowed. The goods in question are taken from the railway station into the municipal limits of Dehra Dun on their way to Rajpur. Learned Counsel for the appellant has argued that goods which the defendant receives at the railway station of Dehra Dun and subsequently despatches to Rajpur cannot be said to be "imported or brought into" the municipal limits of Dehra Dun. His contention is that only those goods can be said to have been imported or brought into the municipal limits of a town which are either kept, consumed or sold by the consignee of the goods within those municipal limits. We find no justification for this interpretation of the word 'import'. The word 'import' literally means 'carried into' or 'brought into.' The Rules framed by the Govt. explain the word 'import' as "the bringing of goods into." It seems to us on the plain meaning of the word, that when goods are received by a consignee and are brought by him into the municipal limits, he imports them within the meaning of the Act and of these Rules. The appellant is clearly an 'importer, as defined in the Rule quoted above. Learned Counsel has invited our attention to para. 198 of the Municipal Account Code. That paragraph occurs in Chap X of the Code which deals with octroi. The case before us is, concerned with terminal tax and not with octroi. Apart from the question therefore whether this paragraph of the Account Code can be pressed into service for interpreting the Act and the rules framed by Govt. thereunder or not, it seems to us that this paragraph which deals with octroi cannot be relied upon by learned Counsel in a case in which no question as to octroi arises. It may be mentioned here that the word 'octroi' used by the plaintiff in his reliefs has been added by some mistake or under some misapprehension because the tax which has been levied on his goods is "terminal tax" and not octroi, which is quite a different tax.

Learned Counsel has referred to the

case in *Sheikh Ajmeri Sheikh v. Emperor* (1). That is a case which dealt with facts which were entirely different and was concerned with the interpretation of s. 155, Municipalities Act. It is of no assistance in the present case. The next case relied upon is that in *Nek Muhammad v. Emperor* (2). That is a case decided by a learned Single Judge and the dictum that the words 'bring' and 'import' contain an element of pause and repose has been relied on by the learned Counsel. That case again dealt with a totally different point and can be of no assistance in the present case. It may also be pointed out that the dictum of the learned Judge relied on by the appellant has been dissented from by a Bench in *Emperor v. Har Datt* (3). In our judgment the decision of the Courts below is correct, and we dismiss this appeal with costs.

S. Appeal dismissed.

(1) A I R 1934 All. 39; 148 Ind. Cas. 603; (1934) Cr. Cas. 70; 35 Cr. L J 704; 56 A 241; (1934) A L J 80; 6 R A 727.

(2) A I R 1936 All. 83; 160 Ind. Cas. 862; (1936) Cr. Cas. 105; 37 Cr. L J 335; 1936 A L R 174; 8 R A 650.

(3) A I R 1936 All. 743; 165 Ind. Cas. 465; (1936) Cr. Cas. 939; (1936) A L J 962; 37 Cr. L J 1147; 1936 A L R 907; 9 R A 281.

MADRAS HIGH COURT

Criminal Revision Case No. 879 of 1939 and
Criminal Revision Petition No. 827 of 1939

October 27, 1939

LAKSHMANA RAO, J.

EMPEROR—PROSECUTOR

versus

AYANCHERI KOVILAGATH SANKARA
VARMA RAJAH—ACCUSED—PETITIONER

Criminal Procedure Code (Act V of 1898), ss. 482, 476
—Application under s. 476 to file complaint for offence
under s. 175, Penal Code (Act XLV of 1860)—Transfer
of, to District Court on abolition of Court—Applica-
tion dismissed but complaint made under s. 482—
Competency of.

An application under s. 476, Criminal P. O., was made, to the Subordinate Judge to file a complaint against the defendants for an offence under s. 175, I. P. O. The Sub-Court was abolished and the application was transferred to the District Court and it was dismissed on the ground that s. 476, Criminal P. O., was not applicable. But a complaint was made under s. 482 of the Criminal P. O.:

Held, that the complaint was not competent as the District Court did not order the production of any document nor, could the alleged offence under s. 175, I. P. O., be said to have been committed in the view or presence of the District Court. *Queen-Empress v. Seshayya* (1), relied on.

Cr. R. Case and Cr. R. P. under ss. 435 and 439 of the Criminal P. O., 1898, praying the High Court to revise the order of the District Court of North Malabar, dated April 15, 1939, initiating proceedings under s. 482, Criminal P. O., against the petitioner 1st defendant in O. S. No. 5 of 1938 on its file.

Messrs. D. A. Krishna Variar and M. C. Sridharan, for the Petitioner.

The Public Prosecutor, for the Crown.

Order.—The petitioner was the first defendant in O. S. No. 12 of 1937 on the file of the Sub-Court of Tellicherry and on the application of the plaintiff an order was passed by the Subordinate Judge on October 15, 1938, directing the defendants to produce certain records by October 21, 1938, or file an affidavit if they were not available. The order was not complied with, and the Subordinate Judge closed the application with the following order

"It is to be regretted that the defendants have not complied with the order and the plaintiff may take such steps as he may find necessary."

An application under s. 476 of the Criminal P. O., was made, to the Subordinate Judge on November 8, to file a complaint against the defendants for an offence under s. 175, I. P. O., and some documents were filed by the petitioner on November 18, with an application to excuse his failure to produce them earlier. The documents were ordered to be received on November 26, after notice to the plaintiff and the Sub-Court was abolished on December 23, 1938. The application under s. 476 of the Criminal P. O., was transferred to the District Court and it was dismissed on April 15, 1939 on the ground that s. 476, Criminal P. O., was not applicable. But a complaint was made under s. 482 of the Criminal P. O., and the question is whether this complaint is competent. The District Court did not order the production of any document nor, as pointed out in *Queen-Empress v. Seshayya* (1), can the alleged offence under s. 175, I. P. O., be said to have been committed in the view or presence of the District Court. The revision petition is therefore allowed and the complaint will be withdrawn.

N.S.

Petition allowed.

(1) 12 M 24.

BOMBAY HIGH COURT

Appeal No. 11 of 1939

in Suit No. 107 of 1939

September 28, 1939

BEAUMONT, C. J. AND KANIA, J.
SUBHAS CHANDRA BOSE—

APPELLANT

versus

GORDHANDAS I. PATEL AND OTHERS—

RESPONDENTS

Will—Construction—Principles—English precedents—Bequest to further principles of particular parties, whether charitable—Clause in will handing over residue to certain person to be spent by him for political uplift of India—Clause held constituted trust which being not for charitable purpose and being also vague was invalid—Succession Act (XXXIX of 1925), s. 138—Whether applies to gift followed by direction amounting to trust—Trust—Charitable trust—Language should be clear—General charitable intention shown but particular charitable purpose indicated failing—General charitable intention will be given effect to—Trust to advance political purpose, whether good.

To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. To search and sift the heaps of cases on wills which cumber the English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd. *Norendra Nath Sircar v. Kamalbasini Dasi* (8), relied on. [p. 475, cols. 1 & 2.]

Gifts or bequests for furthering the principles of particular political parties are not charitable bequests. *Bowman v. Secular Society Ltd.* (6) and 182 Ind. Cas. 882 (7), relied on. [p. 476, col. 1.]

After paying certain legacies, the testator by his will directed the residue of the assets to be handed over to certain person to be spent by him or by his nominee for the political uplift of India and preferably for publicity work on behalf of India's cause in other countries:

Held, (1) that the words constituted a trust, and that there was no beneficial gift to the donee; [p. 472, col. 1.]

(2) that the trust was not for general or specific charitable purpose;

(3) that the trust being vague could not be enforced. Hence it was invalid. There was consequently an intestacy in respect of property covered by the clause.

Section 138, Succession Act, has no application to the case of a gift followed by a direction which amounts to a trust. In such a case the gift is not to the legatee absolutely, but to him upon a trust, which is nonetheless a trust because it is introduced by the word "direct." [p. 472, col. 1.]

Every trust must be expressed in sufficiently clear language to enable the Court to ascertain what are its purpose and object. This is so under English Law and also under s. 6, Trusts Act, and the principle applies to charitable trusts. The test must ultimately be whether, if the Court be called upon to administer the trust, the Court would be able to do so. *Morice v. Bishop of Durham* (5), relied on. [p. 474, col. 1.]

Where a testator shows a general charitable intention, but the particular charitable purpose indicated for some reasons fails, the Court will give

effect to the general charitable intention and will get over the defect in the particular intention by framing a scheme. [p. 474, col. 1.]

A trust to advance a political purpose is clearly bad on the ground that a trust for the attainment of political objects is invalid, not because it is illegal, but because the Court has no means of judging whether any proposed political change will or will not be for the public welfare or benefit. *Bowman v. Secular Society Ltd.* (6), relied on. [p. 474, col. 2.]

Messrs. Sarat Chandra Bose (Calcutta Bar), M. L. Manekshah and M. M. Javeri, for the Appellant.

Mr. M. C. Setalvad (Advocate-General) and Sir Jamshedji Kanga, and Messrs. B. J. Desai, N. P. Engineer, and F. J. Colman, Sir Chimanlal Setalvad and Mr. A. C. Amin, for Respondents Nos. 1 and 2, 4 and 8 and 6 and 7, respectively.

Mr. G. N. Joshi, for the Advocate-General.

Beaumont, C. J.—This is an appeal from a decision of B. J. Wadia, J., and it raises a question as to the validity of the gift of residue contained in the will of the late Vithalbhai J. Patel. The will was made on October 2, 1933 and the testator died on 22nd of the same month. Probate of his will was subsequently granted by this Court. By cl. 9 of his will the testator appointed executors and then gave four legacies, and the only relevance of those legacies is that they are all directed to be "given" to the beneficiaries. Then in sub-cl. (5) the testator disposes of his residue in these terms:

"The balance of my assets after the disposal of the above mentioned four gifts is to be handed over to Mr. Subhash Chandra Bose (son of Janaki Bose) of 1 Woodburn Park, Calcutta to be spent by the said Mr. Subhash Chandra Bose or by his nominee or nominees according to his instructions for the political uplift of India and preferably for the publicity work on behalf of India's cause in other countries."

Then the will goes on:

"In the event of my death in Europe I desire that Mr. Subhash Chandra Bose shall take charge of my body and make the necessary arrangements for sending it to Bombay for cremation on the Chaupaty Sands along side the place where the late Lokamanya Bal Gangadhar Tilak's body was cremated."

The question is whether or not that gift of residue is valid in law. The learned Judge held that it was invalid and that the residue was undisposed of. The argument in this Court has been based on two grounds. First, it is said that on the true construction of cl. (5) the residue is given to Mr. Bose absolutely, the direction as to how it is to be spent being merely the expression of the motive for the gift, or possibly of the testator's hope or belief as

to the way in which the money would be spent. It is fair to Mr. Bose to say that his Counsel disclaims on his behalf any desire to utilize the money for his own purposes; he claims to be absolutely entitled to it in order that he may apply it under the will. The argument is that if the gift had stopped after the name of Mr. Bose, that is to say, if there had been nothing but a direction that the residue was to be handed over to Mr. Bose, that would have been a good bequest to Mr. Bose beneficially and that no doubt is so. But it is to be noticed that there are in the residuary clause no words of gift such as are contained in the case of the other legacies. The residue is not in terms given to Mr. Bose, still less is it given to him for his own use or benefit. The words are "to be handed over to Mr. Subhash Chandra Bose," an expression apt to introduce a trust, and the whole direction being to hand the money over to Mr. Bose to be spent in a particular way. I cannot entertain the slightest doubt that the words constitute a trust, and that there is no beneficial gift to Mr. Bose. Reliance has been placed on s. 138, Succession Act, which provides :

"Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction."

But that section, to my mind has nothing whatever to do with the creation of a trust. The condition precedent to the coming into operation of the section is that the fund is bequeathed absolutely to or for the benefit of any person. That, to my mind, means 'is bequeathed beneficially to any person.' All that the section does is to provide that where you have an absolute gift to a beneficiary you cannot cut that down by subsequent directions as to how the money is to be applied, either for the benefit of the beneficiary, or of anybody else; but the section has no application to the case of a gift followed by a direction which amounts to a trust. In such a case the gift is not to the legatee absolutely, but to him upon a trust, which is nonetheless a trust because it is introduced by the word "direct." Mr. Sarat Bose has further argued that the case can be brought within s. 139, Succession Act, which seems to me to be directed to the rule, well-known in England as the rule in *Lassence v. Tierney* (1) namely,

(1) (1849) 1 Mo. & G 551; 2 H & Tw. 115; 14 Jur 182; 84 R R 158.

that if you have a gift in the first instance absolute in terms, and then trusts are imposed upon it which do not, in the events which happen, exhaust the gift, the original gift takes effect to the exclusion of the residuary legatee, or the next of kin. But here there is no absolute gift in favour of Mr. Bose in the first instance. The only gift to him is upon a trust specified in the latter part of the clause. That disposes of the first question raised.

The second contention of Mr. Sarat Bose is that the trust, if there be one, is a valid charitable trust. The essence of the trust is that the moneys are to be spent for the political uplift of India. It is argued by Mr. Sarat Bose and also by Mr. Joshi on behalf of the Advocate-General, that the political uplift of India is something quite different from the advancement of certain political purposes. It is said that the political uplift of India necessarily denotes a political advance or improvement, the raising of India to a higher political level by improving the methods and machinery of Govt. or possibly by advancing the knowledge of the people on political subjects. At any rate, it is said that the gift is for the improvement of India; and having got so far, Mr. Sarat Bose says that the gift is really equivalent to a gift for general public utility in India, or possibly for the people of India, and he refers to the definition of "charitable purpose" contained in s. 2, Charitable Endowments Act of 1890, which is that "charitable purpose" includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship. There is a similar definition of "charitable purpose" in the Income Tax Act, 1922, except that it does not refer to religious trusts.

Mr. Bose argues that in India a trust for general public utility would be valid, and that the Courts are not bound by the English cases which exclude such a purpose from charitable trusts, and he contends, secondly, that even if we are bound by the English cases, nevertheless this gift is equivalent to a gift to India and falls within the line of cases which may be referred to as "the locality cases." We have been referred to a great many of the English cases, and I think, not for the first time in my life, that they are not by any means in a satisfactory condition. In

Commissioners for Special Purposes of Income-tax v. Pemsel (2) Lord Macnaghten ventured on a definition of charity in the legal sense, that is as falling within the Statute of Elizabeth. He says this (p. 583):

"'Charity' in its legal sense" comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."

That definition, except in relation to religion, which is obviously not in the same position in India as in England, where there is only one religion, is very much the same as the definition in the Indian Charitable Endowments Act. Now very soon after *Commissioners for Special Purposes of Income-tax v. Pemsel* (2) had been decided the Courts in England unfortunately, as I venture to think, held that the fourth class in Lord Macnaghten's definition, viz. trusts for other purposes beneficial to the community was not really a definition at all, that all that Lord Macnaghten meant was that charity in the legal sense might embrace purposes beneficial to the community, but that all purposes beneficial to the community were not charitable. That was laid down as early as *In re Macduff; Macduff v. Macduff* (3) and the result was largely to destroy any practical utility in the definition given by Lord Macnaghten, because instead of having merely to enquire whether a particular gift fell within one of the four classes, if such gift fell within the fourth class the Court had to go further and enquire whether it was charitable or not. However, undoubtedly under English case-law a gift for general public utility is not a good charitable gift, because it might be employed for purposes which are not considered charitable. But side by side with cases of that nature there exists another line of cases which have been referred to as "the locality cases" in which it has been held that a gift for the benefit of a particular place, whether a parish, a city, a county or a country is charitable, although the purposes of the gift are not specified and the gift could apparently be applied for the general purposes of the locality. I need not refer to the cases in detail, because they are all collected and discussed in *Smith, In re; Public Trustee*

v. Smith (4), in the English Court of Appeal. Those cases undoubtedly exist and show that a gift for the benefit of a locality is good. I must confess that I feel great difficulty in seeing how those cases can be brought within the purview of the law relating to charitable trusts. It is very difficult to see why if a gift for the general purposes of the community is not charitable, because it might be applied for purposes which are not charitable, a gift to a particular place is charitable, though that also might apparently be applied to non-charitable purposes in the locality. And this difficulty is not diminished where the locality is extended to the whole of England as it was by the case in *Smith, In re; Public Trustee v. Smith* (4) where the gift was to England. Lawrence, L. J., at the end of his judgment pointing out the principle on which the judgment was based, says (p. 173*):

"The conclusion I have arrived at after considering all the authorities to which our attention has been drawn, is that the present case falls within the principle of the cases in which the gift is for the benefit of a particular class and therefore for a specified public purpose, and not within the line of cases in which the gift is for public purposes of a general and wholly unrestricted nature."

I do not myself see why a gift to a class if it be regarded as being for a specified purpose should be any more for charitable purpose than a gift to the community or to an individual. However there the cases are, and if we had in this case a gift to India, or a gift to the people of India, we should have to consider whether the principle of those cases should be applied in India, and if so whether that principle which has been gradually extended from a parish to a country should now be extended to a sub-continent. However, as we have not got a gift to India, or the Indian people, that interesting question does not arise for decision. With regard to the more general argument of Mr. Bose that what we have got here is in effect a gift for the general public utility of India, I would only say that if we really had such a gift, I should approach the argument of Mr. Bose that a gift for general public utility is a good charitable gift in India with much sympathy; and if the authorities were not too strong for me I should be glad to hold in favour of the argument, relying on the statutory definitions of "charitable purpose" in India, and also

(2) (1891) A C 531 (583); 61 L J Q B 265; 65 L T 621; 55 J P 805.

(3) (1896) 2 Ch. 451; 65 L J Ch. 700; 74 L T 706; 45 W R 154.

(4) (1932) 1 Ch. 153; 100 L J Ch. 409; 5 S J 780; 146 L T 145; 48 T L R 44.

*Page of (1932) 1 Ch.—[24]

having regard to the rather unsatisfactory state of the English authorities. But again we have not got here a gift for the general public utility of India, and therefore that question also does not call for decision.

What we have got here is a gift for the political uplift of India, and one cannot possibly disregard the adjective "political." Assuming that the meaning of those words is that for which Mr. Bose contends, i.e., that they denote improvement in the political system of India, and therefore to that extent must be beneficial to India, the difficulty is that the words are too vague. Every trust must be expressed in sufficiently clear language to enable the Court to ascertain what are its purpose and object. This is so under English Law and also under s. 6, Trusts Act, and that the principle applies to charitable trusts was laid down as long ago as the case in *Morice v. Bishop of Durham* (5). The test must ultimately be whether, if the Court be called upon to administer the trust, the Court would be able to do so. Here, it seems to me impossible for the Court to determine what is embraced in the term political uplift of India. To take an obvious test. Suppose this trustee honestly considered that it would be for the political uplift of India, that India should sever her connection altogether with the British Empire, and proposed to apply the funds for that purpose, and suppose that the Advocate-General, representing the public, were to take the opposite view and were to allege that the trustee was misapplying the funds, and supposing the question was brought before the Court, how could any Court possibly determine judicially whether the separation of India from the British Empire was for the political uplift of India? It is a question on which Judges may have their own private opinions, but, it is not a question on which it would be possible to obtain evidence on which a judicial decision could be based. This trust is so worded as to make it impossible for any Court to say which of two contradictory lines of conduct properly comes within the terms of the trust.

This is not a case, as Mr. Sarat Bose has argued, of a general charitable purpose and a defect only in the expression of the testator's particular intention. Where a testator shows a general charitable intention, but the particular charitable purpose

indicated for some reasons fails, the Court will give effect to the general charitable intention and will get over the defect in the particular intention by framing a scheme. But here there is no general charitable intention; there is no intention whatever expressed, except that the money is to be used for the political uplift of India, and if that is too vague to be enforced, there is nothing left.

Mr. B. J. Desai on behalf of some of the beneficiaries has challenged the view that political uplift of India in this will does indicate a desire for the general improvement of the political status in India. He argues that political uplift in this will means the advancement of India's claim to independence, that is the advancement of a particular political purpose and in support of that contention he relies on the position of the testator. Unfortunately, the affidavit in support of the summons does not state any facts relating to the testator, but we can, I think, take judicial notice of the fact that he was a well-known Indian leader and had been President of the Legislative Assembly, and indeed the direction he gives as to the disposal of his body indicates to anybody with local knowledge that he was an Indian nationalist leader. Mr. Desai contends that political uplift in the mouth of an Indian nationalist leader would mean the advancement of India's claim to independence, and that view of the matter derives support from the words which follow—"preferably for publicity work on behalf of India's cause in other countries." It is difficult to see what India's cause means, if the political uplift of India denotes the general raising of the political status or conditions of India; it is easy to see what the words mean if political uplift denotes advancement of a claim to independence. A trust to advance a political purpose is clearly bad on the ground given by Lord Parker in *Bowman v. Secular Society Ltd.* (6), that a trust for the attainment of political objects is invalid, not because it is illegal, but because the Court has now means of judging whether any proposed political change will or will not be for the public welfare or benefit. Mr. Sarat Bose has drawn our attention to the fact that that dictum is criticised by the learned authors of Edn. 5 of *Tudor on Charities*, but the dictum was accepted by the Privy Council in *Trustees of Tribune Press v. Commissioner of Income*.

(5) (1805) 10 Ves. Jun. 522; 7 R R 232.
(6) (1917) A C 406; 86 L J Ch. 568; 117 LT 161; 61 S J 478; 33 T L R 376.

tax, Punjab (7). I think the Privy Council in that case were definitely of opinion that if the Tribune newspaper was employed for the advancement of particular political purposes the trust under which it was managed would not be charitable. In my opinion, whatever meaning one attaches to the expression "political uplift of India," it is impossible to give effect to it as a valid trust, because it is too vague for the Courts to enforce.

In my opinion, therefore the judgment of the learned Judge was right and the appeal fails. With regard to costs we direct the appellant to pay one set of party and party costs of the executors and one set of party and party costs for all the beneficiaries, between them two Counsel certified. The difference between party and party and attorney and client costs of the executors to come out of the estate. With regard to the Advocate-General, he was a necessary party and we think that his costs must be provided for. He supported the appellant but failed. We think that a reasonable order—though perhaps not a very logical one—is to direct that half his costs should be paid by the appellant and the other half should come out of the estate.

Kanla, J.—Two points have been urged before us by the learned Counsel for the appellant. The first is that the clause in question amounts to an absolute bequest in favour of the appellant. In support of that contention he pressed the argument that the Court should lean against a construction leading to intestacy, and where possible two clauses or two sentences in the same clause should be so construed as to avoid a conflict. There is no dispute about the principle of construction. The first point is whether in fact there is a gift at all, and if so, an absolute gift in favour of the donee. The Judicial Committee of the Privy Council in *Norendra Nath Sircar v. Kamalbasini Dasi* (8) observed as follows (p. 26*) :

"To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. Happily that method of interpretation has gone out of fashion in this country. To

extend it to India would hardly be desirable. To search and sift the heaps of cases on wills, which cumber our English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd."

Bearing these observations in mind if the present will is approached, it is noteworthy that when the testator wanted to bequeath property to his legatees he deliberately used the word "give." This is seen in the preceding four sub-clauses of cl. 9. It was urged that if the sub-clause in question stopped after the name of the donee that would have been an absolute bequest in favour of the donee. Without contesting that proposition it must however be conceded that when words in fact find place in the same sentence or clause they have got to be taken into consideration in giving the proper meaning to the preceding words. Here the words following the name of the donee clearly control the preceding words, and it is not possible to construe the clause as one amounting to a gift or an absolute gift in favour of the donee. The first contention of the appellant must therefore fail.

The next question is : Is there a valid trust? In that connection three positions appear clear from the decided cases and the Acts in force in India. If a general intention of charity is found in the deed, the law does not allow the trust to fail because of the failure of a particular charitable object named in the deed. The reason is that because of the judicial decisions it can now be definitely stated what charity means. The other position is where a specific charitable bequest only (without a general charitable intention) is given and the Court is called upon to inquire whether that should be enforced. The third position is when there is no charitable bequest general or specific. Section 6, Trusts Act, provides that in order to constitute a valid trust the beneficiaries must be indicated with reasonable certainty. Turning to the facts here it has first got to be ascertained whether there is any general charitable intention found in this will. On behalf of the appellant it was contended that the words "political uplift of India" are words of general charitable bequest. It is significant that in this will the word "charitable" is nowhere found. In this connection the appellant relied on cases which may for convenience be described as locality cases. In those cases the bequest was either to a parish or to a town or to En-

(7) 41 Bom. L R 1150; 182 Ind. Cas. 882; A I R 1939 P C 208; I L R (1933) Lah. 475; 66 I A 241; I L R (1939) Kar. (P C) 337; 1939 O L R 466; 12 R P C 33; 5 B R 895; 1939 O W N 678; 20 P L T 629; 50 L W 339; 43 C W N 1065; (1939) 2 M L J 444; 70 C L J 182; (1939) M W N 967; (1939) A L J 851 (P C).

(8) 23 I A 18; 23 C 563 (26); 6 Sar. 667 (P C).

gland. Those cases are recognized as occupying a class by themselves. No case has been pointed out which shows that a general charitable intention should be read into a deed or a will where the word "charity" has not been used at all.

It was urged that "political uplift of India" was an object of "general public utility" and therefore was covered by the definition of "charitable object" as found in s. 2 Charitable Endowments Act, and s. 4 (3), Income Tax Act. Section 18, T. P. Act, was also relied upon in this connection. Relying on those sections it was urged that the Courts should not adopt in India the narrow meaning of "charitable object" as found in the English decisions. I am unable to accept that contention. The definitions contained in the aforesaid Acts are expressly for the purposes of those Acts only. It should be noted that "religion" is omitted in those definitions. Moreover, the Judicial Committee of the Privy Council in *Runchordas v. Parvatibai* (9), in construing the word *dharam* has adopted the meaning given to charitable objects in England to interpretation of wills in India. The word *dharam* was held to be vague because it included objects which were not necessarily charitable but also philanthropic and benevolent. That decision was given when all the aforesaid three Acts were in force in India.

It was urged that as in the locality cases if the gifts were for the "benefit of India" the gift would be good. The difficulty of reconciling these cases with the accepted definition of the word "charity" in English cases has been stated by Lord Sterndale in *Tetley, In re National Provincial and Union Bank of England, Ltd. v. Tetley* (10), at p. 266. I do not propose to attempt to reconcile the principle found in these locality cases with the restrictions otherwise put on the word "charity" as understood in the decided cases. It is sufficient here to distinguish these locality cases from the present one on the ground that the words used in the clause in question are not general, i.e., for the benefit of India. It is recognized in England that gifts or bequests for furthering the principles of particular political parties are not charitable bequests: *Bowman v. Secular Society Ltd.* (6), at p. 442*. This principle, if there was any doubt about its applicability to India, has been accepted by the Judicial Com-

mittee in *Trustees of Tribune Press v. Commissioner of Income-tax, Punjab* (7).

It is clearly stated there that if the dominant purpose of the trust was a political purpose it would not be upheld as a charitable trust. The question therefore is whether political uplift of India is not a political object under the trust intended to be created by the clause in question. In answer to Court the learned Counsel for the Advocate-General stated that that was the result which was to be attained by modes to be selected by the donee but that was not the object. Speaking for myself, I entirely fail to notice any distinction between result and object thus attempted to be made. If the result to be obtained by the steps to be selected by the donee is the political uplift of India, in my opinion, it is the same as stating that the object of the steps was the political uplift of India. I am unable to construe the words as equivalent to "benefit of India," because "benefit of India" would include several heads such as educational uplift, social uplift, religious uplift. In order to succeed the appellant must establish that every one of the component parts which make the whole (the benefit) and not only a particular part in question, is charitable. It is therefore obligatory on the applicant to satisfy the Court not only that "benefit of India" is a charitable object but the particular component part, viz., political uplift of India, is also charitable, if his argument has to be upheld. No authority is cited in support of it. On the other hand, as I have pointed out, their Lordships have held that if the dominant object is political it is not charitable. In my opinion therefore, the contention that by the words "political uplift of India" a general charitable intention was disclosed must fail. It is clearly not a specific charitable object. The reasons for rejecting that contention have already been given just above.

That leaves the question whether the clause fulfils the requirements of s. 6, Trusts Act. In order to fulfil the conditions, it is necessary that the objects of the trust, i.e., the beneficiaries, must be indicated with reasonable certainty. It is obvious that different objects would be included under the heading "political uplift" as understood by different people and it is open to dispute whether they are of such a specific kind as to be capable of being definitely enumerated. If it is not possible, the Court when called upon to determine whether there was a breach of trust will be unable

(9) 23 B 725; 26 I A 71; 1 Bom. L R 607; 7 Sar. 543 (P O).

(10) (1923) 1 Ch. 258 (266); 92 L J Ch. 351.

*Page, of (1917) A. C.—[Ed.]

to decide the question. On that ground starting with the decision of Lord Eldon in *Morice v Bishop of Durham* (5), it has been held that when the objects of the trust are not capable of being sufficiently defined so as to enable the Court to enforce them, the trust must be held bad on the ground of vagueness. In my opinion, the attempt of the testator falls in that category and under the circumstances the trust must fail. As the bequest does not fall within any of the recognized classes of valid bequests it must fail and it must be held that there is an intestacy in respect of the property covered by the clause in question. The appeal must therefore fail.

D.

*Appeal dismissed.***CALCUTTA HIGH COURT**

Appeal No. 1345 of 1937

April 26, 1939

B. K. MUKHERJEE AND LATIFUR

RAHMAN, JJ.

JADUNATH BANERJEE—PLAINTIFF—

APPELLANT

versus

SECRETARY OF STATE—DEFENDANT—

RESPONDENT

Bengal Embankment Act (II of 1882), ss. 43, 68, 56, 57—Removal of Sch. 'D' embankment and construction of new one in its place—Original embankment removed from Sch. 'D' by notification—New embankment does not become Sch. 'D' embankment without notification under s. 43—Civil Court, whether can enquire into question whether Collector has apportioned costs on land not liable to be charged—Proper course for aggrieved party—Apportionment—Notice under s. 56 or s. 57 is condition precedent—Recovery of costs of repairs of several years—Notification for each repair, if necessary.

Where upon an application being made to the Collector for shifting a Sch. 'D' embankment, the Govt. orders by a notification that the embankment should be removed and a new one with drainage sluices be constructed in its place but by a subsequent notification the Govt. orders that a portion of the original Sch. 'D' embankment should be removed from the Sch. 'D' then unless the Govt. by a notification issued under s. 43, Ben. Embank. Act declares that embankment as included in the Sch. 'D' such portion of the new embankment does not become a Sch. 'D' embankment. The mere fact that it replaced a Sch. 'D' embankment does not necessarily mean that it must be included in the Sch. 'D' without any further notification.

A Civil Court cannot enquire into the question whether Collector has apportioned costs on land not liable to be charged. The apportionment of costs by Collector on lands which he should not have done under the provisions of the Ben. Embank. Act is at the most an erroneous decision or an irregular exercise of the jurisdiction which the

Collector undoubtedly possesses and in no sense it can be said to be a usurpation of jurisdiction by the Collector which would make the order a nullity or without jurisdiction. It is open to the party aggrieved to take an appeal against that order to the Commissioner as provided for in s. 84 or to invoke the powers vested in the Commissioner and the Govt. as provided for in s. 85 of the Act.

A notice under s. 56 or s. 57, Ben. Embank. Act is a condition precedent to creation of liability of the proprietor or the tenure-holder as the case may be under the Act, and unless and until due publication or service of the notice is proved the very foundation of the liability is taken away.

Where the costs of embankment which the Govt. seeks to recover are the costs of repairs of several years for each particular repair there must be a notification upon the parties interested, their objection must be heard, and then only can an order of apportionment be passed by the Collector under the provisions of s. 68.

A. from the appellate decree of the Additional District Judge, 24-Perganas at Alipore, dated May 15, 1937.

Messrs. Amarendra Nath Bose, Hemanta Kumar Bose and Biswa Nath Naskar, for the Appellant.

Dr. Basak and Mr. Ramaprosad Mukherjee, for the Respondent.

B. K. Mukherjee, J.—This appeal is on behalf of the plaintiff, and the suit was one for a declaration that the embankment described in the schedule to the plaint, was a Sch. 'D' embankment for which the Govt. was not entitled to realize costs from private proprietors under the Ben. Embank. Act. It was also alleged that the order of apportionment passed by the Collector under s. 68, Ben. Embank. Act was illegal and *ultra vires*, and that as there was no notice served on the plaintiff in compliance with the provisions of the Act no liability attached to him under law. The plaintiff further claimed a permanent injunction restraining the defendant from realizing the embankment costs from the plaintiff. The defence was really of a twofold character. The first defence was that the embankment in dispute was not a Sch. 'D' embankment; and it was contended in the second place that notices were duly served on the plaintiff and other parties interested, and that the Collector was quite within his rights in making the order of apportionment under s. 68 of the Act and to this order no exception could be taken in a Civil Court. Both the Courts below have accepted the defences of the defendant and have dismissed the plaintiff's suit. It is against this concurrent decree of dismissal that

the present second appeal has been preferred.

The first question that arises for our determination is as to whether or not the embankment in suit is one which is included in Sch. 'D' Ben. Embank. Act of 1873, and in which case it is admitted, the costs are to be borne by the Govt. and not by the proprietors or tenure-holders. The facts seem to be, that there was a Sch. 'D' embankment on the left bank of the river Piali which protected the major part of *Touzis* Nos. 208, 1515 and 1124 of the 24-Perganas Collectorate, which are owned by the plaintiff. In 1901 one Brojendra Kumar Ghose applied to the Collector for shifting the embankment, so that a greater area might be protected, and he also proposed that the new embankment should be provided with sluices through which the area protected might be properly drained. It appears that the Collector took action on the application and the construction of the present embankment was started on the basis of a notification which is dated August 11, 1903. The notification runs as follows:

"The Lieutenant-Governor having considered the report and the Board's recommendation of the project, is pleased to order under s. 14 of the Act, that the embankment in question shall be removed and a new one with two drainage sluices constructed in its place at an estimated cost of Rs. 68,151 in accordance with the plan by the Executive Engineer."

Later on in 1907 by another notification the Govt. ordered that a portion of the original Sch. 'D' embankment should be removed from the Sch. 'D'. Under s. 43, Embank. Act, the Govt. is competent, at any time, to direct by notification published in the *Official Gazette*, that any embankment not mentioned in Sch. 'D' be included therein, and the provisions of the section shall apply in that case to such embankment. It is not disputed that in the present case, there was no such notification issued by the Govt. under s. 43. Mr. Bose on behalf of the appellant lays stress upon the words "in its place" which occur in the Govt. notification mentioned above. I am unable to accept his contention as sound. It is a new embankment altogether raised on a perfectly new site. The mere fact that it replaced a Sch. 'D' embankment does not necessarily mean that it must be included in the Sch. 'D' without any further notification. In my opinion, the words "in its place" used in the notification of August 11, 1903 meant nothing more

than that the new embankment was intended to serve the same purpose as was served by the old embankment. As in my opinion, it is not a Sch. 'D' embankment, it is not necessary for the Govt. to rely upon s. 18 of the Act to realize its costs from private proprietors and it is not necessary for us to consider the question as to whether or not the area is a prohibited area within the meaning of s. 6. The next question raised by Mr. Bose is that under s. 42, Embank. Act, the Collector could have apportioned or charge the costs of repair only on lands not protected by the old embankment; but in the present case he has imposed the costs upon the entire lands of the three *touzis* including lands which were protected by the old embankment. The Courts below have overruled this point by saying that there was no evidence to show that the Collector has apportioned the costs on lands not liable to be charged. Mr. Bose has taken exception to this finding and he has placed before us several pieces of documentary evidence which would have a bearing on the point as to whether or not the lands protected by the old embankment were included in the present case.

It seems to me that there is some substance in the argument of Mr. Bose. But even if that be so, I do not think that this is a question that can be enquired into by a Civil Court. The order of the Collector was passed under s. 68, Embank. Act, and it was open to the plaintiff to take an appeal against that order to the Commissioner as provided for in s. 84. There are also powers of general control and supervision vested in the Commissioner and the Govt. as provided for in s. 85 of the Act; and it is expressly laid down in s. 86, that subject to the provisions mentioned aforesaid, the order passed by the Collector under s. 68 shall be final. Mr. Bose contends that the Civil Court would have jurisdiction if the order of the Collector was *ultra vires*. But the whole question is whether it would be *ultra vires* simply because the Collector apportioned costs on certain lands which he should not have done under the provisions of the Act. In my opinion, this may be at the most an erroneous decision or an irregular exercise of the jurisdiction which the Collector undoubtedly possessed, and in no sense it can be said to be a usurpation of jurisdiction by the Collector which would make the order a nullity or without jurisdiction. I am unable

therefore to accede to this contention raised by Mr. Bose.

Mr. Bose then argues that his client could not have preferred an appeal to the Commissioner, or taken the matter before the Board of Revenue because he did not receive any notice prior to the apportionment order under the provisions of s. 56 or s. 57 of the Act. In my opinion, a notice under s. 56 or s. 57 is a condition precedent to creation of liability of the proprietor or the tenure-holder as the case may be under the Ben. Embank. Act, and unless and until due publication or service of the notice is proved the very foundation of the liability is taken away. In this particular case, the question of notice was certainly raised by the plaintiff in his plaint, and he denied that he received any notice preparatory to the passing of the apportionment order by the Collector under s. 68. This allegation was traversed by the defendant in the written statement. The trial Court observed in its judgment that from the evidence it appeared that every attempt was made by the Collector to have the notice served and to act according to law, but whether that notice was served in the proper manner or not was a question of fact into which the Judge did not think it proper to enter. It is difficult to appreciate this part of the judgment of the Special Subordinate Judge, and the question does not seem to have been discussed at all by the lower Appellate Court.

Mr. Mukherjee points out that this question was not raised in this specific manner before the Courts below. All that was said was that the order of amalgamation of costs made by the Collector was wrong in law. It may be that the question of notice was really argued as part of this other argument, but in point of fact, the question does appear to have been raised before the trial Court, and the evidence bearing upon it was considered. Now, from the evidence, as it appears on the record, I find that the costs of embankment which the Govt. sought to recover from the plaintiff are the costs of repairs of several years from 1917 to 1925. It is not disputed before us that for each particular repair there must be a notification upon the parties interested, their objection must be heard, and then only could an order of apportionment be passed by the Collector under the provisions of s. 68. What appears to have been done here is this: there were two proceedings, one of the year 1921-22 and another of the year 1924-25. In the first of these pro-

ceedings an order was passed not only for the costs of that particular year but of four previous as well. Similarly in the proceedings of 1924-25 the costs of two previous years were added to and amalgamated with the costs which were incurred in that year. If there were really separate proceedings in respect of separate repairs and notifications were duly issued in respect of all of them in compliance with the provisions of the Act, the mere order of amalgamation would be a purely formal matter which could not injure any party, and could not be regarded as illegal. But what is pointed out here is, that there is no evidence to show that there was notification issued in respect of the costs of repairs of the four years previous to 1921-22 or two years prior to 1924-25. The order sheet, (Exs. D and D-1) and also the notices (Ex. E series) seem to support this contention on behalf of the appellant. They all refer to the notices issued in respect of the costs incurred in the years 1921-22 and 1924-25. There is no material whatsoever from which it could be gathered that there was any notice in respect of the costs of the earlier years.

Mr. Mukherjee raises the objection that this is a new point which was not raised in either of the Courts below, and the appellant should not be allowed to make out a new case for the first time in second appeal. But I think as there was a general denial of the service of notice in the plaint, it would be incumbent upon the defendant before he can fasten the liability upon the plaintiff to prove that there was notification issued in pursuance of the provisions of the Act, which was a condition precedent to create the liability so far as the present plaintiff was concerned. Of course, if there was no evidence adduced on the side of the plaintiff, the order sheet and the notices would be *prima facie* sufficient to discharge the burden on the defendant. But here it is pointed out by Mr. Bose that neither the order sheet nor the notices mention the name of the present plaintiff, and it does not show that any notice was issued or served on him. At any rate, these papers do not show that there were notices issued upon the parties interested in respect of the costs incurred in years other than the years 1921-22 and 1924-25. In my opinion, this is a matter which requires investigation and in the circumstances, I am constrained to set aside the judgment and decree of the lower Appellate Court and send the case back to that Court in order that the

appeal may be re-heard on this point alone. The Appellate Court will consider as to whether there was proper service of notice under s. 56, Embank. Act, upon the plaintiff, for the years that the embankment costs are sought to be recovered from him, and come to a decision on the evidence adduced. It would be open to him to ask the parties to adduce additional evidence on the point, if it thinks desirable. If the lower Appellate Court holds that there was due service of notice the decree of dismissal made on the previous occasion will stand. If, on the other hand, it is found that there was no service of notice for all or any of the years the plaintiff will be entitled to a declaration that the costs of those years are not realizable from him. There will be no order for costs of this appeal. Future costs will abide the result.

Latifur Rahman, J.—I agree.

s.

Order accordingly.

BHOPAL HIGH COURT

Civil Revision Petition No. 60 of 1939

February 6, 1939

MOHAMMAD AHMAD KHAN, C. J.

ISHAQUE ALI—PLAINTIFF

—PETITIONER

versus

ABDUS SAMAD—DEFENDANT

—RESPONDENT

Jurisdiction Small Causes—Nature of small cause suit—Suit for fixed amount—Defendant's plea giving rise to settlement of accounts—Nature, if changed—Suit against agent for value of tickets received and not accounted for is cognizable by Small Cause Court—Small Cause Courts Act (Bhopal).

The essential nature of a suit for accounts is that therein the plaintiff does pray for a decree for a fixed sum of money, but only wants rendition of account by the defendant followed by a decree for the amount found due. Such suits are excluded from the purview of Small Cause Courts Act. But a suit which is essentially of small cause nature does not change its character merely because the defendant has chosen to raise a plea of account. It is possible that even in claims for a fixed amount the defendant's plea might some time give rise to the necessity of settlement of account, but this alone would not convert a suit for a fixed sum into a suit for account. Even if the Court has to go into the parties' account to a certain extent, the jurisdiction of Small Cause Court is not ousted. A suit against an agent for value of goods received and not accounted for by him would lie in a Court of Small Causes.

The plaintiff had given to the defendant a number of admission tickets in connection with a wrestling match to be sold on commission. The defendant sold these tickets to the public and pocketed all the money realized thereby. Thus the plaintiff neither got any unsold tickets back from the defendant, nor any

money on account of such tickets as were disposed of. The price of the tickets was fixed and their number was in dispute. The plaintiff brought a suit in Small Cause Court to recover full face value of the total number of tickets :

Held, that the suit was cognizable by the Court of Small Causes. *Konduru Runga Reddi v. Subbiah Setty* (1), 21 Ind. Cas. 761 (2) and 20 Ind. Cas. 518 (3), relied on.

O. R. of an order of the Judge, Small Cause Court, Bhopal.

Syed Mohammad Ali, for the Respondent.

Order.—This is a plaintiff's application praying for revision of an order passed by Judge Small Causes Court, Bhopal directing the plaint to be returned for being filed in the proper Court, and holding that the suit was not cognizable by Small Causes Court. It is contended on behalf of the plaintiff that the suit as framed was of the nature of the small cause as defined by law and the lower Court has acted with material irregularity in returning the plaint merely because the defendant had pleaded that the suit was really one for account and as such was triable as a regular suit. The facts on record disclose that the plaintiff had given to the defendant a number of admission tickets in connection with a wrestling match to be sold on commission. The defendant sold these tickets to the public and pocketed all the money realized thereby. Thus the plaintiff neither got any unsold tickets back from the defendant, nor any money on account of such tickets as were disposed of. This suit has been filed against the defendant as an agent for the return of goods consigned or the value thereof. The price of the admission tickets was fixed and their number is also not in dispute. The defendant was obliged either to return the unsold tickets or to pay the face value thereof after deducting his commission. On these facts the nature of the suit really depends and we have to see whether the plaintiff's suit was cognizable by the Court of Small Causes or not. The Small Cause Courts Act has excluded from its purview all suits relating to settlement of accounts between the parties. The essential nature of such a suit is that therein the plaintiff does pray for a decree for a fixed sum of money, but only wants rendition of account by the defendant followed by a decree for the amount found due. In the present suit the plaintiff has sued the defendant for the full face value of the total number of admission tickets delivered to him for the simple reason that the defendant has failed to

return to the plaintiff any tickets which were left unsold. If the defendant pleaded that all the tickets were not sold, still on his own plea he was obliged to pay the price of all such tickets as were sold by him after deducting his commission, returning at the same time the balance of original tickets that had remained unsold. Thus it appears that the plaintiff's claim was practically for a fixed sum of money and is not one for account. It is possible that even in claims for a fixed amount the defendant's plea might some time give rise to the necessity of settlement of account, but this alone would not convert a suit for a fixed sum into a suit for account. It is a settled principle that a suit which is essentially of small cause nature does not change its character merely because the defendant has chosen to raise a plea of account. Even if the Court has to go into the parties' account to a certain extent the jurisdiction of Small Cause Court is not ousted. This principle has been approved in *Konduru Runga Reddi v. Subbiah Setty* (1). Again it is not necessary to treat every case between a principal and an agent involving some accounts as one out of the purview of the Small Cause Courts Act. In a Madras case reported in *Malaya Pillai Nadan v. Venganan Chetty*, 24 Ind. Cas. 764 (2) it was held that a suit against an agent for value of goods received and not accounted for by him would lie in a Court of Small Causes. Similarly if an agent misappropriates any sum of money collected by him on behalf of his principal, the suit would lie in a Court of Small Causes *Varadarajulu Chettiar v. Pattra Narayanaswamy Chetty*, (20 Ind. Cas. 518) (3). In the present suit the plaintiff and the defendant hold the capacity of principal and agent and the suit being one for a fixed amount representing the full face value of the admission tickets was not a suit for account. The order of the lower Court in returning the plaint is not in accordance with law. It is therefore ordered that the revision petition of the plaintiff be accepted, the lower Court's order set aside, and the plaint be returned for being registered as a small cause suit for decision according to law. Costs of this petition shall be paid to the plaintiff applicant by the defendant respondent who shall bear his own costs.

B.

(1) 28 M 394.

(2) 24 Ind. Cas. 764; A I R 1914 Mad 100; 1 L W 180.

(3) 20 Ind. Cas. 518; 14 M L T 46; 24 M L J 693; (1913) M W N 879.

*Petition accepted.***MADRAS HIGH COURT**

Criminal Appeal No. 548 of 1939

December 6, 1939

BURN AND MOCKETT, JJ.

EMPEROR—PROSECUTOR

versus

DEYYAM CHINNAYYA—PRISONER

—ACCUSED.

Criminal trial—Confession—Murder—Accused confessing but introducing in it circumstances to avoid conviction for murder—Evidence showing and Court satisfied that violence amounted to murder—Accused can be convicted of murder on his confession.

Where an accused confesses to having caused the death of a woman and admits having robbed her after death but, during that confession he introduces into it circumstances with a view to excuse himself from a conviction for murder, and it is clear from the medical evidence and the Court is satisfied that the woman lost her life not in the least in the manner described by the accused but that by violence to the neck and pushing of the cloth into her mouth by the accused, the violence amounts to murder and the accused can be convicted of murder upon his confession.

Trial referred by the Court of Session of the Vizagapatam Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 39 of the Calendar for 1939 on September 29, 1939.

The Public Prosecutor, for the Crown.

Mr. D. Narasaraaju, for the Accused.

Mockett, J.—The accused has been convicted and sentenced to death by the learned Sessions Judge of Vizagapatam for the murder of a woman Lakshmikantham described by some witnesses as a dancing girl, by her uncle as a prostitute. There is no doubt that on May 29, 1939, she was alive. She met her death by violence unquestionably and the only point we have to consider in this case is whether it is proved that that violence which unquestionably came from the hands of the accused was such that it can be said that Lakshmikantham was murdered by the accused.

The evidence can be very shortly summarised. On the discovery of the murder the local Police who obviously had information took steps to trace the suspected person who had gone in the direction of Narasannapet. P.W. No. 9 a *jutka* driver gave evidence to the following effect. He said that he heard of the death of the dancing girl on Tuesday at about noon and that the accused had come to him on the previous Sunday. He came to hire his *jutka* to take him to Narasannapet. He was to start on Monday i.e. May 29, the date on which this woman lost her life. But he did not come on that day. P. W. No. 9 met

him in the bazar and complained that he had lost engagements by waiting for him. The accused said he would start at 3 A. M. on Tuesday and in fact he came to P. W. No. 9 at 5 A. M. on Tuesday. They started at 5 o'clock and drove to Satyavaram which is 20 miles from Tekkali, reaching that place at 7-30 A. M. At Satyavaram the accused after making excuses went into the village, without making immediate payment of his fare. Then P. W. No. 9 becoming apprehensive followed him and the accused had to concede that he had no money. But he gave to P. W. No. 9 as security a bangle which has been marked M. O. II-a in this case and which has been identified as belonging to the deceased. P. W. No. 9 drove back to Tekkali but at Narasannapet he learnt that the Police were making enquiries for a red *jutka* and white horse which was the description of his own. He found the Police and learned that they were investigating a case of murder of a dancing girl. He handed over the bangle to someone in the Police Station at Narasannapet. There is a slight discrepancy as to whether he handed it over in the presence of the Circle Inspector or the Sub-Inspector as he said at the Sessions or whether when he handed it over they were not present as he said in the lower Court. In our opinion in this case this discrepancy is totally immaterial. But he did hand over the bangle and went with the Police towards Urlam which is 8 miles off. There they saw the Narasannapet Police chasing a man who was caught at the village of Mathalapuvanipata which is near Urlam and when he was caught he had on him M. Os. Nos. II, III, and III-a and IV which are jewellery and ornaments belonging to the deceased. Now in this case we have not to enquire whether there is any question as to whether these jewels did belong to the deceased and as we have already indicated we have not to enquire as to whether the deceased met her death at the hands of anyone else other than the accused, because both these matters are set beyond all doubt by a confession made before the Magistrate by the accused and which has been marked Ex. D. After the most elaborate warning the accused made the following statement:

"A week back on a Sunday night I went to the house of the dancing girl Nelluru Lakshmikantham at Tekkali. As per the condition of the night's engagement I paid her Rs. 4. When I woke up at day break at 4 o'clock and when I was ready to come out, she demanded a rupee alleging that I owed her previously. There upon we both quarrelled. She beat me with a fan when I was coming

out. She caught hold of my waist cloth. I put my hand on her shoulder and pushed her saying, "do you leave it or not".

She caught hold of my testicles. Thereupon after putting my hand upon her neck I pressed her hard against the cot and pushed her. The frame of the cot struck against her neck and she appeared like a person dying. The mouth was opened. I removed from her person all the jewels i.e., three pairs of gold bangles, a garland of gold miriyalu (gold balls) a gold Puducher inanu with Jigini and put them in my pocket and came out. I went to the house of the *jutkawala*, engaged the *jut* and reached Satyavaram by 7 o'clock in the morning. I got down there. I went to Dukalapadu from there. The Circle Inspector of Police of Chicacole and some others caught hold of me on the way. The Taluk Magistrate was satisfied that that confession was voluntary and made with due appreciation of what was said and of the consequences. So it will be seen that the accused admits possession of the jewels which has been also proved by the evidence of other witnesses for instance P. W. No. 20, who describes how they were in the accused's possession. P. W. No. 2 identifies the jewels as belonging to the deceased. It will be seen also that the accused describes how he used violence to the deceased. He has before the learned Sessions Judge repudiated this confession. Before the Magistrate he said that he did not commit the offence, that the Circle Inspector and others caught hold of him unnecessarily on the Urlam road, when somebody put these jewels in his hand and that he confessed owing to the Circle Inspector threatening to beat him. Before the learned Sessions Judge he stated as follows:—

"I came on May 29, 1939, Tuesday, in a Chicacole bus from Ranasthalam to Chicacole. I engaged a *jutka* at Chicacole and went to Dukalapadu and other places to purchase yarn. I went to Bhadrappa's house at Dukalapadu and asked him for fresh water and stood there after drinking the water. The Police came, thrust the jewels into my pocket and beat me in order that I should confess the crime. The Sub-Inspector and others told me to make a confession of crime before the Magistrate also. In the interval the Magistrate gave me time to think the matter. Head Constable and others came to me and said that if I did not make a confession I would be beaten. While I was making the confession two Constables watched at me through a window with sticks in their hands. I made the confessional statement for fear that they would beat me. I know nothing about the offence."

He was asked why the Circle Inspector should have met him in the neighbourhood and thrust the jewels into his pocket to which he replied.

"I cannot give any reason. But a purse containing Rs. 30 was taken from my pocket and these jewels tied in a cloth were put into my pocket".

The evidence of the Deputy Tahsildar who was the Magistrate for the purpose of this confession was clear that he kept the accused in a separate cell after being warned and in cross-examination no attempt was made to put to the witness the case for the defence. It may be said that there is a bare hint that the accused might have been accessible, but the suggestion that between the warning by the Magistrate and the actual confession he was under Police influence was never pressed home: no doubt for the reason that, as we are quite satisfied, the suggestion is wholly baseless.

We are asked by the learned Counsel for the appellant to say that this confession as it stands is not a confession of murder, when it must be accepted as it is and that therefore on the evidence before us it is not possible to convict this man of murder. That is a proposition which is wholly unacceptable and is contrary to practice and authority. The circumstances must be taken as a whole. What are the circumstances here, A man confesses to having caused the death of a woman and admits having robbed her after death. But during that confession he introduces into it circumstances with a view no doubt to excuse himself from a conviction for murder. Now in those circumstances it is obvious that the most vital evidence in the case is the evidence of the Medical witness P. W. No. 1. He is the Medical Officer in charge of the Tekkali Hospital. He received the body for the purpose of *post mortem* examination at 2-30 on the 30th and he gave a *post mortem* certificate. Before dealing with this evidence it will be convenient to examine that certificate Ex. A. He found injuries on this woman. There were a nail mark on the right side of the neck, four nail marks or marks resembling nail marks on the left side of the neck, bruises on the left side of the upper lip and the right leg near the knee, but the most significant of all perhaps was that in this woman's mouth between the teeth and against the tongue was thrust a small shirt which was firmly caught between her teeth and was removed with difficulty. It had been pressed in such a way that the tongue was pressed and pushed back. The cloth was stained red and on removal there was a discharge of reddish froth. It is not surprising perhaps

in these circumstances and having regard also to the condition of the lungs, to say that the opinion as given in the *post mortem* certificate was that "the deceased would appear to have died of Syncope, probably the result of throttling." In his evidence the Doctor is quite definite, he says, in his opinion the deceased died of Syncope, the result of throttling. And he again describes, as he did in his *post mortem* certificate what he found. Now in cross-examination certain questions were asked to suggest apparently that this cloth could have been put into this woman's mouth when she was asleep, though what the relevance of these questions is we find it difficult to understand. In re-examination he stated if the victim was seized by the throat first she would be powerless to resist the introduction of the cloth into the mouth. So possibly questions were put in order to suggest that the cloth was inserted into this woman's mouth when she was asleep. It will be observed that in the confessional statement of the accused there is no mention whatever of the cloth. The accused says,

"Thereupon after putting my hand upon her neck I pressed her hard against the cot and pushed her. The frame of the cot struck against her neck and she appeared like a person dying."

The suggestion apparently being that in this struggle she lost her life from a blow on the back of the neck. There is nothing in the cross-examination of the Doctor to suggest that explanation and the evidence of the Doctor is wholly inconsistent with it. It is clear from his evidence and we are quite satisfied that this woman lost her life not in the least in the manner described by the accused but that she was throttled, that a cloth was stuffed into her mouth and from those causes—violence to the neck and this pushing of the cloth into her mouth—she died and there can be no doubt whatever that that violence was done in circumstances that must amount to murder. If there had been any doubt which there is not, the fact that this man afterwards robbed her of her jewellery is of the utmost significance. The learned Judge came to this conclusion and with that conclusion we entirely agree. The appellant was guilty of murder and nothing else and in the circumstances the sentence passed upon him could be the only sentence. We confirm both the conviction and sentence and dismiss the appeal.

Before parting with this case we should like to express our appreciation of the

detection work in this case by the Police Officers responsible. It will be noticed that this murder occurred during mid-night of 29th-30th, and that early in the morning of the 30th the Police were engaged in making investigation at a long distance from Tekkali and successfully arrested the accused a little further off on the same day. We have no doubt that our observations will be brought to the notice of the superior officer of the officers concerned.

N.-S.

Appeal dismissed.

PATNA HIGH COURT

Appeal from Appellate decree No. 158 of 1939

February 6, 1940

ROWLAND AND CHATTERJI, JJ.

MATHURA SINGH AND OTHERS—PLAINTIFFS

—APPELLANTS—

versus

PALAKDHARI RAI AND OTHERS—

DEFENDANTS—RESPONDENTS

Deed—Construction.—Precedents, value of—Mortgage—Hypothecation of property to secure only interest—Money decree for amount of principal—Limitation Act (IX of 1908), s. 20, sub-s. 1, proviso—Proviso applies to sub-s. (1) only.

It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms expressed by them. 177 Ind. Cas. 533(1), relied on.

Where the executant (defendant) mortgages and hypothecates the lands in favour of the plaintiff not for payment of the principal but to secure payment of the interest on it and the payment of principal is not secured on the land, the plaintiff would be given a money decree for the amount of principal.

It was not the intention of the Legislature in enacting proviso to sub-s. 1 of s. 20, Lim. Act to abrogate the long-established and traditional practice by which a mortgagee in possession of land is deemed to be in receipt of interest and to have a fresh start of limitation from the period when his possession ceases and in this view the proviso was intended to apply to the first sub-section and not the second sub-section of s. 20.

A. from a decision of the Subordinate Judge at Monghyr, dated September 19, 1938.

Messrs. S. M. Mullick and Sarjoo Prasad, for the Appellants.

Messrs. S. N. Bose and N. N. Ray, for the Respondents.

Rowland, J.—This appeal arises out of a suit by the plaintiff-appellant to recover money advanced to defendant No. 1 as a loan. The advances amounted to Rs. 1,200

and the first defendant executed two *sudhbharna* deeds for Rs. 400 and Rs. 800 respectively on February 14, 1924. It was the plaintiff's case that he was put into possession of the mortgaged properties, but was dispossessed on July 26, 1934 by the defendants first party and defendants second party. The defence of the principal defendants was that actual possession of the land was with defendant No. 1 who made over to the plaintiff the produce thereof to the extent of 48 maunds of paddy annually to the plaintiff. It does not seem necessary to decide whether upto 1341 the plaintiff was in physical possession or in constructive possession by receipt of profits from defendant No. 1 who held under him. The plaintiff's case was that in 1342 the defendant No. 1 and others dispossessed him and this has been negatived by the Courts who hold that the plaintiff is still in constructive possession. That being so, the question arises whether the plaintiff can sue for his money, which was the form in which the claim was laid at first or alternatively for sale of the mortgaged property which was an additional prayer in the alternative added at the appellate stage. The point turns on whether there is a personal covenant to repay. We have been shown some authorities by both sides, but as pointed out by Wort. A. O. J. in *Raj Kumar Bharthi v. Surajdeo Sahi* (1): "It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken, and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms expressed by them."

In these two documents which are similar in their provisions there is an express promise that :

"I (the executant) on paying up the said amount of principal in full in one lump sum in the month of *Jeth* 1334 *Fasli* and getting the endorsement of payment made on the back of this *sudhbharna rehan* deed by the said creditor shall take back this land."

That appears to be a plain promise to repay. Then the hypothecation clause is curious. The executant mortgages and hypothecates the lands in question not for payment of the principal but to secure payment of the interest on it. So far as appears from the documents themselves, the payment of principal is not secured on the land. That being so, I see no objection to giving the plaintiff a money decree for the amount of principal which he claims subject to limitation.

(1) 19 P. L. T. 777; 177 Ind. Cas. 533; 11 R. P. 154; 4 B. R. 834; A. I. R. 1938 Pat. 555; 17 Pat. 737.

As regards interest, the bond stipulates that no interest shall be payable so long as the plaintiff is in possession of the land. Therefore, there is no cause of action for interest up to the date of suit and if the plaintiff has any grievance with regard to non-delivery of produce of the land which he has sub-let to the defendants, then that would be a separate cause of action.

Finally we have to consider the question of limitation which is raised on behalf of the respondent. The due date of payment of the one bond was about June 1926 and of the other June 1927. The suit was instituted in May 1937. The bond was a registered one. It is contended that the period of six years' limitation bars the suit; but the appellant relies on sub-s. 2 of s. 20 of the Lim. Act under which :

"Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-s. (1)"

Mr. Bose for the respondent refers to the proviso to sub-s. 1 of s. 20 which was inserted by the amendment of 1929. His contention is that this proviso applies to the whole of the section, whereas for the appellant the contention is that it applies only to sub-s. 1. It does not seem to us that the intention of the Legislature in enacting this proviso was to abrogate the long established and traditional practice by which a mortgagee in possession of land is deemed to be in receipt of interest and to have a fresh start of limitation from the period when his possession ceases and in that view I am of opinion that the proviso was intended to apply to the first sub-section and not the second sub-section of s. 20, so that the suit is not barred by limitation. In my opinion the plaintiff-appellant was entitled to a decree for the principal amount claimed and should get interest from the date of suit up to the date of decree at six per cent. simple and thereafter interest on the whole amount at 6 per cent. The decree will be against defendants Nos. 1 to 6 only with costs proportionate to his success. The defendants Nos. 2 to 6 being the sons and grandsons of defendant No. 1 are liable to the extent of their interest in the family property.

Chatterji, J.—I agree.

D.

Order accordingly.

ALLAHABAD HIGH COURT

Second Appeal No. 117 of 1937

September 13, 1939

BENNET AND VARMA, JJ.

ASHARFI LAL AND ANOTHER—

PLAINTIFFS—APPELLANTS

versus

ZAMIR FATIMA BIBI AND OTHERS—

DEFENDANTS AND OTHERS—PLAINTIFFS—

RESPONDENTS

Mortgage—Mortgage by conditional sale—Conditions which the parties desire to express in regard to term—Redemption—Limitation—Mortgage before 1882—Limitation for redemption—Statutory right under Bengal Regulations I of 1798 and XVII of 1806—Redemption suit brought more than 60 years—Applicability of Art. 148, Limitation Act (IX of 1908)—Agreement that mortgagor may redeem within stipulated time, validity—Construction—Principles—Limitation—Law in force before 1877—Limitation Act (IX of 1908), s. 3—Act, if draws distinction as to whether cause of action arose with regard to document before 1877 or after it.

In a simple or in a usufructuary mortgage, the conditions which the parties desire to express in regard to a term will be different from the conditions which the parties desire to express in a mortgage for conditional sale. In the latter mortgage one of the points which the parties desire to express is the period when foreclosure will arise and another point which they desire to express is within what period redemption is to be allowed. There is no reason to make these two periods the same and the natural agreement would be to allow redemption up to a certain date, and if not made by that date then to allow the right to foreclosure to begin. No such points arise in a simple mortgage; and in a usufructuary mortgage the important point is that the usufructuary mortgagee desires to hold possession for a certain time in order that he shall have the benefit of such a period. [p. 489, col. 1.]

In case of a mortgage by conditional sale executed before 1882, (before T. P. Act), the mortgagor has a statutory right under Ben. Regs. I of 1798 and XVII of 1806 to redeem within any stipulated period provided in the deed. Therefore, even if there had been only a period of 2 years in the deed, the statutory right existed by which the mortgagors can have redeemed from the date of execution and the suit for redemption brought more than 60 years would therefore be barred by the period of limitation under Art. 148 of the present Lim. Act. [p. 490, col. 1.]

[Case-law referred to.]

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of this specified period, but there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of a mortgagor. 23 Ind. Cas. 355 (6), relied on. [p. 489, col. 2.]

In each case the Courts must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was. One deed cannot be interpreted in the light of the language used in other deeds. [p. 491, col. 2.]

It is not correct to say that because the first Lim. Act was not introduced until 1877 there was no law

of limitation in force in 1872. There was a law of limitation laid down in s. 14 of Regn. III of 1793 which provided a period of 12 years for the cause of action for any suit.

The Lim. Act, does not make any distinction as to whether the cause of action arose in a suit in regard to a document before or after 1877. The Act says clearly that every suit instituted after the period prescribed therefor shall be dismissed. [p. 488, col. 1.]

S. A. from the decision of the Additional Civil Judge, Allahabad, dated September 18, 1936.

Messrs. Gopi Math Kunzru and Gopalji Mehrotra, for the Appellants.

Mr. Mukhtar Ahmad, for the Respondents.

Bennet, J.—This is a second appeal by the plaintiffs whose suit for redemption was decreed by the trial Court but dismissed by the lower Appellate Court on the ground that it was time-barred. The question of limitation is the only one raised in this second appeal. The plaintiffs sued for redemption of a mortgage by conditional sale executed on August 7, 1872. The relevant clause for the purpose of limitation in this deed is as follows:

Bawas mubligh 1203-16 maskura bala ke rehan miadi do sal yani bai bilwafa kar diya wa tamam wa kamal sare saman apna murtahinse wasul paya ab dame wa dirame yaftani mera atimme murtahin ke baqi nahin hai aur igrar yeh hai ki andar do sal ke jab rupya mahina Sawan men naqd yekmusht ada karden tab us sal jaedad haqiqat apni fak rehan kara lewen aur agar andar do sal ke rupya ada na ho to bad do sal ke yeh bai bilwafa bai kamil hojaega our murtahin malik mustaqil shai markhuna ka hoga.

The trial Court interpreted this mortgage to mean that redemption could not take place until the period of two years had expired, i. e., on August 7, 1874. The suit was brought on August 7, 1934 and was therefore according to the trial Court within 60 years of the date when the right to redeem first accrued. Article 148 of Sch. I, Lim. Act, states that for a suit against a mortgagee to redeem or recover possession of immovable property mortgaged, the period of limitation is 60 years and, the period begins to run from the time "when the right to redeem or to recover possession accrues." On the other hand, the lower Appellate Court held that the clause quoted gave a right to redeem prior to 1874 and that therefore the period of 60 years in Art. 148 had begun to run from 1873 and had expired in 1933 and therefore the suit in 1934 was time-barred. The expression used by the Court below is that the right to sue will begin to run from

the first year of the mortgage. The actual date in the mortgage of August 7, 1872 has been ascertained by learned Counsel for the appellants to correspond to *Sawan Sudi 13, Sambat 1929*, i. e., it is the 13th day of the month of *Sawan* in this year. There therefore remained 17 days in that month of *Sawan* in 1872 and if the interpretation adopted by the lower Court is correct then redemption could have been effected in the 17 days of the month of *Sawan* in the year 1872 or in the month of *Sawan* in the year 1873 and also in the month of *Sawan* in the year 1874. On the other hand, the interpretation of the learned Counsel for the appellants is that there could not be redemption until the expiry of two years and as redemption could have first taken place on August 7, 1874 the suit which was brought on August 7, 1934 was within the period of 60 years. Learned Counsel at first based his argument on the provisions of s. 60, T. P. Act, (Act IV of 1882), and his argument was that this section lays down the law in regard to redemption for mortgages generally and therefore covers the mortgages by conditional sale which are defined in s. 58, sub-s. (c) of that Act. Section 60 states:

"At any time after the principal money has become payable the mortgagor has a right of payment or tender at a proper time and place of the mortgage money to require the mortgage..."

His point was that redemption was at any time after the principal money has become payable. He further argued that in the amendment of the T. P. Act by Act XX of 1929 the word "payable" had been replaced by the word "due" and therefore he argued that this alteration should be considered to have the effect that the right to redeem and the right to foreclose should be co extensive and should run from the same point in time. Now whatever the merits of this contention are, there is a serious difficulty in the application of this argument to the present case. In the T. P. Act (Act IV of 1882), s. 2 provides:

"But nothing herein contained shall be deemed to affect.....(c) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability."

The present suit is based on a mortgage executed in 1872 which was long before the T. P. Act came into force in 1882. Therefore the rights of the parties should be interpreted in accordance with the law on the subject which was in force in the

year 1872 and not in accordance with the later law laid down in Act IV of 1882. The Schedule of the T. P. Act shows that there were repealed certain Regulations in regard to conditional sales and redemption, namely, Beng. Regn. I of 1798 and Beng. Regn. XVII of 1806 and in each case the whole Regulation was repealed. Therefore those Regulations had been in force up to 1882 and were in force in 1872. Now turning to these Regulations, Regn. I of 1798 in the Preamble states:

"It has been long a prevalent practice in the Province of Behar to borrow money on the mortgage and conditional sale of landed property under a stipulation that if the sum borrowed be not repaid (with or without interest) by a fixed period, the sale shall become absolute. This species of transfer has in the above Province been usually denominated *bye bilwafa*."

In s. 2 it is provided:

"In all instances of the loan of money on *bye bilwafa* or on the conditional sale of landed property as explained in the Preamble to this Regulation however denominated the borrower who may be desirous to redeem his land by the payment of the money lent upon it with any interest due thereon within the stipulated period, is at liberty on or before the date stipulated either to tender and pay to the lender the amount due to him, taking such precautions as he may think necessary to establish such tender and payment, if evaded or denied, or without any tender to the lender to deposit the amount due to him, on or before the stipulated date in the Dewanny Adawlut of the City or Zillah... and if the land be in the possession of the lender shall entitle him to demand the immediate recovery thereof."

This present mortgage is stated by the Courts below to be a *rehan bye bilwafa* and this point is not contested. The statutory provision in s. 2 of Regn. I of 1798 states that whatever the conditions are, "however denominated," the statutory right exists for the lender on or before the date stipulated to make payment and obtain recovery of his land. The exact provision therefore in the document cannot override this statutory right. In Regn. XVII of 1806 s. 7 made a further provision in regard to redemption which was stipulated to be additional to the provision in Regn. I of 1798. This s. 7 states:

"In addition to the provisions made in Provinces of Bengal, Behar, Orissa and Benares by Regn. I of 1798, and in the ceded and conquered provinces by Regn. XXXIV of 1803 for the redemption of mortgages and conditional sales of land under deeds of *bye bilwafa*, *kutubaleh* or any similar designation, it is hereby provided that when the mortgagee may have obtained possession of the land on execution of the mortgage deed, or at any time before a final foreclosure of the mortgage the payment or established tender of the sum lent under any such deed of mortgage and conditional sale or of the balance due if any part of the principal amount shall have been discharged, or when the mortgagee may not

have been put in possession of the mortgaged property the payment or established tender of the principal sum lent, with any interest due thereupon, shall entitle the mortgagor and owner of such property or his legal representative to the redemption of his property."

This Regulation therefore extended the period for redemption to any time before a final foreclosure of the mortgage. In this connection an argument may be noted by learned Counsel on behalf of the appellants that because the first Lim. Act was not introduced until 1877 there was no law of limitation in force in 1872. This appears to me to be incorrect, because there is a law of limitation laid down in s. 14 of Regn. III of 1793 which provided a period of 12 years for the cause of action for any suit. It is true that in a number of cases which have been shown to us these Bengal Regulations have not been quoted, but as they were in force until repealed by T. P. Act in 1882 it appears to me that they govern the present case and that quite apart from any interpretation of the particular clause in the mortgage deed before us the statutory right of redemption arose prior to the period of two years stated in the document and that the mortgagor had the right to redeem on any day from *Sawan* 13, 1872 and as his period of limitation was 60 years from the accrual of his right of redemption his suit would be barred in 1934. The next point is what is the meaning of the particular words in the clause. No doubt the first part of the clause in question does state that there is a mortgage by conditional sale for a period of two years, but this is followed by the particular clause which gives a right to pay in the month of *Sawan* within two years and on such payment from that year the property will be redeemed. Then follows the clause to the effect that if within two years there is no redemption then the mortgage by conditional sale will become an absolute sale and the mortgagee will become the permanent owner. No doubt the mortgagee could not become a permanent owner without a suit for foreclosure but that point does not arise in the present case as the question is whether a suit for redemption is or is not time-barred by Art. 148, Lim. Act. It appears to me that the right of the plaintiffs to redeem began in 1872 and was subject in the first place to the bringing of a suit for foreclosure by the mortgagees which could have been brought any time from August 7, 1874 onwards. Such a suit would have terminated the right of the plaintiffs or their predecessors to redeem.

The right of redemption was also subject to the law of limitation and in the present instance the law of limitation has been applied by the Court below with the finding that the suit of the plaintiffs was time-barred.

An argument was made by learned Counsel for the appellants that their right to redeem had accrued in 1874 and that it was a substantial right and having accrued to them should not be affected by limitation which according to him began with the first Lim. Act of 1877. Now this argument is entirely contrary to what is laid down in s. 3, Lim. Act of 1908, which provides that "every suit instituted... after the period of limitation prescribed therefor by Sch. I shall be dismissed." The Lim. Act does not make any distinction as to whether the cause of action arose in a suit in regard to a document before or after 1877. The Act says clearly that every suit instituted after the period prescribed therefor shall be dismissed. Various rulings have been quoted by learned Counsel for the appellants. One of the earliest of these is *Vadju v. Vadju* (1). On p. 24 the ruling laid down:

"The general principle as to redemption and foreclosure is that in the absence of any stipulation express or implied to the contrary the right to redeem and the right to foreclose must be regarded as co-extensive."

That principle is not inconsistent with the judgment of the Court below because what the Court has found is that there was a stipulation expressed to the contrary by which the right to redeem and the right to foreclose in the present case did not begin at the same time. It appears to me from the clause that the right to foreclose did not begin until two years had elapsed, whereas the right to redeem began at once with the limitation that it must be exercised in the month of *Sawan* within the 2 years. The next ruling to which reference was made was *Lasa Din v. Gulab Kunwar* (2). No question such as arises in the present case arose in that ruling. In that ruling their Lordships of the Privy Council dealt with a mortgage of July 26, 1912, with a period of 6 years and with a clause which stated that if there was default in the payment of annual interest the mortgagee would have the power to realize the entire mortgage money... "at all time."

(1) 5 B 22.

(2) A I R 1932 P C 207; 138 Ind. Cas. 779; 7 Luck 442; 59 I A 376; 9 O W N 638; Ind. Rul. (1932) P C 251; 63 M L J 187; 36 O W N 1017; 36 I W 246; 56 O L J 237; (1932) A L J 913; 34 Bom. L R 1600 (P O).

There was a default and the mortgagee did not sue until within the period of 12 years from the expiry of the 6 year period provided for re-payment. The sole question was whether the suit should have been brought within 12 years from the first default in payment of interest or whether it was within time when it was brought within 12 years from the expiry of the period of 6 years. Their Lordships held that the suit in this latter period was within time. Learned Counsel desires to argue by analogy from some observations on p. 452* and in particular on the sentence,

"if the principal money is 'due' and the stipulated term has gone out of the contract, it follows, in their Lordships' opinion, that the mortgagor can claim to repay it, as was recognized by Wazir Hasan, J., in the judgment in the Chief Court. Their Lordships think that this is an impossible result."

I do not think that these observations which were in regard to a simple mortgage which was executed in 1912 under the T. P. Act can be transported and applied to the mortgage by conditional sale executed before the Act in 1872. Moreover, in the mortgage before their Lordships there was a single term of 6 years provided. In the mortgage before this Court the terms in the mortgage deed are more complex. The next case referred to was *Sayad Abdul Hak v. Gulam Jilani* (3). In this case there was one mortgage of October 1, 1877, with possession (not conditional sale) and a provision for foreclosure and redemption on the expiry of 10 years. There was a second mortgage of September 25, 1878, which extended the period for redemption to the expiry of 40 years after the period of 10 years in the first mortgage. It was held that this implied that the period of foreclosure was also postponed. There was a suit for redemption brought in 1892 and it was held that redemption should be allowed as the right of redemption could not be fettered. I do not find that there is anything in this ruling to support the claim of the appellants. In *Raghubar Dayal v. Budhu Lal* (4), there was a simple mortgage with promise to pay the principle in 10 years executed on March 15, 1883, which was after the T. P. Act came into force. A suit for redemption was brought on July 16, 1884. It was held that a suit for redemption did not lie. The clause in this document was not at all similar to the clause in the document before us and moreover the mortgage was a simple one. In

(3) 20 B 677.

(4) 8 A 95; A W N 1886, 13.

*Page of 7 Luck.—[Ed].

my opinion, in a simple or in a usufructuary mortgage, the conditions which the parties desire to express in regard to a term will be different from the conditions which the parties desire to express in a mortgage for conditional sale. In the latter mortgage one of the points which the parties desire to express the period when foreclosure will arise and another point which they desire to express is within what period redemption is to be allowed. There is no reason to make these two periods the same and the natural agreement would be to allow redemption up to a certain date, and if not made by that date then to allow the right to foreclosure to begin. No such points arise in a simple mortgage; and in a usufructuary mortgage the important point is that the usufructuary mortgagee desires to hold possession for a certain time in order that he shall have the benefit of such a period.

The conditions therefore in these mortgage deeds are not the same and rulings of simple and usufructuary mortgages are not likely to throw any light on the interpretation of the language in a mortgage for conditional sale. In *Huseni Khanum v. Husain Khan* (5), it was laid down that under ordinary circumstances a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem the mortgage. This ruling did not lay down that this was a fixed rule but merely that it was the ordinary rule. The ruling therefore is not in favour of the principle enunciated for the appellants. The mortgage was one of 1830 but the actual mortgage deed was not produced and there was a dispute as to what were the terms. The case was the same which was taken in appeal before their Lordships of the Privy Council in *Bakhtawar Begam v. Husaini Khanum* (6). In *Muhammad Husain v. Sanwal Das* (7) the reference to the Full Bench p. 958* shows that the question was quite a different one from the one before us. The mortgages were of 1902 and 1903 and were both simple mortgages and therefore came under the T. P. Act. Moreover, the language used was not at all similar to the present case. In *Akbar Husain v. Shah*

Ahsanul Hak (8) there was a suit for redemption of a usufructuary mortgage executed on June 14, 1923. On p. 150* learned Counsel invites attention to the statement:

"Within the term the mortgagee cannot enforce the mortgage and within the term the mortgagor cannot sue for redemption. It was no doubt open to the parties to fix two different dates for the enforcement of the rights of the mortgagor and the mortgagee respectively, but where only one term is fixed it is to be recorded and that term is meant equally for both."

This is quoted from *Bakhtawar Begam v. Husaini Khanum* (6). In this ruling on p. 199† their Lordships of the Privy Council stated:

"Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of this specified period, but there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of a mortgagor."

These are provisions which were made in regard to a mortgage of January 6, 1830. As that mortgage was prior to the T. P. Act their Lordships therefore laid down that in regard to mortgages prior to the T. P. Act it was open to the parties to make provisions by which the mortgagor might discharge the debt within the specified period and take back the property. The mortgage in question was one which arose under two documents, a sale deed and an agreement for return forming together a mortgage of conditional sale. This ruling is authority against the proposition advanced by Mr. Kunzru for the appellants that the rights of redemption and of foreclosure must be co-extensive in time and that it is not open to the parties to make provision to the contrary. In *Shyam Lal v. Jagdamba Prasad* (9) it was laid down that in the absence of any agreement express or implied to the contrary the right to redeem and the right to foreclose must be regarded as co-extensive. This proposition however does not help the appellants because there is, in my opinion, in the present mortgage deed a provision which gives the right of redemption at an earlier period than the right for foreclosure. In *Kalka Prasad v. Bhuiyan Din* (10) there was a sale deed

(5) 29 A 471; A W N 1907, 133; 4 A L J 375.

(6) 36 A 195; 23 Ind. Cas. 355; A I R 1914 P O 36; 41 I A 84; 18 O W N 586; 26 M L J 474; 12 A L J 473; 19 C L J 477; (1914) M W N 411; 15 M L T 389; 16 Bom. L R 344; 1 L W 813 (P O).

(7) 56 A 954 (968); 148 Ind. Cas. 951; A I R 1934 All. 397; (1934) A L J 261; 6 R A 795 (F B).

*Page of 56 A.—[Ed.]

(8) A I R 1932 All. 155; 134 Ind. Cas. 459; Ind. Rul. (1931) All. 843.

(9) A I R 1928 All. 131; 108 Ind. Cas. 561; 25 A L J 1051.

(10) 31 A 300; 2 Ind. Cas. 180; 6 A L J 222.

*Page of A I R 1932 All.—[Ed.]

†Page of 36 A.—[Ed.]

with an agreement to re-convey of the year 1845. On p. 303* the judgment stated:

"We think that in each case we must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was."

I do not think that this proposition will assist the appellants. Having regard to the circumstances of the present case I find two reasons against this appeal succeeding. The first reason is that there was a statutory right under the Ben. Regns. No. I of 1798 and No. XVII of 1806 which were in force in 1872 and this statutory right gave the mortgagors the right to redeem within any stipulated period provided in the deed. Therefore, even if there had been only a period of two years in the deed, the statutory right existed by which the mortgagors could have redeemed from the date of execution and the suit would therefore be barred by the period of limitation in question under Art. 148 of the present Lim. Act. Secondly, I find that the interpretation of the clause in the deed itself does give this right of redemption within the period of 2 years and in the first year of that period in the part of the month of *Sawan* which remained from the date of execution. For these two reasons this suit would be time-barred. No further point has been raised in the grounds of objection to the decree. Accordingly, in my opinion, the appeal should be dismissed. There is a cross-objection in regard to costs. The lower Appellate Court decreed that the defendants will bear their own costs although the suit was to be dismissed. The defence of limitation is a technical one and it is for this reason that the Court below exercised its discretion and directed that each party would pay their own costs. I do not see any reason for interfering with this discretion and I would dismiss the cross-objection but without costs.

Varma, J.—I agree that the appeal should be dismissed. In my judgment the point that arises for decision in this case is governed by the principles laid down by their Lordships of the Privy Council in the case in *Bakhtawar Begam v. Husaini Khanum* (6). The suit out of which this appeal has arisen was one for the redemption of a mortgage by conditional sale made on August 7, 1872 by Yusuf Ali and Ausaf Ali in favour of Ali Asghar. We are informed by learned Counsel appearing for the appellants that the corresponding Hindi date for August 7, 1872 was *Sawan*

Sudi 3, Sambat 1929. The plaintiffs are the representatives of the mortgagors and the principal defendants are the representatives of the mortgagee. The mortgage deed in question, after reciting that the total amount due from the mortgagors to the mortgagee on the date of the execution of the document was Rs. 1,203-1-6, and setting out certain other preliminary facts proceeds thus:

Baewaz mubligh 1,203-1-6 mazkura bala ke rehan miadi do sal yani bai bilwafa kardiya wa tamam wa zara saman apna murtahin se wasul paya ab dame wa dirame yaftani mera zimme murtahin ke baqi nahin hai. aur igrar yeh hai ki andar do sal ke jab rupiya mahina Sawan men naqd yekmusht ada karyden tab us sal jaedad haqiqat apni fak rehan kara lewen aur agar andar do sal ke rupiya ada na ho to bad do sal ke yeh bai bilwafa bai kamil ho jaega aur murtahin malik mustaqil shai marhuna ka hoga.

The suit was filed on August 7, 1934. The main defence was one of limitation. It was contended by the defendants that, although a term of 2 years was fixed in the mortgage deed, yet the later clause clearly conferred on the mortgagors the right to redeem before the expiry of that term if they paid the mortgage money in the month of any *Sawan* within that period of 2 years, that the right to redeem accrued to the mortgagors at least in the month of *Sawan* in 1873 A. D., and that the suit, having been brought more than 60 years thereafter, was barred under Art. 148, Lim. Act. The first Court repelled the contention of the defendants and decreed the suit but the lower Appellate Court has held that the suit was barred by time. The learned Counsel appearing for the appellants has urged that the general principle as to redemption and foreclosure is that in the absence of any stipulation, express or implied to the contrary, the right to redeem, and the right to foreclose are co-extensive, and has cited the case in *Vadju v. Vadju* (1). His argument is that there is no "stipulation, express or implied, to the contrary" in the mortgage deed in question. He has further argued that, on a true construction of the deed, the mortgagee was not entitled to foreclose before the expiry of the 2 years mentioned in the deed and that it must therefore be held that the mortgagors also were not entitled to redeem at any time before the 2 years had expired. He urges therefore that the right to redeem accrued for the first time on August 7, 1874 and that the suit, having been filed on August 7, 1934, was within time.

The question that arises for considera-

*Page of 31 A.—[Ed.]

tion is whether the learned Counsel is right in contending that there is no "stipulation to the contrary" in the mortgage deed in question. It seems to me that there is a clear stipulation in the deed which expressly provides for an exception to the general principle relied upon by the learned Counsel. There is no doubt that it is open to the parties to a mortgage transaction to enter into an agreement that the mortgagor shall be at liberty to redeem within that term. In *Bakhtawar Begam v. Husaini Khanum* (6) their Lordships of the Privy Council observed on p. 199* of the record :

"Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise on the expiration of the specified period. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor."

It is not necessary in my opinion to consider whether the argument of the learned Counsel for the appellants that the mortgagee in this case could not foreclose before the expiry of the term of 2 years is correct or not. Assuming that his contention is well founded it is open to the parties to agree that, although the mortgagee shall not be entitled to foreclose before the expiry of the term, the mortgagor shall be entitled to redeem before its expiry. If I may say so with respect, the point has been well put by Niamatullah J., in his judgment in the Full Bench case in *Muhammad Husain v. Sanwal Das* (7) at p. 968 of the record :

"..... A condition like the one found in these deeds is always for the benefit of the mortgagor, who cannot be sued by the mortgagee within that term but may himself pay it if he likes. The term is always intended as a measure of forbearance which the mortgagee agrees to show."

The only question therefore that arises for consideration is whether, on a true construction of the mortgage deed in question, there is a stipulation entitling the mortgagor to redeem before the expiry of the term fixed. It seems to me that that question must, in view of the language of the deed be answered in the affirmative. I have already quoted the relevant passage. The provision that whenever the mortgagor paid off the mortgage money in any *Sawan* within the 2 years he would be entitled in that year to redeem the mortgage clearly shows to my mind that the intention of the parties was that the mortgagor was to

have the right to redeem before the expiry of the term of 2 years. It is hardly necessary to point out that one deed cannot be interpreted in the light of the language used in other deeds as was observed in *Kalka Prasad v. Bhuiyan Din* (10) at p. 303* :

"We think that in each case we must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was."

The language of the deed, what we have to consider, leaves no room for doubt in my opinion that the parties clearly intended that the mortgagor would have the right to redeem before the expiry of the term. In *Bakhtawar Begam v. Husaini Khanum* (6) their Lordships, after making the observations quoted above, proceeded to consider whether in the case before them there was any stipulation entitling the mortgagor to discharge the debt within the specified period and take back the property. Their Lordships found that it was admitted in paras. 2 and 8 of the plaint in that case that there was such a stipulation between the parties. That being so, their Lordships held that the suit for redemption was barred. It is to be noted that in that case the mortgage deed itself was not on the record and the only evidence of the transaction was to be found in a certain proceeding of the Collector's Court. In the case before us the deed has been filed and, as already observed, on a true interpretation of its language the only conclusion possible is that the parties did enter into an agreement laying down the clear "stipulation to the contrary." The general principle relied upon by the learned Counsel, namely that the right to redeem and the right to foreclose are co-extensive, is therefore not applicable in the present case.

Learned Counsel for the appellants has relied on the ruling of their Lordships of the Privy Council in *Lasa Din v. Gulab Kunwar* (2). The point that arose for their Lordships' consideration in that case was in my opinion a different one. What their Lordships had to consider was whether, as the result of an option given to the mortgagee, to call in his money before the expiry of the term fixed, the "money becomes due" within the meaning of Art. 132, Lim. Act. The question that arises in the case before us, on the other hand, is when the right to redeem or to recover possession accrued to the mortgagors within the meaning of Art. 148, Lim. Act. The other

*Page of 36 A.—[Ed.]

*Page of 31 A.—[Ed.]

cases cited by the learned Counsel for the appellants are also inapplicable as has been pointed out by my learned brother. I also agree that the cross-objection is without force and should be dismissed, but would make no order as to costs.

By the Court.—The appeal is dismissed with costs throughout. The cross-objection is dismissed, but no order as to costs of the cross-objection is made.

D. — *Appeal dismissed.*

PATNA HIGH COURT

Appeal No. 295 of 1938

August 18, 1939

ROWLAND AND CHATTERJI, JJ.

BACHOO PRASAD SINGH AND OTHERS—

APPELLANTS

versus

GOBARDHAN DAS AND OTHERS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXI, rr. 22, 90—Suit against joint family—Pleader appointed by Court as guardian ad litem on behalf of minor members—In execution, another mentioned as guardian—No order removing Pleader and appointing another as guardian ad litem—Sale held unsustainable against minors—Sale also held should be set aside in its entirety.

Once the Court has found that the legal conditions do not exist for proceeding with an execution, then there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. XXI, r. 22 must fall to the ground.

The Court appointed a Pleader on behalf of the minor members of the joint family in a suit against them, to be their guardian *ad litem*. But in the execution application no mention was made of the Pleader. The execution was sought to be taken against minors as under guardianship of another person. No notice under O. XXI, r. 22 was sent to the Pleader guardian and to the minors through him. There was no order removing him and appointing another as guardian *ad litem* so as to authorise the latter to represent the minors in the execution proceedings or to make any admission on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions:

Held, that the sale of the shares of the minors could not be sustained. *Walian v. Banke Behari* (1) and *Malkarjun v. Narhari* (2), distinguished.

Held, also that since the sale of the entire joint family property was found to be without title against the share of the minor members, and it was not confirmed by the time when the minors objected to the sale and there was no mutual understanding between the Court and the bidders as to what was being put to sale, the sale should be set aside in its entirety and not only as against share of the minors.

A. from the original order of the Sub-Judge, Patna, dated July 11, 1938.

Mr. Mahabir Prasad and Chowdhury Mathura Prasad, for the Appellants.

Messrs. C. P. Sinha and Kaushal Kishore Sinha, for the Respondents.

Rowland, J.—This is an appeal by the decree-holders who in execution of a money decree against a number of members of a joint family put up to sale certain properties of the joint family. After the sale three of these members presented objections under s. 47, Civil P. C., and also under O. XXI, r. 90 contending that the execution as against them was not properly constituted at its inception and the Court had no jurisdiction to proceed with it. The Court allowed the objection and declared that the sale which had been held should not affect the interest of the minor judgment-debtors who were petitioners before it. The facts as to representation of these minors are that in the original suit they were represented by a Pleader, Babu Jagdish Chandra Mitra, appointed by the Court to be their guardian *ad litem*; but in the execution application no reference is made to the above-named Pleader. Execution was sought to be taken against the minors describing them as under the guardianship of Gobardhan Das who is brother of one and uncle of others of the minors and is the managing member of the joint family. In the course of the proceedings in execution Gobardhan appeared. He took time and he obtained adjournments of the sale from date to date, asking for adjournments on some of these occasions in the name of all the judgment-debtors including the minors and waiving all objections regarding the necessity of issuing a fresh sale proclamation in consequence of the sale having been adjourned. The sale was eventually held on May 5, 1938 and the property knocked down to the decree-holders and the objection under s. 47 and the application under O. XXI, r. 90 was presented on June 4, 1938. It is presented in the name of the minors through Babu Radha Kishun Daga their maternal uncle. An application was presented for the discharge of Babu Jagdish Chandra Mitra and appointment of the maternal uncle as their next friend. It is obvious that the failure in the execution petition to name Babu Jagdish Chandra Mitra as the guardian *ad litem* of the minor and to issue notice to him under O. XXI, r. 22 and to the minors through him was in contravention of the correct procedure. It is clear too that there is no order of the Court either

removing him or appointing Gobardhan Das as guardian *ad litem* so as to authorize the latter to represent the minors in the execution proceeding and to make any admissions on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions. The question is whether these defects are to be considered fatal to the proceedings.

Mr. Mahabir Prasad has relied on the Privy Council decision in *Walian v. Banke Behari* (1) in which a decree and sale in execution had been obtained against minors whose mother had been nominated by the opposite party to be guardian *ad litem* and had in fact appeared and acted as such throughout the proceedings, but the Court had never passed a formal order appointing her to be guardian *ad litem*. In a suit brought by the minors years afterwards to set aside the sale and recover possession of the property the Privy Council held that the sale was not a nullity, that the alleged irregularities had not caused prejudice to the plaintiffs and they could get no relief. The position here, however, is not quite on all fours. In *Walian v. Banke Behari* (1) all the parties had for years acted on the supposition that the mother had been properly appointed and had acted as guardian lawfully and regularly. The proceedings were held not to be bad merely because that understanding proved in fact to be mistaken. In effect, an arrangement had been proposed and carried out for the representation of the minor, an arrangement which, if the attention of the Court had been given to it, would have been clearly unobjectionable and would have been approved. But in the case before us, it is not so; on the face of the record it was apparent that the proposal to appoint Gobardhan to represent the minors was highly objectionable for the obvious reason that there was already a guardian *ad litem* appointed for the suit, including the execution proceedings also, therefore an order appointing Gobardhan can hardly be supposed to have been made by implication when in the circumstances it could not be made. No doubt it was possible for the Court to remove the Pleader and thereafter to appoint Gobardhan, but the Court at this stage was not asked to remove the Pleader. So the condition precedent to Gobardhan being appointed or acting as

guardian *ad litem* did not exist. Along with the difficulty arising out of O. XXXII, Civil P. C., we have also to consider the bearing of O. XXI, r. 22 which requires a notice to be served on the judgment-debtor to show cause why execution should not be levied. No such notice was served on the guardian *ad litem* appointed by the Court who should have received notice on behalf of the minors.

It is said that a notice was served on Gobardhan and Mr. Mahabir Prasad suggests that this notice though served on a wrong person may suffice to give the Court jurisdiction to proceed with the execution. No doubt the service of notice on a wrong person does not in all cases invalidate the proceedings in execution. There was the case in *Malkarjun v. Narhari* (2) in which the notice had been served on the wrong person as the legal representative of a deceased mortgagor. An objection was taken in those proceedings that the person on whom notice had been served was not the legal representative. The Court considered that objection and decided against it. The property was sold. Years afterwards when a suit was brought to avoid the sale on account of the defect in the proceedings owing to the wrong person having been brought on the record and the right person not having been brought on the record, their Lordships held that the sale could not be defeated as the Court had jurisdiction to hold it; it had jurisdiction to hold rightly or wrongly that the person who had been brought on the record was the legal representative of the deceased debtor. But this case is different. Here we are not trying after long lapse of time the effect of proceedings which have long ago reached their conclusion in the Court which was seised of them. But we are dealing with a pending case and a sale which has not yet been confirmed. We are also not dealing with a case in which the Court has mistakenly held that Gobardhan was the right person to be served with the notice. On the contrary as soon as its attention was drawn to the matter, the Court had no hesitation in finding that Gobardhan was not the right person. Once the Court has found that the legal conditions do not exist for proceeding with an execution, then there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly con-

(1) 30 O 1021; 30 I A 182; 7 O W N 774; 8 Sar. 512 (P O).

(2) 25 B 337; 27 I A 216; 2 Bom. L R 927; 7 Sar. 739 (P O).

stituted in the absence of proper notice under O. XXI, r. 22 must fall to the ground. It follows therefore that the sale of the share of the respondents was rightly held by the Subordinate Judge to be unsustainable.

Mr. Mahabir Prasad's last contention was that the sale which purported to be a sale of the entire property, a house, should either stand or be set aside as a whole. There is I think substance in the contention. This is not a case in which the sale has been confirmed, possession taken and enjoyed for years but in respect of part or a share of the property without title. In that state of things there are cases in which the purchaser has retained possession of so much of the property as could in those proceedings have been validly sold to him. It was indeed too late to set aside the entire sale. But here the sale not having been yet confirmed (I speak with reference to the date of the objections before the Subordinate Judge) it is to be considered what was being put up for sale and for what the purchaser was bidding. If there was not a mutual understanding between the Court and the bidders as to what was being put up to sale, it is difficult to say that such a sale can be confirmed. For the respondents Mr. C. P. Sinha has no objection to this direction being given. In the result the appeal is dismissed subject to a direction that the order of the Subordinate Judge be read as an order setting aside the sale in its entirety. The respondents are entitled to their costs actually incurred by them.

Chatterji, J.—I agree.

D. Appeal dismissed.

BOMBAY HIGH COURT

Application in Suit No. 941 of 1939

August 8, 1939

KANIA, J.

SHRIRAM HANUTRAM—PLAINTIFF

versus

MOHANLAL & Co.—DEFENDANTS.

Arbitration Act (IX of 1899), s. 19—Fact of contract itself disputed—Arbitrators, if can decide that point—Court, if can grant stay—Submission in writing—S. 19, nature of.

As the Arbitration Act requires a submission in writing, the fact that a contract or submission in writing exists is to be established by the person who comes to Court and applies for a stay. On the assumption that a contract which contains a submission in writing exists, an application may be made because

on that assumption the fact of the contract cannot be decided by the arbitrators. It is the normal course of procedure in such cases (337 (2) and 69 Ind. Cas.)

Merely sending a copy of the contract without any confirmation by the party does not amount to a submission required by the Act (s. 19), explained.

Section 19, Arbitration Act, summary procedure in cases of lengthy or protracted contracts.

Mr. M. C. Setalvala for the Plaintiff.

Mr. M. A. Jinnah for the Defendant.

Order.—This is an application under s. 19, Arbitration Act, for an order setting aside the award of the arbitrators. The plaintiff alleges that the arbitrators, by awarding the contract to the defendant, have acted in violation of the terms of the contract. The defendant, who is a member of the East India Company Ltd., claims that the award is valid and that the plaintiff is bound by it. The plaintiff claims that the award is invalid and that the contract is void. The arbitrators have held that the contract is valid and that the plaintiff is bound by it. The plaintiff claims that the arbitrators have acted in violation of the terms of the contract. The defendant claims that the arbitrators have acted in accordance with the terms of the contract. The court has heard the arguments of both parties and has decided in favour of the defendant. The award is valid and the plaintiff is bound by it.

Mohanlal agreed that the contract notes were sent to the plaintiff through mistake. The plaintiff thereupon personally went to the defendants' shop and returned the contract notes to the defendants. According to the plaintiff therefore he had given no instructions for those transactions and had not accepted the contract notes.

The first question which arises is whether there is a submission in writing as required by the Arbitration Act. The only submission in writing which can be alleged is in the contract notes sent by the defendants to the plaintiff and alleged to be accepted by the plaintiff. In this connection the defendants rely on the decision of Blackwell, J., in *Rambaksh v. Bombay Cotton Co.* (1). On behalf of the plaintiff, on the other hand, it is contended that the contracts are not signed by him. He denies acceptance thereof and he has contended that *Rambaksh v. Bombay Cotton Co.* (1) has no application to the facts of this case. On behalf of the plaintiff it is further urged that the arbitrators have no jurisdiction to determine whether the contracts in fact were made, *i e.*, instructions were given by the plaintiff to the defendants which resulted in contracts of sale and purchase as put forward by the defendants. As that goes to the root of the jurisdiction of the arbitrators, the arbitrators cannot decide the point and therefore the application cannot be entertained. In respect of the option transactions the plaintiff contends that the agreement is of reference according to the rules and bye-laws of the East India Cotton Association, Ltd. Rule 38-A does not deal with option transactions at all and there is no other rule which can cover an arbitration in respect of option transactions. It is further urged by the plaintiff that in respect of the option contracts also there is no reference in fact to arbitration although the contracts state that the disputes shall be referred according to the rules of the East India Cotton Association, Ltd. On the affidavits it appears to be common ground that if no claim is left in respect of the sale and purchase of the 2000 bales no money is due by the plaintiff to the defendants. The principal questions therefore to be determined are: (1) whether in respect of the forward transactions of sale and purchase of 2000 bales there is a contract between the parties; and (2) whether there is a submission in writing as required by the Act.

(1) 32 Bom. L. R. 1451; 128 Ind. Cas. 881; A. I. R. 1931 Bom. 81; Ind. Rul. (1931) Bom. 97.

In *Mahomed Haji* (2) a petition was awarded *inter alia* on arbitrators had no jurisdiction whether the 800 and 100 bales as contracts there. In that were repudiated by the confirmation notes were. In the course of Wadia, J. observed as

"The very factum or contracts being denied, there out of or in relation to the red to arbitration."

After considering the learned Judge (p. 701*):

"... but in my opinion in relation to a contract is denied are not disput have jurisdiction to decide arbitrators have no jurisdiction in fact the contracts were made."

Jai Nerrain Babu Jaini Mal (3) was aside an award. Shivering the judgments (p. 305†):

"Now it is quite clear profess to determine the factum or the validity think that either of these cognizance of the arbitrators."

A distinction exists which is voidable on outside the contract itself whether there was a submission in writing, the fact that a submission in writing exists by the person who applies for a stay. On a contract which contains writing exists, an application because on that assumption have jurisdiction. If the itself is disputed then decide the point, an normal course would be present case as the computation, I do not think jurisdiction to decide contract at all, and the must fall on that ground.

The second question

(2) 34 Bom. L. R. 697; 138 Bom. 341; Ind. Rul. (1932) B. (3) 3 L. 296; 69 Ind. Cas. 369.

*Pages of 34 Bom. L. R.—
†Page of 3 L.—[Ed.]

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and does not normally
or protracted inquiry
ed. On this ground
therefore fails. It is
side the question in
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the plaintiff is not in-
dant. The notice of
dismissed with costs.

of motion dismissed.

HIGH COURT

No. 457 of 1931

or 22, 1939

D VARMA, J.J.

ND BRAHMCHARI—

—APPELLANT

rsus

OTHERS—DEFENDANT

ONDENTS

*endowment—Math—Suit for
eging its illegal transfer by
t possession thereof—Plain-
r title to claim possession
does not constitute math or
bring suit for possession of*

s a worshipper at a temple
ins permission under s. 92,
it for the declaratory reliefs
but where a suit is not one
or possession of property
ally transferred by previous
gal possession of that pro-
have to show some right
a. The mere worship of the

image does not constitute a *math*, nor does it give the
plaintiff any right to bring a suit for the possession
of *zemindari* property. 142 Ind. Cas. 214 (1), dis-
tinguished.

F. A. from a decision of the Sub-Judge,
Gorakhpur, dated September 15, 1931.

Messrs. *Shiva Prasad Sinha* and
Shambhu Prasad, for the Appellants.

Mr. *Sri Narain Sahai*, for the Respon-
dents.

Bennet, J.—This is a first appeal by the
plaintiff *Baba Jagtanand Brahmchari* whose
suit has been dismissed by the learned Civil
Judge of Gorakhpur. The suit as brought
was in the first instance for a declaration
that a number of sale-deeds between 1893
and 1916 were not binding on the *math* and
Mahadeoji installed in *Mauza Mathia Muafi*
in Gorakhpur District and the plaintiff
might be put in possession of the property.
Later, this relief was struck out and the
relief asked was a simple decree for posses-
sion of the property in favour of the plain-
tiff. This point is of importance because
the allegations for a suit asking for the first
relief are materially different from the
allegations in a suit asking for possession.
The plaintiff headed his plaint by describ-
ing himself as "disciple of *Swami Lachchmi*
Charan, deceased, residing at the *math* at
Mauza Mathia Muafi." It would appear
therefore that he at first thought of claim-
ing as a disciple or *chela* of one of the
mahants, but that was not proved by the
evidence and the learned Counsel for the
appellant-plaintiff states that he does not
now claim to be a *chela* of a *mahant*. The
status of the plaintiff is set out in para. 10
of the plaint:

"The plaintiff is also a *Nihang sanyasi*. He has
for the last four years, been performing all the
religious services relating to the *math* and *Shri*
Mahadeoji, installed in the said *math*. He has also
started a Sanskrit and Hindi Pathshala under the
auspices of the said *math*. He personally per-
forms the service and worship of *Shri Mahadeoji*,
aforesaid and imparts religious teachings and has
it done by others."

The table attached to the plaint shows
that the property in question is situated in
a number of villages. There were various
written statements. One of these, on p. 13,
para. 5 states that there was never any *math*
in *Mauza Mathia* and in para. 10:

"The entire *Mauza Mathia Muafi* was originally
the family property of *Mahipal Singh*. The
ancestors of the said proprietors personally gave
some land by way of *birt* to *Shambhu Gir*, *Ratan*
Gir, *Thamman Gir*, *Bhawani Bakhsh Upadhis*,
Kunjan Gir and *Pargash Singh*. Thus the persons
mentioned at the end were the owners in posses-
sion of the property aforesaid and in every way

entitled to transfer it. Accordingly, on the death of Shambhu Gir, his son and disciple Bundel Gir, became owner in possession by right of inheritance...

The Court framed issue No. 1 which was: "Whether the plaintiff can maintain the present suit or is it barred by s. 92, Civil P. O.?" The latter part of the issue does not now arise as the suit was altered to one for possession. On p. 22 the plaintiff gave evidence and he stated that his residence was at *math* Kuber Nath which is another place from the alleged *math* a *Mauza Mathia*. He states on p. 23, line 27:

"I was born in *Mauza* Koraya at a distance of 5 or 6 miles from village *Mathia Muafi*...my wife is alive, but I have no issue."

On p. 22 he states:

"I was married at the age of 10 years by my parents. I left my home when I was about 12 years of age for my father used to punish me...I became a *sanyasi* about 25 or 30 years ago...I became a *sanyasi* at Deoghat Asthan in Raj Naipal. I came back to a place called Kuber Nath in this District about 8 or 9 years ago...In village Kuber Nath there is a temple of Shiva known as Kuber Nath temple...I got the temple repaired and started a Sanskrit school...From Kuber Nath I used to go out for collecting funds by begging to the neighbouring villages and once I happened to reach the village *Mathia Muafi* about four or five years ago...In village *Mathia Muafi* I discovered a temple of Shiva and a *math* in ruins. A *math* means a monastery. The residents of village *Mathia Muafi* and even of other places requested me to take some interest in the shrine and the monastery in the village *Mathia Muafi*. I got the shrine and the *math* repaired and white-washed and started a school there for the study of Sanskrit and Hindi. The worship in the shrine in village *Mathia Muafi* is conducted by myself when I am in the village. But when I am not there the Sanskrit teacher conducts the worship."

Now this statement shows that the plaintiff is not in any way connected with the alleged *math* at the village of *Mathia Muafi*. He happened to come there as it was a suitable place to have a school, and finding an image there he conducts some worship of that image, but there is no *math* shown to be in existence at this place called *Mathia Muafi* and the plaintiff cannot be said to be in possession of a *math* in any way. We do not think that on his own allegation the plaintiff has shown that he is a person who could bring a suit like the present which is a suit for possession. No doubt anyone who is a worshipper at a temple or of an image, if he obtains permission under s. 92, Civil P. O., can bring a suit for the declaratory reliefs allowed by that section; but the present is not a suit under s. 92, Civil P. O., and we consider that for a suit like the present for possession of property, alleged to have been illegally transferred by previous persons who were in legal possession of that property, the

plaintiff would have to show some right or title to claim possession. The mere worship of the image does not constitute a *math*, nor does it give the plaintiff any right to bring such a suit for the possession of *zamindari* property. Learned Counsel referred to a ruling of their Lordships of the Privy Council: *Ram Charan Das v. Naurangi Lal* (1), at p. 328, where their Lordships stated:

"Their Lordships however are not now concerned with any question of title because both the Courts below have found that the plaintiff is the person in actual possession of the *Paliganj math* and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the *math*."

That *dictum* will not apply to the present case because the plaintiff fails to establish that he is in any way in possession of a *math*. As regards the question as to whether there ever was a *math* or any endowed property, we have been taken over a number of documents which learned Counsel for the appellant has had printed in a supplementary record. (After examining certain documents the judgment concluded as follows.) Having examined these documents, we find that there is no document whatever which purports to be the endowment of a *math* or the creation of endowed property or the endowment of a temple or of deities. It is therefore clear that the plaintiff has failed to prove that there ever was any endowed property or any *math* or that he is in possession of any *math*. The plaintiff therefore has in our opinion failed to show that he has a right to obtain possession of property which was transferred by the documents between the years 1893 to 1916. These documents were executed by persons who were at the time in legal possession of the property and during all the years from the time of those documents until plaintiff filed the suit in 1930 no one made any challenge of the right to transfer. It remained for the plaintiff who is a mere wandering *sanyasi* claiming to be a Nihang *sanyasi* to bring the suit. The word "Nihang" means celibate and it is clear from the fact that in this property the succession was from father to son that the persons were not celibates. We do not think that the plaintiff has any right of suit. Accordingly we dismiss this first appeal with costs.

Appeal dismissed.

S.

(1) (1933) A L J 327 (328); 142 Ind. Cas. 214; A I R 1933 P C 75; 60 I A 124; 12 Pat. 251; Ind. Rul. (1933) P C 56; 14 P L T 185; 37 L W 512; 64 M L J 505; (1933) M W N 272; 10 O W N 455; 37 O W N 541; 57 G L J 229; 35 Bom. L R 530; 17 R D 754 (P O).

BOMBAY HIGH COURT

Civil Revision Application No. 15 of 1939

August 15, 1939

DIVATIA, J.

P. M. DIXIT—APPLICANT

versus

SENIOR INSPECTOR OF FACTORIES—

OPPONENT

Payment of Wages Act (IV of 1936), ss. 15, 15(3), 3, 19—Revision—Finding whether wages were delayed and mill was working during material period cannot be disturbed—Claim for delayed wages—Proceedings under s. 15(3), against whom to be taken.

A finding of the lower Court on the question whether the wages were delayed and whether the mill was working during the material period or not, cannot be disturbed in revision application, whether the finding is right or wrong.

If a manager of a factory is appointed by the owner the proceedings on an application under s. 15(3), Payment of Wages Act, for a claim of delayed wages should be against the manager alone, but if no manager is appointed they should be against the employer. The liability of the employer would arise only if it is subsequently found that the whole or part of the amount could not be recovered from the manager. The use of the word "or" instead of "and" clearly shows that the proceedings under s. 15 are to be instituted against only one person, whether he is the manager or the employer, but not against both.

C. R. App. against an order of the District Judge, Ahmedabad, in Appeal No. 463 of 1937.

Messrs. M. G. Purohit and N. N. Majumdar, for the Applicant.

Mr. B. G. Rao, Assistant Govt. Pleader, for the Opponent.

Order.—This revisional application arising under the Payment of Wages Act is preferred by original opponents Nos. 1 and 3 against whom, along with opponent No. 2, the original application was filed by the Senior Inspector of Factories. Opponents Nos. 1 and 2 were described as co-owners of a mill called the Vimal Mills Ltd., at Ahmedabad and the third was described as the manager. It was filed to recover Rs. 2,000 odd as the delayed wages of workers in the mill under s. 15 of the Act under which the authority, in this case the Stipendiary Magistrate, is to hear the applicant and the employer or other person responsible for the payment of wages under s. 3, and, after such further inquiry as may be necessary, direct the payment of the delayed wages. Various defences were taken on behalf of the opponents. One of them was that the owner or employer, who was opponent No. 1 (opponent No. 2 was not found to be a co-owner), could not be impleaded in the application, under s. 15. It was further contended that the applica-

tion, which was originally filed in the Court of the Additional City Magistrate, Ahmedabad, was transferred by the District Magistrate to the Court of the City Magistrate, and that the District Magistrate had no power to direct such transfer. It was also contended that the mill was not working at the material time for which the application was made, namely the period between March 28, 1937 to April 30, 1937 and that therefore the mill authorities were not liable to pay any wages to the workers.

The learned Magistrate held that opponent No. 2 was not liable on the ground that he had no interest in the mill, and the application as against him was dismissed. On the merits the learned Magistrate found that part of the mill was working up to April 30, 1937, that the manager, who was opponent No. 3 was also working as such till that date, that there was, therefore, no reason why the workers should not have been paid up to the period when the mill was working, that is, up to April 30, 1937 and that no reason was given on behalf of the opponents why payments were not made to the workers in time. The learned Magistrate, therefore, passed an order for the payment of the delayed wages plus Rs. 5 per head as compensation against opponent No. 3, i. e., the manager, in the first instance, and directed that if the whole or part of the amount could not be recovered from him, the balance should be recovered from the employer, i. e., opponent No. 1, under s. 19 according to which if the authority passing the order of payment under s. 15 or s. 17 against any person (other than an employer) liable under s. 3 is unable to recover the amount, it shall be recovered from the employer.

Against this order there was an appeal by opponents Nos. 1 and 3 to the Court of the District Judge at Ahmedabad as provided in s. 17 of the Act. On behalf of opponent No. 1 it was contended that no order could be passed against him under s. 15 as his liability would arise only under s. 19 if and when the whole of the amount could not be recovered from the manager. It was also contended on the merits that the mill was not working during the material period, and therefore, no party was liable. The contention urged before the Magistrate as to the illegality of the transfer by the District Magistrate was also repeated before the learned District Judge.

The learned District Judge has rejected the appeal on all the grounds and has confirmed the order of the learned City

Magistrate. With regard to opponent No. 1, the learned Judge does feel a difficulty in passing the order as against the employer, i. e., appellant No. 1 before him, and he says that the contention as urged by him is correct, but though the proceedings under s. 15 were to be taken against the person responsible, namely the manager, still as the trial Court had directed that the employer was liable only for that much of the amount which could not be recovered from the manager, there was no illegality in that order. Besides, appellant No. 1 had no right of appeal as no appeal by an employer against an order passed under s. 19 of the Act had been provided. On the other points, the learned Judge has confirmed the findings of the Magistrate and held that part of the mill was working till April 30, and that the original opponent No. 3 continued to work as manager during that whole period. With regard to the jurisdiction of the District Magistrate to make the transfer, the learned Judge was rather doubtful as to who was the officer who could make an order for transfer in this case, but as the City Magistrate was one of the authorities mentioned in s. 15 (1), who could take cognizance of the application under that section, he was of opinion that there was no illegality because ultimately the Magistrate who tried the case was a Magistrate who had jurisdiction to do so under the section. Against this order of the District Judge dismissing the appeal the two opponents have come to this Court in revision under s. 115, Civil P. O., and all the grounds urged by them before the lower Court have been also urged before me.

With regard to the merits of the case as to whether the wages were delayed, and, secondly, whether the mill was working during the material period or not, both the Courts have found against the present petitioners on the evidence, and whether those findings are right or wrong, they could not be disturbed in this revision application. But even apart from that, I am satisfied that the mill had not entirely closed down and no notice had been given to the workers that the mill would stop working after a particular time. It is also found that opponent No. 3, i. e., applicant No. 2, here, did work as manager during that period. Therefore there is no doubt in this case about his liability under s. 15 (3) of the Act. The only point that requires consideration is about the liability of the first applicant in this application under

s. 15 (3) under which the authority is to hear the applicant and the employer or other person responsible for the payment of wages under s. 3. Under this section every employer shall be responsible for the payment to persons employed by him of all wages required to be paid under the Act: provided that in the case of persons employed in a factory if a person has been named as the manager of the factory under the Factories Act, the manager would be responsible for the payment; in the case of industrial establishments, if there is a person responsible to the employer for the supervision and control of that establishment, then such person who is responsible to the employer is liable and thirdly, in the case of railways, if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned, then the person so nominated shall be responsible. The present case is that of a factory, so that if a person is named as the manager of the factory under the Factories Act, then he would be liable for the payment of wages.

Now, turning back to s. 15 (3), it says that "the authority shall hear the applicant and the employer or other person responsible for the payment of wages." On behalf of the applicants it is contended that the proper party, or rather the only party, to these proceedings is the manager if the employer has appointed any such manager. In this case it is clear that Mr. Dave, original opponent No. 3, has been employed as manager. It is therefore contended that the application should have been filed against him alone and not against the original employer Mr. Dixit. In reply to that it is contended that the section speaks of the employer or other person responsible for the payment of wages under s. 3, and that therefore the case of the employer is also included in this section, so that he also could be proceeded against. Although it is conceded that by virtue of the provisions of s. 19, the employer cannot be made responsible for the amount in the first instance but that he is responsible only for the balance which could not be recovered from the manager, it is urged that it is not illegal on the part of the Magistrate to direct, if the employer is made a party, that the amount should be recovered in the first instance from the manager, and in so far as the whole or part of the amount could not be recovered from him, the balance should be recovered from the employer. The

learned Judge himself has felt some difficulty in maintaining the order as originally passed against opponent No. 1. He says that the contention of the employer seems to be correct because the proceedings under s. 15, are to be taken against the person responsible under s. 3, i. e., the manager in this case, but that when the authority is unable to recover the amount from him, it can give a direction to recover the amount from the employer under s. 19. Then he says that it was not however clear whether the lower Court found before passing the order under s. 19, that the money could not be recovered from the manager and he winds up his reasoning by observing: "There are however no provisions for an appeal against an order passed under s. 19."

If the learned Judge was of opinion, as he seems to have been, that petitioner No. 1 was a proper party under s. 15, it is erroneous to say that he has no right of appeal on the ground that no right of appeal has been provided under s. 19, because in that case the order against the employer would be both under ss. 15 and 19. Besides, his further reasoning that although it was not yet clear that the money could not be recovered from the manager, still an order could be passed against the employer before that is ascertained appears to me to be incorrect. The point is in what sense is the word "employer" used in sub-s. (3) of s. 15? The words are, "the employer or other person responsible for the payment of wages under s. 3." Does it mean the employer where no manager is appointed, or also the employer where a manager is appointed? It is contended on behalf of the opponent here that the word "employer" is also used in the sense of an employer where a manager is appointed, and that therefore even though the manager would in the first instance be liable, the employer could also be made a party in the proceedings under s. 15 and an order against him be passed under s. 19. This argument however seems to me to be erroneous. Section 3, speaks of the liability of an employer or any other person who is named as the manager. In other words, the section means that in all cases where a manager or a responsible person or a nominated person is appointed then these persons are liable, but where no such persons are appointed or nominated in the case of factories, industrial establishments or railways, then in those cases only it would be the employer who would be responsible for the payment of wages and

therefore it is that the words as they appear in sub-s. (3) of s. 15 are "the employer or other person responsible for the payment of wages under s. 3." It should be noted that the words are not "the employer and other person responsible," but they are "the employer or other person responsible for the payment of wages under s. 3." In other words, it is distinctly contemplated that the proceedings in the first instance should be against either the employer or against the manager but not against both. Therefore, if a manager is appointed the proceedings should be against the manager alone, but if no manager is appointed they should be against the employer. I think the use of the word "or" instead of "and" clearly shows that the proceedings under s. 15 are to be instituted against only one person, whether he is the manager as in this case, or the employer, but not against both.

It is true that if after the order is passed against him the whole of the amount could not be recovered from the manager, the balance could be recovered from the employer under s. 19 and no appeal is provided against an order passed under s. 19, with the result that as the employer cannot be made a party to the application under s. 15, in the first instance, and if subsequently an order is passed against the employer to recover the balance from him, the employer has no right of appeal against that order passed under s. 19 and that it may appear inequitable that the employer should be saddled with liability without giving him any right of appeal against the order. But the remedy, if at all, to that defect is, in my opinion, in the hands of the Legislature. It cannot however be contended that in order to give a right of appeal to the employer, he should also be impleaded as a party in the first instance where a manager has been appointed. Looking to the plain phraseology of s. 15 (3) and reading with ss. 3 and 19, I think it is clear that the manager alone in this case ought to have been made a party to the application, and that the liability of the employer would arise only if it is subsequently found that the whole or part of the amount could not be recovered from the manager. I think the Legislature contemplated that before fixing the employer with any liability, it must be first found that the whole or any part of the amount could not be recovered from the manager. There is no such finding in this case, and there could not be any such finding as the stage of recovery from the manager has not yet come.

In the result therefore I am of opinion, that Mr. Dixit, opponent No. 1, i. e., applicant No. 1 here, was not a proper party to this application under s. 15 and that the order against him should be set aside. The order against applicant No. 2, i. e., the manager Mr. Dave, is maintained. As regards applicant No. 2 the rule is discharged with costs. As regards applicant No. 1 the rule is made absolute with costs.

D.

Order accordingly.

ALLAHABAD HIGH COURT

First Appeal No. 209 of 1937

September 22, 1939

THOM, C. J. AND GANGA NATH, J.

JAGGO BAI—DEFENDANT—APPELLANT

versus

HARIHAR PRASAD SINGH, PLAINTIFF

AND ANOTHER—DEFENDANT—RESPONDENTS

Vendor and purchaser—Breach of contract—Held vendors and not vendee liable for breach—Specific performance—Alternative claim for refund—Claim by vendee for specific performance or in alternative for refund of purchase money—Withdrawal of former claim—Vendee, if can claim refund—Interest—Purchaser, if entitled to interest on purchase price.

Vendors made an offer to the vendee to execute a deed of transfer of their mortgagee rights. The offer, however, was not *bona fide*. One of the vendors who by separate agreement had covenanted to transfer his share in the mortgagee rights to the vendee, if called upon, did not carry out his part of the agreement:

Held, that the vendee and not the vendors committed the breach of the contract.

Where upon a breach of contract by the vendors the vendee claims a decree for specific performance or in the alternative a refund with interest of the amount of the purchase price paid by him but withdraws during the pendency of the suit his claim for specific performance and the vendors do not suffer from the suit, the vendee is not debarred from claiming the refund as the claim seeks only *restitutio in integrum* and is not strictly one of damages. 111 Ind. Cas. 413 (1), distinguished. *Nicholson v. Brown* (2), discussed. 94 Ind. Cas. 782 (3), relied on.

In a suit on breach of contract by the vendor, the vendee is entitled to a claim for interest upon the amount of purchase price paid by him to the vendor and retained by him even after his repudiation of the contract. 173 Ind. Cas. 15 (4) and 119 Ind. Cas. 615 (5), referred to.

F. A. from decision of the Civil Judge. Banda, dated March 19, 1937.

Sir Syed Wazir Hasau, for the Appellant.

Mr. Ambika Prasad, for the Respondents.

Thom, C. J.—This is a defendant's appeal arising out of a suit in which the plaintiff prayed for the following

reliefs:

"(a) That the defendants be ordered to execute a deed of assignment of their mortgagee right under the mortgage deed, dated February 18, 1921, executed by the late Bindeshwari Prasad in favour of the defendants on payment by the plaintiff of a sum of Rs. 23,000, the balance of the amount of sale consideration, or any other amount that the Court may be pleased to fix, and a decree in favour of the plaintiff be passed for the specific performance of the contract against the defendants. (b) That if, for any reason, in the opinion of the Court a decree for specific performance of contract cannot be passed, the defendants may be ordered to refund the sum of Rs. 29,000 with interest to the plaintiff, and a decree for a sum of Rs. 26,000 be passed against defendant No. 1 and for a sum of Rs. 3,000 against defendant No. 2 with interest by way of compensation from the date of payment up to the date of realization, and the Court may grant any further relief."

On December 16, 1928 the appellant, *Mst. Jaggo Bai*, agreed to transfer to the plaintiff her mortgagee rights under a mortgage executed by Bindeshwari Prasad on February 1, 1921. The sale price of the mortgagee rights was fixed at Rs. 52,000. The material clauses of the deed executed by *Mst. Jaggo Bai* are as follows:

"Accordingly negotiations for transfer of the document aforesaid together with all the rights were started with *Rai Bahadur B. Harihar Prasad Singh* through *B. Girja Shankar Vakil* of Lucknow, and it has been settled that I shall transfer the amount of the mortgage deed aforesaid with interest together with all the rights and powers for a sum of Rs. 52,000 and I shall see that the *Rai Bahadur* aforesaid acquires the entire property permanently. In case the legal advisers of the *Rai Bahadur* aforesaid consider that I would not be in a position to transfer the entire property mentioned in the mortgage deed free from all defects and disputes, unless *Seth Beni Chand* is made to join the deed of transfer, I shall transfer to the *Rai Bahadur* aforesaid one-half of the property mentioned in the document aforesaid for a sum of Rs. 26,000 without raising any plea or objection. Whenever within three years the *Rai Bahadur* aforesaid wants I shall execute the deed of transfer in respect of the mortgage deed, dated February 18, 1921, and have it registered in any way and in favour of anyone proposed by him. For the present, I have already received a sum of Rs. 7,000 out of the amount agreed upon by means of a cheque No. 4-A 19897, dated November 28, 1928, and I have this day received Rs. 19,000 by means of cheque No. 4-A 19893, dated December 16, 1928, i. e., in all I have received a sum of Rs. 26,000. At the time of compliance and completion of the deed of transfer I shall, as directed by the *Rai Bahadur* aforesaid, allow credit for the sum of Rs. 26,000 and accept the balance of the amount settled, whatever it might be, subject to the terms noted above."

The mortgage deed of February 18, 1921 was executed for a sum of Rs. 60,000 in favour of defendant No. 1, *Mst. Jaggo Bai*, and defendant No. 2, her son *Seth Beni Chand*. The plaintiff avers that the defendants refused to implement the agree-

ment of December 16, 1928. He accordingly claimed a decree for specific performance or, in the alternative, a decree for refund of Rs. 26,000 plus interest thereon. After the evidence had been completed and during the course of arguments in the trial Court the plaintiff withdrew his claim for decree for specific performance. This was done by means of a statement made by the plaintiff's Pleader, which is in the following terms:

"*Babu Makut Behari Lal*, Pleader for the plaintiff, stated that regard being had to the facts of the case, he does not want to press the point re-specific performance prayed for in relief (a)."

The plaintiff's claim was contested by both the defendants upon various grounds. In the trial Court, as is apparent from the judgment of the Court, the main issue was as to whether defendant No. 1, Jaggo Bai, had validly executed the agreement of December 16, 1928. In her written statement she averred that she had no knowledge of the contents of the document which she signed. She is a *pardanashin* lady, and the onus was therefore upon the plaintiff to prove that she had fully understood the import of the document which she signed. The learned Judge in the trial Court held that the plaintiff has discharged that onus. He has accepted the evidence of Mr. Rahim Bux, a leading Mukhtar of Banda, who advised *Mst. Jaggo Bai* in connection with the execution of the aforesaid agreement. This finding of the learned Civil Judge was not challenged before us in appeal. The decision of the learned Civil Judge was challenged upon two grounds. It was maintained in the first place that the evidence established that the defendants were not in breach of their contract, but that the plaintiff had failed to implement his obligations in connection with the contract, in the second place, it was contended that, assuming that the defendants were in breach of the contract, inasmuch as the plaintiff had withdrawn his claim for decree for specific performance, he was debarred from insisting upon his alternative claim for refund of the amount of the purchase price paid by him to defendants Nos. 1 and 2.

The learned Civil Judge granted a decree in terms of the alternative claim, that is, he granted a decree against defendant No. 1 for Rs. 26,000 and interest thereon, and against defendant No. 2 for Rs. 3,000 and interest thereon. Defendant No. 2 filed an appeal against the decision of the learned Judge, but that appeal has been dismissed

for default. In regard to the appellant's first contention that she is not in breach of her contract, it is necessary only to refer to the documents' record. (His Lordship then dealt with the correspondence between the parties, and after a full consideration of the same came to the conclusion that the defendants repudiated the contract with the plaintiff. The judgment then proceeded.) It was contended for the appellant that the contract was one under which the plaintiff agreed to accept the transfer of the mortgagee rights under the mortgage of 1921 from *Mst. Jaggo Bai* and *Seth Beni Chand* and that they had together offered to transfer these rights to him on December 14, 1931. There are two answers to this contention. The first is that under the deed of agreement of December 16, 1928 *Mst. Jaggo Bai* covenanted to transfer the half share in the mortgagee rights to the plaintiff, if called upon. The plaintiff did call upon *Mst. Jaggo Bai* to implement this covenant on December 7, 1931. *Mst. Jaggo Bai* quite obviously refused to carry out this part of the agreement. Secondly, the offer of December 14, 1931 to execute a deed of transfer of the mortgagee rights by *Mst. Jaggo Bai* and *Seth Beni Chand* on payment of Rs. 26,000 was not a *bona fide* offer to carry out the contract. The sum due by the plaintiff under the contract was Rs. 23,000, and not Rs. 26,000. In these circumstances, in our judgment, the defendants, and not the plaintiff, are in breach of the contract. The appellant's second contention now falls to be considered. As before mentioned, it was maintained on her behalf that in view of the withdrawal of the claim for the relief for specific performance the plaintiff had debarred himself from claiming damages. This contention was based by learned Counsel for the appellant upon the decision of the Privy Council in *Ardeshir H. Mama v. Flora Sasoon* (1). In that case it was decided that

"in a case of breach of contract by one party the other party may elect to put an end to the contract and to sue for damages, or he may keep the contract open and sue for specific performance. In the latter case he must, if required, prove a continuous readiness and willingness from the date of the contract to the time of the hearing to perform the contract on his part. If during the progress of the suit and before the hearing he abandons his claim to specific performance or disentitles himself to that relief by some act on his part, he cannot

(1) 26 A L J 1220; 111 Ind. Cas. 413; A I R 1928 P O 208; 52 B 597; 55 I A 360; 32 O W N 953; 30 Bom. L R 1242; 28 L W 257; I L T 40 Bom. 125; 55 M L J 523; (1928) M W N 893; 48 O L J 451 (P O).

claim or be awarded by the Court damages in lieu of specific performance of the contract. Jurisdiction to award damages in substitution of the relief for specific performance remains so long as the plaintiff does no act on his part to disentitle himself to a decree for specific performance. A Court may allow a plaintiff for specific performance to be amended into a plaintiff for claim of damages, pure and simple, but discretion to allow such an amendment should be exercised with great care and caution."

It is to be observed that this decision is no authority to the proposition that the Court is precluded from awarding damages in a suit for specific performance where the plaintiff during the pendency of the suit withdraws his claim for specific performance. After an exhaustive review of the law upon the question the Board observed :

"In other words, that the Court should have the power of granting such amendment in a proper case is salutary and indeed necessary. The possibility that the power will be exercised may, in certain cases, be the only effective check upon a defendant to a specific performance suit, who by delay, expensive appeals and other device, sets himself to starve a relatively impecunious plaintiff into submission by making continued performance of the contract on his part beyond his power. And such a power is possessed by the Court in England, and in a proper case and under suitable conditions it may be used see *Nicholson v. Brown* (2). But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effect upon the position both of the plaintiff and the defendant. If the defendant is to be prevented by the possible exercise of the power from starving a plaintiff out of his rights, the plaintiff must not by its ill-considered exercise be permitted to turn his suit into a gamble for himself at the defendant's expense. Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaintiff to be actually remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent, and the amendment will be allowed or refused with a due appreciation of the position."

The circumstances in the present case are not such, in our judgment, that the Court should refuse to allow the plaintiff to withdraw his claim for specific performance and insist on the alternative claim for refund of part of the purchase price which was paid by him to the defendants. The defendants have not in any way suffered by the suit which has been maintained against them by the plaintiff so far as their rights under the mortgage are concerned. Indeed, they have instituted a suit against the mortgagors on the basis of the mortgage and that suit is still pending. In claiming the refund the

plaintiff is not strictly claiming damages at all. He is seeking *restitutio in integrum* the contract, having fallen through.

In the present suit further there is no question of re-modelling the plaintiff. The plaintiff does not, in fact, sue for damages for breach of contract. He claims the equitable relief that the contract between him and the defendants having fallen through he is entitled to what he has paid to the defendants in respect of the purchase price of the mortgagee rights, which under the contract were to be transferred to him. That the plaintiff is in equity entitled to claim the refund of the portion of the purchase price paid by him we have no doubt and in this connection we would refer to the decision of the Privy Council in *Chiranjit Singh v. Har Swarup* (3). The facts in that case were that under a document of sale of immovable property the purchaser was bound to pay Rs. 20,000 as earnest money, and the remaining sale consideration in two instalments. The purchaser however could not pay the earnest money as agreed, and later paid in a large sum which the vendor acknowledged as having received 'towards the sale price' out of the agreed consideration. The purchaser subsequently repudiated the contract and sued to recover the money paid by him. It was held that in those circumstances there was no supersession of the original contract; and there was nothing to show that the vendor agreed to sacrifice the stipulated earnest. The purchaser therefore, it was, held must lose his earnest money, but was entitled to recover the balance of his payment to account. Now, if a defaulting purchaser is entitled to recover the balance of his payment to account, there can be no question that a purchaser, who is not in default, is entitled to recover the balance of what he has paid towards the purchase price from the defaulting seller. We hold therefore that the plaintiff in the present suit is entitled to insist upon his claim for refund of the sum of Rs. 26,000 from *Mst. Jaggo Bai*. The learned Civil Judge in the Court below has granted a decree to the plaintiff against *Mst. Jaggo Bai* for the sum of Rs. 26,000 plus interest on the said sum from the date of payment of the said sum.

It was contended for the appellant that in the circumstances the plaintiff was not

(3) 24 A L J 248; 94 Ind. Cas. 782; A I R 1926 P C 1; 23 L W 172; 3 O W N 168; (1926) M W N 145; 50 M L J 629 (P C).

entitled to interest. It was urged that since the plaintiff maintained up to February 20, 1937 his plea for specific performance, he was certainly not entitled to interest prior to that date. It was contended that interest upon the sum of Rs. 26,000 was in the nature of damages suffered by the plaintiff as a result of the breach of contract. We do not agree that the interest upon the sum of Rs. 26,000, which the plaintiff claims, can be regarded strictly as compensation in respect of damage resulting from the appellant's breach of contract. It appears to us that the appellant having obtained this sum without any willingness on her part to perform her obligations under the agreement of December 16, 1928, she is bound in equity not only to return the sum of Rs. 26,000, but to pay a reasonable interest thereon. She has had the use of this sum which she should have returned to the plaintiff when she decided to repudiate the contract. In this connection we refer to the decision of the Privy Council in *B. N. Ry. Co., Ltd. v. Ruttanji Ramji* (4). It was held in that case that the proviso to s. 4, Interest Act, applies to a case in which the Court of equity exercises jurisdiction to allow interest, but that in order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction. In the course of the judgment the observation of Lord Tomlin in *Maine and New Brunswick Electrical Power Co., Ltd. v. Alice M. Hart* (5), was quoted with approval, viz.:

"In order to invoke a rule of equity it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as for example, the non-performance of a contract of which equity can give specific performance: see p. 70 of *B. N. Ry. Ltd. v. Ruttanji* (4), col. 1."

In our judgment it would be highly inequitable in the present case to refuse the plaintiff his claim for interest upon the sum of Rs. 26,000 which the appellant had no right to retain in view of her refusal to implement her obligations under the deed of December 16, 1928. We hold therefore that in equity the plaintiff is entitled to

interest. Taking all the facts and circumstances into consideration we fix interest at the rate of 4 per cent. per annum. The interest will run from December 16, 1928 to the date of payment. In the result the appeal is allowed in part and the decree of the Court below is modified. The plaintiff is granted a decree against the appellant for the sum of Rs. 26,000 plus interest thereon at the rate of 4 per cent. per annum from December 16, 1928 down to the date of payment. As the appellant has substantially failed, the respondent is entitled to his costs in this appeal.

D.

Decree modified.

BOMBAY HIGH COURT

First Appeal No. 150 of 1938

August 17, 1939

N. J. WADIA AND WASOODHW, JJ.

IRAPPA LOKAPPA VASTRAD AND

ANOTHER—DEFENDANTS NOS. 1 and 2—

APPELLANTS

versus

RACHAYYA MADIWALAYYA, PLAINTIFF

AND ANOTHER—DEPENDANT No. 3—

RESPONDENTS

Hindu Law—Adoption—Widow of predeceased brother adopting subsequent to partition between remaining co-parceners—Adopted son, if entitled to share.

A co-parcenary consisted of two brothers and a son of one of them. After the death of one of the brothers leaving behind him his widow, the remaining brother and his son made a partition of the family property. Subsequently the widow of the pre-deceased brother adopted a son who brought a suit against the partitioning members for half share in the family property:

Held, that though the adoption was valid, the adopted son was not entitled to half-share in the property which had already been partitioned. *Shivappa Jayappa v. Yagappa Shiddappa*, F. A. No. 247 of 1935, followed, 180 Ind. Cas. 295 (4), distinguished.

F. A. from a decision of the First Class Sub-Judge, Bijapur, in C. S. No. 51 of 1935.

Mr. R. A. Jahagirdar, Govt. Pleader, for the Appellants.

Messrs. G. R. Madbhavi and K. R. Bengeri, for Respondents Nos. 1 and 2, respectively.

N. J. Wadia, J.—This appeal raises a short and interesting question with regard to the law of adoption. The plaintiff, who is respondent No. 1 before us, claimed to be the adopted son of one Shivalingayya, and filed the suit to recover possession of his half share in the suit property from

(4) A I R 1938 P C 67; 173 Ind. Cas. 15; 65 I A 66; 1 I L R (1938) 2 Cal. 72; 32 S L R 374; 1938 O L R 119; 19 P L T 125; (1938) A L J 169; 10 R P C 216; 47 L W 281; (1938) O W N 261; 1938 A L R 167; 4 B R 374; (1938) 1 M L J 610; 67 O L J 153; 42 O W N 985; (1938) M W N 616; 40 Bom. L R 746 (P O).

(5) (1922) A C 631; 119 Ind. Cas. 615; A I R 1929 P C 185; 98 L J P C 146; 141 L T 370; 30 L W 153; (1929) A L J 1065; Ind. Rul. (1929) P C 319; 57 M L J 622; (1929) M W N 862 (P O).

defendant No. 1 Irappa, who was his paternal uncle, and defendant No. 2 Gurbasappa, who was the son of Irappa. Shivalingayya, the plaintiff's adoptive father, and his younger brother Irappa were the sons of one Lokappa who died in the year 1915. Shivalingayya himself died in 1925. At the time of his death he was joint with his brother Irappa. He left a widow Parawwa who was defendant No. 3 in the case and who is respondent No. 2 before us. On September 18, 1933, Irappa and his son Gurbasappa, who were at the time the only members of the co-parcenary, divided. The partition deed (Ex. 70) mentions that the partition had been effected because Gurbasappa, who had come of age, had taken to bad habits and bad company and was constantly quarrelling with his father and demanding separation. The property of the family was partitioned. The deed mentioned that Parawwa *kom* Shivalingayya, the widow of Irappa's brother, had obtained a decree in the Bijapur Court awarding her maintenance at Rs. 165 per annum—and provided that this maintenance should be paid to her by Gurbasappa alone. About two months after this partition, on November 10, 1933 Parawwa adopted the plaintiff, and on January 24, 1935, the plaintiff filed the suit out of which this appeal arises to recover a half share in the family property from Irappa and Gurbasappa.

The defendants had contended *inter alia* that in fact no adoption had taken place although an adoption deed had been executed, and that the adoption was also invalid because of the unchastity of Parawwa. The learned Judge has found that unchastity on the part of Parawwa during the lifetime of her husband has not been proved, and this point was not seriously pressed before him. At the trial, the defendants admitted the *factum* on the plaintiff's adoption and the plaintiff admitted that there had been a partition between defendants Nos. 1 and 2 on September 18, 1933. But he added that that admission was subject to his right to show that the partition was not *bona fide* and was intended to defeat the rights of others. No issue was sought or raised with regard to the dishonest nature of the partition. The learned Judge found on the admission of the plaintiff himself that the partition had taken place, and on the admission of the defendants, that the plaintiff's adoption had taken place on November 10, 1933. He held that the adoption was valid.

On the view which has now been taken by the Privy Council, Parawwa was clearly entitled to make an adoption. The only question is whether as a result of that adoption the plaintiff acquires any right to a share in the property which had originally belonged to the joint family and which had been partitioned by defendants Nos. 1 and 2 prior to the plaintiff's adoption. The learned Judge held that it was not permissible for the defendants to put an end to the co-parcenary by separation, and that the plaintiff by reason of his adoption was entitled to a share in the joint family property. He therefore made a decree giving the plaintiff a half share in the suit property. Against that decree the first two defendants Irappa and Gurbasappa have appealed, and the only question before us is whether the adoption of the plaintiff by Parawwa after co-parcenary had come to an end by the partition between Irappa and Gurbasappa, who were the only members of the co-parcenary, could revive the co-parcenary and entitle the plaintiff to claim a share in the co-parcenary property which had been divided between defendants Nos. 1 and 2. In the recent Full Bench decision of this Court *Balu Saktharam v. Lahoo* (1) to which I was a party, it was held by the majority of the Full Bench that (p. 414)

"where a co-parcenary exists at the date of the adoption, the adopted son becomes a member of the co-parcenary, and takes his share in the joint property accordingly. [But] where the adoption takes place after the termination of the co-parcenary by the death, actually or fictionally, of the last surviving co-parcener, the adoption by a widow of a deceased co-parcener has not the effect of reviving the co-parcenary, and does not divest property from the heir of the last surviving co-parcener (other than the widow) or those claiming through him or her."

In principle I am unable to see any distinction between the extinction of a co-parcenary by the death of the last surviving co-parcener and its extinction by partition, so far as the rights of an adopted son adopted after the extinction of the co-parcenary are concerned. The effect of a partition is to dissolve a co-parcenary, with the result that the separating members hold their respective shares as their separate property after the partition. In *Hirachand v. Rowji Sojpal* (2) it was held by Rangnekar, J., sitting singly that "under Hindu Law, on the extinction of a co-parcenary by a partition, the widow of a co-parcener, who

(1) 39 Bom. L R 382 (414); 170 Ind. Cas. 393; A I R 1937 Bom. 279; I L R (1937) Bom. 508; 10 R B 83 (F B).

(2) 41 Bom. L R 760; 184 Ind. Cas. 876; A I R 1939 Bom. 377; I L R (1939) Bom. 512; 12 R B 803.

had died long before the partition cannot make a valid adoption."

In dealing with the effect of partition Rangnekar, J. said (p. 766*):

"The effect of partition under the Mitakshara is the conversion of an indefinite joint right in the whole into a specific right in part. The effect of partition is to dissolve the co-parcenary, with the result that the separating members thenceforth hold their respective shares as their separate property, and the share of each member dying without issue will pass on his death to his heirs. But if a member, while separating from his other co-parceners, continues joint with his own male issue, the share allotted to him on partition will in his hands retain the character of co-parcenary property as regards his male issue

"In the face of these principles, which are as old as the hills, it is difficult to appreciate the argument that the nature of the property remains the same after a partition as before it, or that the nature of the property remains dormant. True, that *qua* a divided member and his issue a co-parcenary comes into existence, but it is not the co-parcenary which subsisted before the partition. It is a new co-parcenary; and in that way a partition may at once give rise to several co-parcenaries, but these co-parcenaries are quite distinct from the larger original co-parcenary in existence before the partition but destroyed by the partition."

After referring to the decisions in *Balu Sakharam v. Lahoo* (1) and *Chandra v. Gojarabai* (3), Rangnekar J. says (p. 768*):

"If therefore on the extinction of co-parcenary by reason of the property devolving by inheritance on the heir of the last surviving co-parcener, an adoption made by the widow of a predeceased co-parcener is invalid and cannot affect that property, it is difficult to hold that, on the extinction of a co-parcenary by a partition, the widow of a co-parcener, who had died long before the partition, can make a valid adoption."

Rangnekar J.'s remarks with regard to the validity of such an adoption are in accordance with the view which he took in his dissenting judgment in *Balu Sakharam v. Lahoo* (1). On the view taken by the majority of the Full Bench in that case such an adoption would be valid, but would give the adopted son no right to divest the property which had already vested in others by reason of the extinction of the co-parcenary whether by the death of the last surviving co-parcener or by partition. The view taken by Rangnekar J., in the above case was subsequently followed by a Division Bench of this Court, of which I was a member, in *Shivappa Jayappa v. Yagappa Shiddappa*, First Appeal No. 247 of 1935, decided on December 16, 1938. The facts in that case were very similar to the facts in the case before us. In that case the plaintiff, who claimed to have been adopted by the widow of one Jayappa in March 1933, brought a

suit against four defendants who represented two other branches of the family to recover his one-third share in the property. Prior to the plaintiff's adoption there had been a partition in the family in the year 1901-02. The question was whether the plaintiff having been adopted in the third branch of the family long after the partition between the other two branches could claim a share in the joint family property which had gone to those branches at the partition. The judgment of Rangnekar J., in *Hirachand v. Rowji Sojpal* (2) was cited before us in that case, and the view taken by Sen J., and myself was that where a co-parcenary had come to an end whether by the death of the last surviving co-parcener or by partition, a son adopted subsequent to such termination of the co-parcenary should not be allowed to reopen the partition or to divest the property already vested in others.

Sen J., who delivered the judgment in that case, pointed out that this view was in accordance with the view which had been taken by the Full Bench in *Balu Sakharam v. Lahoo* (1) and also with the view which had been taken in *Chanbappa v. Huchappa* (4). In the latter case two branches of a joint family arrived at a partition of the joint family property, each branch taking a half share. One of the branches consisted of the defendant, who was the last surviving co-parcener, and the widow of his paternal uncle, who continued to live jointly. The widow thereafter adopted the plaintiff. In a suit brought by the plaintiff to obtain his half share in the property which fell to the defendant on partition, it was held that the plaintiff as the adopted son was entitled to a share in the property in the hands of the defendant, as the joint family was still subsisting and had not come to an end. The plaintiff in that case was entitled only to a share in the property which had fallen to his branch which at the time of the partition had been represented by defendant No. 3. But he was not held entitled to a share in the property of other branch. The learned Chief Justice held in that case that the half share which defendant No. 3 took on partition was taken by him as the joint family property of his branch and not as his absolute property, and that therefore the plaintiff, who was the adopted son of his father's brother was

(3) 14 B 463.

*Pages of 41 Bom. L. R.—[Ed.]

(4) 40 Bom. L. R. 1185, (1187-88); 180 Ind. Cas. 295; A I R 1939 Bom. 47; 11 R B 292.

entitled to a share in what defendant No. 3 had taken. Dealing with defendant No. 3's contention that the share which he took on partition was his absolute property the learned Chief Justice said (pp. 1137-8 *):

"He (defendant No. 3) and the widow of Parappa were the only members of the joint family, and no doubt he was the sole co-parcener. But in my opinion it is not accurate to say that the co-parcenary had come to an end. I think the co-parcenary still exists in respect of the share which he took on the partition, and that on the birth of a son to him, that son would have a share in the co-parcenary, and on the adoption of a son by his father's brother's widow, that adopted son is also entitled to share."

Mr. Madbhavi for the respondent-plaintiff contends that his case is similar to *Chanbasappa v. Huchappa* (4), and that on the principle there laid down he is entitled to a share in the property which Irappa and Gurbasappa took at the partition. We are unable to accept this contention. The present case is clearly distinguishable. In that case there was a member of the plaintiff's branch who took a share at the time of the partition, and the view which the learned Chief Justice took was that by reason of the partition the original co-parcenary came to an end, but new co-parcenaries were created between the two dividing branches, one branch being represented by defendants Nos. 2 and 4 in that case, and the other branch being represented by defendant No. 3, and that a joint family continued within defendant No. 3's own branch represented by himself and Vairawwa, the widow of his predeceased uncle. In the case before us there was no representative of Shivalingayya's (i. e., plaintiff's) branch at the time of the partition. The only co-parceners were defendants Nos. 1 and 2 representing the other branch and after the partition there could be no state of jointness between either of them and Parawwa, the widow of Shivalingayya. The mere fact that by the partition deed Gurbasappa undertook the liability to pay the maintenance which had been awarded to Parawwa, the widow of Shivalingayya, by the Civil Court, did not create any state of jointness between Gurbasappa and Parawwa, and the subsequent adoption of the plaintiff by Parawwa could not possibly have the effect of reviving the co-parcenary between Gurbasappa and Irappa which had terminated by the partition; nor could it give the plaintiff, the adopted son, any right to divest either of them of the property which

they had taken at the partition. That property ceased to be joint family property from the date of the partition. The facts in this case are, in our opinion, exactly similar to the facts in F. A. No. 247 of 1935 and the decision in that case is binding on us. On this view of the case, although Parawwa was legally entitled to adopt, and the plaintiff's adoption is therefore valid, the plaintiff would by the adoption acquire no right to a share in the joint family property which had already been partitioned two months before his adoption. His suit must fail. The appeal will therefore be allowed and the plaintiff's suit dismissed. Appellants Nos. 1 and 2 will get their costs throughout from respondent No. 1, plaintiff. Under O. XXXIII, r. 11, Civil P. C., we direct that the plaintiff should pay the Court-fees in the suit.

D.

Appeal allowed.

LAHORE HIGH COURT

Civil Revision No. 309 of 1939

November 2, 1939

ADDISON, J.

TULSI RAM NARULA—DEFENDANT—

PETITIONER

versus

FIRM GIAN CHAND-AMAR NATH—

PLAINTIFF AND OTHERS—DEFENDANTS—

RESPONDENTS

Debtor and creditor—Suit for portion of debt jointly owned is incompetent—Plaintiff's becoming joint owner of debt by assignment makes no difference.

A suit for a portion of a debt, jointly owned by various persons is incompetent. It makes no difference that the plaintiff became a joint owner of the debt by assignment, and was not originally a joint owner.

O. R. from the decree of the Additional Judge, Small Cause Court, Amritsar, dated February 14, 1939.

Mr. Shamair Chand, for the Petitioner.

Mr. D. D. Kapur, for the Respondent (Plaintiff).

Order.—Here a part of a debt was assigned and the assignee has sued for the part assigned to him and not for the whole debt. Nor have the assignees of other portions of the debt joined. His suit has been decreed. It seems to me that this is a suit for a portion of a debt, jointly owned by various persons. Such a suit must be held to be incompetent. It makes no difference that the plaintiff became a joint owner of the debt by assignment, and was not originally a joint owner. Such a distinction is obviously superficial. For the reasons given

I accept the petition and dismiss the suit, leaving parties to bear their own costs throughout.

s.

Petition accepted.

BOMBAY HIGH COURT.

Second Appeal No. 806 of 1935.

June 22, 1939.

N. J. WADIA AND INDARNARAYEN, JJ.

DATTATRAYA CHANDRAYA

BACHUWAR—APPELLANT

versus

K. L. BAWACHEKAR—RESPONDENT

Provincial Insolvency Act (V of 1920), ss. 4, 53, 54, 75—Order passed by Subordinate Judge under ss. 53 and 54—Second appeal, if lies.

The words "or of any nature whatsoever" in s. 4, Prov. Insol. Act, are incompatible with the *ejusdem generis* rule of interpretation, and that s. 4 (1) must be taken to give the Court power, subject to the provisions of the Act, to decide all questions which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. Section 4 is not intended to cover orders made under ss. 53 and 54. No second appeal therefore lies from an order made by Subordinate Judge under ss. 53 and 54. 132 Ind. Cas. 441 (1) and 178 Ind. Cas. 373 (3), distinguished.

S. A. from the decision of the Assistant Judge, Sholapur, in Miscellaneous Appeal No. 11 of 1934.

Messrs. G. N. Thakor and A. G. Kotwal, for the Appellant.

Messrs. H. C. Coyajee and M. G. Chitale for the Respondent.

N. J. Wadia, J.—This is a second appeal against the decision of the Assistant Judge of Sholapur confirming an order made by the First Class Subordinate Judge of Sholapur under ss. 53 and 54, Prov. Insol. Act. The petitioner in the application, who was the Receiver of the estate of certain insolvents, applied for setting aside a sale deed passed by the insolvents to the opponent, the present appellant, on December 15, 1930, alleging that the sale by the insolvents which had been made within two years of the insolvency was not *bona fide* and for valuable consideration, but was hollow and fraudulent, and intended to defraud other creditors. The trial Court came to the conclusion that the opponent was not a *bona fide* purchaser for value and that the sale was a fraudulent one and intended to give preference to the opponent and to defraud other credi-

tors, and it, therefore, set aside the sale. This order was confirmed in appeal by the Assistant Judge, and the opponent has come in second appeal. A preliminary objection has been raised by Mr. Coyajee for the respondent that no second appeal lies. The application to the Subordinate Judge was under ss. 53 and 54, Prov. Insol. Act, and the order made by the learned Subordinate Judge, which was confirmed by the Assistant Judge, was under those sections. Section 75 (1) of the Act provides that the debtor, any creditor, the Receiver, or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court, may appeal to the District Court, and the order of the District Court upon such appeal shall be final. Under this section, therefore, the order made by the District Court in appeal is final and no second appeal would lie. The section provides however that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit. The proviso, therefore, allows a revision application to the High Court against orders made by the District Court in appeal. Proviso 2 says that any such person aggrieved by a decision of the District Court on appeal from a decision of a Subordinate Court under s. 4 may appeal to the High Court. It is contended for the appellant that all orders made under ss. 53 and 54 of the Act are also orders made under s. 4 and that a second appeal, therefore, lies in the case of such orders to the High Court from the decision of the District Court. Section 4 of the Act provides that subject to the provisions of the Act, the Court shall have power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court.

The question whether a second appeal lies against an order made by a District Court in appeal from an order made by a Subordinate Judge under ss. 53 and 54, Prov. Insol. Act, has been considered by this Court in two unreported cases. In Second Appeal No. 854 of 1935, *Virappa Basappa Bile-angadi v. Rachappa Balappa Hosmani* decided on October 7, 1937 Rangekar, J. sitting singly held that in such cases no second appeal

lay to the High Court, and the same view was taken by myself sitting singly in Second Appeal No. 741 of 1935, *Anant Raghunath Puranik v. Shantaram Ramchandra Pandit*, decided on August 24, 1938 by N. J. Wadia, J. The view which was taken in both these cases that the words "subject to the provisions of this Act" in s. 4 were intended to take out of the purview of that section cases which are provided for by other section of the Act, such as ss. 53 and 54. It is true that cases falling under s. 53 and to some extent those falling under s. 54 would be cases involving questions of title and may to that extent be considered to fall also under the wider provisions of s. 4. The difficulty however is created by the language of s. 75. Sub s. (1) of that section expressly deals with orders made by the District Court on appeal from orders made in the exercise of insolvency jurisdiction by a Court subordinate to the District Court. Orders under ss. 53 and 54 made by the Subordinate Courts are clearly covered by this clause, and the decision of the District Judge in appeal from such orders must, therefore, be final, and not appealable to the High Court. To hold that proviso 2 to s. 75 which allows second appeals in the case of decisions of the District Court on appeal under s. 4 covers also decisions of the District Court on appeal under ss. 53 and 54 would render the provisions of sub-s. (1) of s. 75 nugatory, and would in effect mean that every order made by the District Court on appeal from a decision under ss. 53 and 54 would, in spite of the express provisions of s. 75 (1), be subject to a second appeal.

The same question has been considered by a Bench of the Madras High Court in *Alagirisubba Naik v. Official Receiver of Tinnevely* (1). It was held in that case that no second appeal could lie against an order made by a District Munsif annulling a sale under s. 53, Prov. Insol. Act. As has been pointed out in that case s. 4 of the present Act, Prov. Insol. Act, V of 1920, did not exist in the earlier Act of 1907, and the section appears to have been introduced in the present Act because of conflicting decisions as to the power of an Insolvency Court to deal with certain questions of title or priority other than those falling under ss. 53 and 54. Provisions corresponding to

the present ss. 53 and 54 existed in the Act of 1907 and under the earlier Act also no second appeal lay from a decision of the District Court in appeal from orders under those sections. No change was made by the new Act in those provisions, and it would be difficult to hold that the Legislature altered the previous procedure and provided a second appeal from orders made by Subordinate Courts under ss. 53 and 54 without expressly saying so, and merely indirectly by the provision that orders under the new s. 4 were subject to second appeal. It has been pointed out by Reilly, J., in the Madras case that s. 4 (3) of the Act of 1920 provides that the Court need not decide every question of title or priority or any question of the nature described in sub-s. (1) of that section which may arise in an insolvency case before it but may decline to go into such a question and yet may sell the debtor's interest in the property concerned. If all questions falling under s. 53 were considered as questions falling under s. 4, it would mean that the Court would have a discretion to decline in certain cases to go into the question whether a sale falling under s. 53 was voidable against a Receiver. No such discretion is given to the Court by s. 53, Prov. Insol. Act, nor had the corresponding provision of the earlier Act given any such discretion, and it cannot have been the intention of the Legislature, nor is it possible to infer from the language of the Act, that it was the intention of the Legislature to alter the law on the subject and to give to the Court under s. 53 a discretion to refuse to decide whether a particular transfer came within the purview of the section. The language of s. 4 is extremely wide. It gives the Court power to decide all questions whether of title or priority or of any nature whatsoever.

With respect, I agree with the view which was taken by the learned Judges in the Madras case referred to above that the words "or of any nature whatsoever" are incompatible with the *ejusdem generis* rule of interpretation, and that s. 4 (1) must be taken to give the Court power, subject to the provisions of the Act, to decide all questions which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. That being

(1) 54 M 989; 132 Ind. Cas. 641; A I R 1931 Mad. 745; 61 M L J 820; Ind. Rul. (1931) Mad. 673; 34 L W 105.

so, if proviso 2 to s. 75, which deals with decisions of the District Court on appeal from decisions of the Subordinate Courts "under s. 4," were interpreted in the way in which the appellant asks us to, the provisions of s. 75(1), which expressly provide that no second appeal shall lie from orders made in the exercise of insolvency jurisdiction by a Subordinate Court, would be rendered absolutely nugatory. The only way in which s. 4 can be interpreted so as to make the Act intelligible and consistent is to hold that it was not intended to cover orders made under ss. 53 and 54. The fact that Sch. (I) to the Act, which specifies the cases in which the decisions and orders of a District Court come to or made otherwise than in appeal are appealable to the High Court, refers separately to orders made under s. 4, and those made under ss. 53, 54 and other sections of the Act leads to the same conclusion, that it was not the intention of the Legislature that proviso 2 to s. 75 should refer to orders made under ss. 53 and 54.

No authority has been cited to us in support of the view that a second appeal lies against such order. We have been referred to two cases, *Sholapur Spinning and Weaving Co., Ltd. v. Pandharinath* (2), and *Balubhai v. Kalyanji* (3), in both of which second appeals were admitted from orders made under ss. 53 and 54, Prov. Insol. Act. In neither of these cases however was any question with regard to the admissibility of such appeals raised, and the attention of the Court, was therefore not directed to the point now raised before us. In another case Second Appeal No. 765 of 1938, *Keshavlal Mohanlal Shah v. Ranchhoolal Maganlal Shah*, Decided on October 14, 1938, by Wassoodew, J., to which also our attention has been drawn, a revision application had been filed against an order made by a Subordinate Judge under ss. 53 and 54, Prov. Insol. Act, and on a preliminary objection being raised that application was allowed to be treated as a second appeal, and was disposed of as such. The judgment does not mention the grounds on which the revision application was allowed to be converted into a second appeal, and it does not appear from the judgment that the question whether a second appeal lay was raised. In our opinion, the view taken in *Alagiri-*

subba Naik v. Official Receiver of Tinnevely (1) and in the two second appeals, No. 854 of 1935 and No. 741 of 1935, to which I have referred, is correct, and no second appeal lies against the order made by the Subordinate Judge in the present case. The appeal must therefore be dismissed. We are asked to treat this as a revision application and we have allowed it to be argued as such. After going through the evidence we are not satisfied that we would be justified in interfering in revision.

It is contended that the burden of proving good faith under s. 53 of the Act was wrongly thrown on the opponent. The application was however both under s. 53 and s. 54, and so far as Issue No. 2 with regard to fraudulent preference was concerned, both in the Subordinate Judge's Court and in the lower Appellate Court the burden was rightly thrown on the Receiver. Both the learned Judges have accepted the statements made by the Receiver, and from those statements and the facts elicited in the cross-examination of the opponent it appears that the view which they have taken that fraudulent preference has been proved is correct. The sale was entered into on December 15, 1930, only eight days before the vendor was adjudicated an insolvent. It appears from the evidence that the insolvent had been heavily indebted to several persons, and there is ample justification for the view which both the learned Judges have taken that the opponent must have been perfectly well aware of the heavy indebtedness of the insolvent. The opponent himself has stated that he had made demands for his own outstandings and that he had not been paid. The learned Judges have found that out of the consideration of Rs. 12,000, Rs. 7,000 were paid before the Sub-Registrar. The rest of the consideration is alleged to have been made up of a debt of over Rs. 5,000 due on promissory notes. The promissory notes were not forthcoming. It is also alleged that an amount of over Rs. 2,000 was remitted and for the balance the shop of the debtor was purchased. Considering that the insolvent had very heavy debts to the extent of Rs. 30,000 to Rs. 40,000 and practically no other property from which the other creditors could have been satisfied, the transaction, in our opinion, did amount to a dishonest preference given to the opponent. We see no reason therefore for interfering in revision. The appeal is dismissed with costs.

S.

Appeal dismissed.

(2) 30 Bom. L R 393; 113 Ind. Cas. 148; A I R 1928 Bom. 341.

(3) 40 Bom. L R 884; 178 Ind. Cas. 373; A I R 1938 Bom. 449; I L R (1939) Bom. 1; 11 B B 156.

PATNA HIGH COURT

Criminal Revision Nos. 2 and 91 of 1938

March 14, 1939

MOHAMAD NOOR, J.

RAMA BARIK AND ANOTHER—PETITIONERS
versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 144—Starting of rival business in close proximity to previously established one—Order under s. 144 against person interested in rival business, if can be issued—Order spending itself—Interference by High Court.

A Magistrate, as an emergency measure, has power to stop, by an order under s. 144, Criminal P. O. the holding of a hat, or the exercise of his rights by a man on his own land. But a man, who holds a hat on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the newcomer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case the best course is to prohibit the doing of the wrongful act or if necessary, to bind down the wrongdoer under s. 107, Criminal P. O. But an order more or less of a permanent nature is not justified under s. 144, Criminal P. O., which is meant for speedy remedy. 150 Ind. Cas. 118 (1), 157 Ind. Cas. 760 (2) and *Satish Chandra Roy v. Emperor* (3), relied on.

It is not the usual practice of the High Court to interfere with an order which has spent in its force unless there are special reasons for such interference.

Or. R. against two orders of the Sub-Divisional Magistrate, Jajpur, dated May 30, 1938, and July 29, 1938, respectively.

Messrs. B. K. Ray and B. Mahapatra, for the Petitioners.

Messrs. C. M. Acharjya and P. Mahanti, for the Crown.

Order.—These two applications in revision are directed against two orders of the Sub-Divisional Magistrate of Jajpur, one under s. 144, Criminal P. O., dated May 30, 1938 and the other dated July 29, 1938 directing that a complaint be made against the petitioners for their prosecution under s. 188, I. P. O. It appears that the proprietor of the Madhupurestate had for about two years a hat, in *Mauza Kainchi*, called Madhuban Hat. It was being held on Wednesdays and Saturdays. No toll was levied on the shopkeepers who exposed their goods for sale in the hat. On April 5, 1938 the proprietor leased it out for Rs. 650 and for the first time toll was collected in it on April 9, 1938. This seems to have been resented to by the villagers

of the locality who started a rival hat adjacent to the Madhuban Hat on a land belonging to a deity installed in the village of which the petitioners are the *marfatdars* or managers. The rival hat was held for the first time on a Wednesday. There was no Police report of any apprehension of breach of the peace but a complaint was made to the Sub-Divisional Magistrate of Jajpur who called upon the petitioners to show cause why an order under s. 144, Criminal P. O. would not be passed against them. They appeared and showed cause. The learned Magistrate thereafter held a local enquiry, examined some witnesses on May 30, 1938 and holding that there was a likelihood of breach of the peace if the rival hat was allowed to be held, passed an order under s. 144, Criminal P. O. against the petitioners

"restraining them from holding the hat and calling upon them to prevent the sitting of the hat on their lands by withdrawing his (their) consent which they have given to the villagers for the holding of the hat on Wednesdays and Saturdays."

The petitioners moved the District Magistrate of Cuttack under s. 144 (4), Criminal P. O. but the learned Magistrate declined to interfere and rejected the application on August 8, 1938, Criminal Revision No. 82 of 1938 is directed against this order. The order under s. 144, Criminal P. O., referred to above, was affixed in front of the house of the petitioners and was also promulgated by beat of drum. The contents of the proceeding were explained by the Sub-Inspector of Police on the spot. The Sub-Inspector of Police reported on June 13, 1938 that the new hat continued to be held within the prohibited area and that the order under s. 144, Criminal P. O., was disobeyed. The petitioners were called upon to show cause against their prosecution under s. 188, I. P. O. They did not show cause but cross-examined the witnesses who were examined in support of the report of the Sub-Inspector of Police. As the learned Magistrate has observed, the trend of the cross-examination was that no order was served upon the petitioners and that the hat was not held on the prohibited land. There was however evidence that the hat was held on June 1, 1938 and on June 8, 1938 and also on June 22, 1938 after the Police report. The learned Magistrate then directed that a complaint be made to the District Magistrate for the prosecution of the petitioners under s. 188, I. P. O. A complaint was accordingly made and the District Magistrate after taking cognizance of the offence made over the case to a Magistrate of Cut-

tack for trial. Criminal Revision Application No. 91 of 1938 is directed against this order of prosecution. I shall take up these two applications separately.

Criminal Revision No. 82 of 1938.

It is now settled law that a Magistrate, as an emergency measure, has power to stop, by an order under s. 144, Criminal P. O., the holding of a hat, or the exercise of his rights by a man on his own land. This was the view which I took in *Saligram Singh v. Baijnath Singh* (1), and Rowland, J., after reviewing all the leading authorities on the subject, came to the same conclusion in *Hansraj Prasad Singh v. Abdul Jabar* (2). But in the former case I pointed out that a man, who holds a hat on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the newcomer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case the best course is to prohibit the doing of the wrongful act or if necessary, to bind down the wrongdoer under s. 107, Criminal P. O. But an order more or less of a permanent nature is not justified under s. 144, Criminal P. O. which is meant for speedy remedy. This was pointed out in *Satish Chandra Roy v. Emperor* (3). In the second case Rowland, J., after referring to *Satish Chandra Roy v. Emperor* (3), mentioned above, pointed out that

"the real disadvantage of passing an order under s. 144 without going into the merits of the dispute is that on the expiry of two months which is the limit of the duration of such an order the whole dispute is left to break out again. To pass an order under s. 144 and to leave it as if that order disposed of the dispute finally is merely postponing trouble and inviting its recurrence in an aggravated and more complicated form at a later date."

It is true that in this case the learned Magistrate recorded some evidence a summary of which has been given in his judgment but his order did not touch the real trouble. From what he had said it appears

(1) 14 P. L. T. 740; 150 Ind. Cas. 118; A. I. R. 1934 Pat. 104; (1934) Cr. Cas. 198; 35 Cr. L. J. 1057; 6 R. P. 712.

(2) 16 P. L. T. 624; 157 Ind. Cas. 760; A. I. R. 1935 Pat. 461; 36 Cr. L. J. 1268; (1935) Cr. Cas. 1170; 1 B. R. 812; 8 R. P. 161 (2).

(3) 11 C. W. N. 79; 4 Cr. L. J. 433.

that the villagers are annoyed on account of the levy of toll by the proprietor of the Madhuban Hat and are determined to hold a rival hat at a different place where they can carry on their trade without the payment of toll. Commissions of wrongful acts were alleged against one Narain Misra, Tahsildar of Ollas estate, and also against the *paiks* of the Madhupur estate, though the learned Magistrate has not believed the latter allegation. But no wrongful act is attributed to the petitioners. The only thing which they are said to have done is that they have permitted the villagers to hold the hat on the land which is under their management as *marfatdar* of a deity. In my opinion, therefore, this was pre-eminently a case in which those against whom allegations of wrongful acts were made should have been proceeded with under the suitable section of the Criminal P. O. The petitioners were ordered not to hold the hat and to withdraw their consent. There is nothing to show that they were holding the hat or were personally interested in it. I am not sure whether the withdrawal of the consent by itself will be sufficient to avert a breach of the peace if it were apprehended. Therefore though the Magistrate had power of passing an order which he did, I am not convinced of the suitability of the order which is in the nature of a permanent injunction and can hardly be said to be appropriate under s. 144, Criminal P. O. though it does come within its terms. How inefficacious in such cases an order like the one passed by the learned Magistrate is, will be apparent from what happened in this case. The order was against the petitioners in the terms already stated. Though it was published on the spot it was not directed against the villagers. Whether an order prohibiting them to hold a hat of their own and thus to force them to go to a particular hat and pay toll would have been justified is quite a different matter. They were however free to act as they liked and the hat was held.

It is clear from the facts of this case that the petitioners, apart from being the managers of the land on which the hat was being held, had no personal interest in it and, as I shall presently show, they were not responsible for the holding of the hat. Now, an order has been passed which was, as I have said, within the power of the learned Magistrate to pass and it is not the usual practice of this Court to interfere with an order which has spent in its force unless

there are special reasons for such interference. There is none in this case. For this reason I reject the application in this criminal revision case.

Criminal Revision No. 91 of 1938.

The facts have already been stated. The petitioners have been prosecuted for disobeying an order passed under s 144, Criminal P. O. There is nothing on the record to show that they disobeyed the order. The only thing which appears from the order of the learned Magistrate is that the hat was held, but there is nothing to show that they did not withdraw their consent. The hat might have been held in spite of the withdrawal of consent. If the villagers held the hat, the petitioners are in no way responsible for it. The learned Public Prosecutor was unable to point to any fact on which a prosecution can be based and had to concede that there is no material for the prosecution of the petitioners. The order for prosecution is unjustified and I set it aside. The complaint filed by the learned Sub-Divisional Magistrate will be withdrawn and no proceeding will be taken on it and the proceeding so far taken is quashed.

D.

Order accordingly.

BOMBAY HIGH COURT

Letters Patent Appeals Nos. 45 and 46 of 1936

and

Second Appeal No. 180 of 1938

August 22, 1939.

N. J. WADIA AND WASSOODEW JJ.

Sri SACHIDANAND VIDYA NARASINHA
BHARATI SHANKARACHARYA OF
SANKESHWAR MATH—APPELLANT

versus

CHANMALAPPA GURUSIDH MALAPPA—

RESPONDENT

Grant—Grant not from Crown—Right to recover assessment or rent—Presumption—Hindu Law—Religious endowment—Math—Alienation—Effect—Whether binds successor—Grant—Construction—Inam in favour of Math—Alienation register showing grant in favour of mahant personally—Effect.

The grants which are not grants from the Crown must be construed in favour of the grantees. Unless, therefore, the right to recover assessment or rent is expressly reserved the presumption would be that that right was also granted. [p. 516, col. 2.]

In case of an *inam* of the nature of a *devasthan inam* the mahant or Shankaracharya for the time being would have no power to alienate the Math property whether by sale or permanent lease so as to bind his successors except in the case of legal necessity. The mahant, therefore, who has made the

inam grants has no power to alienate permanently the right of the Math to recover assessment from the lands, or in other words to grant the lands permanently free of assessment. The grant would in each case endure only during the life-time of the mahant who made it, and succeeding mahants would be entitled to repudiate the grants and to recover assessment within 12 years of his becoming mahant. 4 Ind. Cas. 449 (1), 65 Ind. Cas. 161 (2) and 142 Ind. Cas. 214 (3), relied on. [p. 517, col. 2.]

A certain grant, according to the *sanad* and the decision of Inam Commissioner, was made to the Math itself for its maintenance and not to the mahant personally. But in the alienation register the grant was entered as *jat* or personal *inam* :

Held, that the fact that for some reason or other the *inam* was entered in the alienation register as a *jat* or personal *inam* did not make it any the less an *inam* to the Math, and that, being an *inam* to the Math, it was subject to all the conditions which attach to such *inams*. [p. 516, col. 1.]

L. P. A. and S. As. against the decision of Macklin, J., in S. A. No. 257 of 1936.

Mr. G. N. Thakor, Mr. S. H. Balawadi for Mr. R. A. Jahagirdar, for the Appellant.

Mr. G. S. Talpade, for the Respondent.

N. J. Wadia, J.—These three appeals arise out of three Suits Nos. 291 of 1932 and 667 of 1932 and 253 of 1934 which were filed by different plaintiffs against the same defendant, the Shankaracharya of the Sankeshwar Math. The contentions raised in Suits Nos. 291 and 667 of 1932 were the same and both the suits were heard together and decided by the same judgment. The appeals against both these suits were also heard together by the Assistant Judge of Satara and decided by the same judgment. Suit No. 253 of 1934 was heard separately by another Subordinate Judge and the appeal against it was also decided by a different Judge. The result in all the three cases was the same. The plaintiffs' claims were decreed. Against the decisions of the Assistant Judge in Suits Nos. 291 and 667 of 1932 second appeals were filed in this Court which were summarily dismissed by the Honourable Macklin, J. Leave to appeal was subsequently given. All the three appeals involve the same question and have therefore been heard together by us.

The appellant in all the three appeals, who was the defendant in the trial Courts, is the Shankaracharya of the Sankeshwar Math. The village of Hatnur was granted in *inam* by the Mogul Emperor Mohamed Shah either to the predecessor-in-title of the present Shankaracharya or to the Math itself. That grant was confirmed by the Maratha King Sambhu Chhatrapati Swami in the year 1760. In the year 1803 the Shankaracharya of the Sankeshwar

Math granted in *inam* three lands in the village to the Ayya or priest of the Lingayat Math at Hatnur, the predecessor-in-title of the plaintiff in Suit No. 291 of 1932, the respondent in Letters Patent Appeal No. 45 of 1936. In the years 1821 a similar grant of two lands in the same village was made by the Shankaracharya of the Sankeshwar Math to certain ancestors of the plaintiffs in Suit No. 667 of 1932, respondents in Letters Patent Appeal No. 46 of 1936; and in the year 1735 one land in the same village was given in *inam* to an ancestor of the plaintiffs in Suit No. 253 of 1934, respondents in Second Appeal No. 190 of 1938, by the Shankaracharya of the Sankeshwar Math.

In the year 1928 the defendant Shankaracharya claimed assessment on the lands in all the three suits from the present holders, the plaintiffs in the three suits, and on their refusing to pay he recovered it from them through the revenue authorities by filing assistance suits. The plaintiffs in all the three suits prayed for a declaration that the defendant was not entitled to recover any amount from them by way of rent or assessment for the suit lands, for a perpetual injunction restraining him from recovering anything from them in future, and for refund of the amounts which he had already recovered from them through the revenue authorities. In the suits from which Letters Patent Appeals Nos. 45 and 46 arise, the trial Judge held that by the terms of the original grant made to the predecessors-in-title of the plaintiffs in the two suits no exemption from payment of assessment had been granted to them. He further held that the grant made by the predecessor-in-title of the present Shankaracharya was not binding on his successor, the present defendant, and that the defendant's right to recover assessment had not been extinguished by lapse of time. He therefore dismissed the plaintiffs' suits.

In appeal the learned Assistant Judge of Satara held that by the terms of the grants made to the predecessors-in-title of the plaintiffs in the two suits the plaintiffs were entitled to hold the lands free of rent and assessment. He further held that the grant of the village to the Shankaracharya of the Sankeshwar Math was a personal and not a *devasthan inam* and that therefore the alienations made by the Shankaracharya in 1803 and 1821 to the predecessors-in-title of the plaintiffs in the two suits were binding on the defendant. He also held that the plaintiffs' claims were not barred

by limitation. He therefore reversed the decrees of the trial Judge in both the suits and granted the declarations and injunctions prayed for. In the third suit No. 253 of 1934 both the trial Judge and the Appellate Judge came to the conclusion that under the terms of the grant made to the predecessor-in-title of the plaintiffs, in that suit in the year 1735 the grantees were entitled to hold the land free from assessment or rent, that the *inam* to the defendant was a personal *inam* and not *devasthan* and that the alienation made in 1735 was binding on the present defendant. Both the Courts therefore decided in favour of the plaintiffs. Against all the three decrees the defendant, the Shankaracharya of the Sankeshwar Math, has appealed.

The first question that arises for consideration in the appeals is what is the nature of the *inam* granted to the defendant and whether that *inam* was granted to the Shankaracharya of the Math personally or to the Math itself. The *sanad* granted by the Mogul Emperor has been produced in the case. It is Ex. 61 in Letters Patent Appeal No. 45 of 1936. The exact year of the grant cannot be ascertained but the document states that it was granted in the ninth year of the reign of the Emperor Mahomed Shah. The document, which is in the form of an order to the subordinate officers, is as follows :

"Now the *Mauza* of Hatnur on the side of Tasgaon in *Paraganah* Haveli of the said circuit has been settled upon and made over to Shankarachari Math Sankeshwar by way of *inam*. It behoves that the revenue payable in respect of the said *mauza* should be given in the charge and possession of the said gentleman and his word should not be disobeyed, in order that he may spend the same on the maintenance of *fakcers* (i. e., religious mendicants) and engage himself in praying for the continued safety of the everlasting kingdom. They should consider him to be exempted from all civil dues and official taxes. No one should under any circumstances come in the way of the said gentleman for the purpose of recovering the revenue, etc."

In the year 1760, by which time the country had come under the rule of the Maratha Sovereigns a fresh *sanad* was granted by the then Maratha King Shambhu Chhatrapati Swami. The document, which is also in the form of an order to Balaji Babajirao Pandit Pradhan (Prime Minister) runs as follows :

"Srimant Shankaracharya ordered the Swami at Karavir that there are *inam* villages for the maintenance of the Sansthan of Maths at Karavir and Sankeshwar by way of *sewa inam*. But to continue the *annachatra*, and other religious performances in the Sansthan continuously, the Maharaja should agree to continue the same in *inam* and should give his sanction and the order be sent to the

Ministers that the income should be continued. Taking this into mind that those villages which are *inam* to Shri's Math should be continued permanently as before. By maintaining the *annachatra* and other religious duties of the Maths and performing of the festivals of the anniversary days, would bring welfare to the Maharaja and his kingdom, the said villages with *kul-bab*, *kul-kannun*, *hali-patti*, *pestai pati* and with all trees, water, stones and all other incidents are granted in *inam* to Shri's Math, excepting previous *hakdars* and *inamdars*."

Then follows a description of the eight villages among which is *Mauje Hatnur Karyat Tasgaon*. The document continues:

"In all the said eight villages with their previous boundaries are given in *inam* to Shri's Math. So you should send orders to all the villages concerned and should send annually all the income from the same to Shri's Math permanently and should continue in the line of disciple of Shri's Math. You should not ask for a fresh order every year and a copy of this be taken and the original should be given to Shri's Math for possession and the said villages should be continued as *inam* with Tijai, Chouthai and Ghasdana, Sahotra and Panchotra and Dulani, Vadhava, etc. . . . You should send orders to all the villagers concerned so that the income of the said *inam* should go yearly for the maintenance of the Sansthan."

If the terms of the *sanad* granted by the Mogul Emperor be looked at by themselves it is arguable that the grant was personally to the Shankaracharya of the Math for the time being and not to the Math itself. The document refers to the revenue being given to the "said gentleman" personally and contains a direction that his word should not be disobeyed and mentions that the grant was in order that he may spend it for the maintenance of *fakiers* and engage himself in praying for the continued safety of the kingdom. There can however be no doubt whatever, that the subsequent Maratha *sanad*, which purported to continue and confirm the *inam* which had been granted by the Mogul Emperor, was a grant not to the Shankaracharya personally but to the Math, and for the maintenance of the Math. In the Preamble of this document the original Mogul grant is mentioned as having also been a grant for the maintenance of the Math, and the language of the Maratha grant shows clearly that the *inam* was granted to the Math for the maintenance of the Math, the continuance of the *annachatra* (feeding of the poor) and other religious objects of the Math, and the performance of the festivals of the Math. The grant mentions that "those villages which are *inam* to Shri's Math should be continued permanently as before." Reading the two documents together, we are of opinion, that the Mogul grant must also be taken to have been a grant to the Math. There can be no

question that the Maratha document undoubtedly was a grant to the Math for the maintenance and religious purposes of the institution.

The next question to be considered is what were the terms on which the *inam* was continued by the British Govt. For some years prior to 1863 an inquiry was conducted by the Inam Commission in connection with *inams*, and the decision with regard to the village of Hatnur arrived at in 1863 by the alienation settlement officer, which is Ex. 47 in Letters Patent Appeal No. 45, was that the village of Hatnur was to be continued as *surva inam* continuously to the Math of the Swami of Sankeshwar so long as the *jahagirs* attached to the said Math are continued, subject to such *nazarana* as Govt. may think fit to levy. From the language of the Maratha grant as well as from the terms of the decision of the Inam Commission of 1863, it would appear that the *inam* was a *devasthan inam* granted to the Math, but in the alienation register of the village of Hatnur, Ex. 57 in Letters Patent Appeal No. 45, the village is classed as *jat inam*, and it is stated that "it is to be claimed till the Sankeshwar Math is in existence," the authority for this being given as Govt. Resolution No. 1980 of March 22, 1849. It is contended for the respondents in all the three appeals that the entry in the alienation register showing the village as *jat* or personal *inam* shows that it is not *devasthan inam* or *inam* to the Math but an *inam* personally to the Shankaracharya for the time being. We are unable to accept this contention. The description of the village in the alienation register as a *jat* or personal *inam* cannot be regarded as conclusively determining the nature of the *inam*. That must be taken as determined by the decision of the Inam Commissioner (Ex. 47) which was that the *inam* was to the Math of the Sankeshwar Swami, and not to the Swami personally, and that it was to be continued so long as the Math remained in existence. It is clear, therefore that the British Govt. continued the *inam* as an *inam* to the Math. It is difficult to understand why the *inam* continues to be classed as *jat* or personal *inam*. But whether that entry in the alienation register is correct or not, it cannot alter the real nature of the *inam*, which must be taken to be an *inam* to the Math, and therefore in the nature of *devasthan inam*.

In this connection it may be pertinent to observe that with regard to certain other villages in the district of Belgaum which

were also given in *inam* to the Sankeshwar Math an order was made by the Govt. in the year 1918 that the *inam* should be converted from personal *inams* to *devasthan inams*. There is nothing before us to show whether the omission of the village of Hatnur from this order was deliberate or accidental. From the terms of the decision of the Inam Commissioner (Ex. 47), it is clear that the *inam* was continued by the British Govt. as an *inam* to the Math and not to the Shankaracharya personally. The fact that for some reason or other the *inam* is entered in the alienation register as a *jat* or personal *inam* does not make it any the less an *inam* to the Math, and it must be held that, being an *inam* to the Math, it is subject to all the conditions which attach to such *inams*.

The next question is what was the nature of the grant made by the Math or the Shankaracharya for the time being to the predecessors-in-title of the present plaintiffs in the years 1803, 1821 and 1735. The terms of the grants in all the three cases are the same. The only difference is that while in the case of the plaintiffs in Letters Patent Appeal No. 45 the grantee was a Lingayat Math and the grant was to the Ayya or priest of the Math for the maintenance of the Math, in the case of the plaintiffs in Letters Patent Appeal No. 46 the grantees were private persons, the ancestors of the plaintiffs, to whom the grant was made for the maintenance of their family and in consideration of the fact that they had served the Sankeshwar Math loyally for a long time and had been very useful. In the third case, Second Appeal No. 190, the grant was made to a Brahmin who had been performing his daily religious duties in the Math and who was well-versed in the Shastras and Vedas. In all cases the deeds of grant mention that the land had been granted in *inam*. The document of grant in the case of the plaintiffs in Letters Patent Appeal No. 45, which is in form of an order to the village officers of Hatnur, is as follows:

"The Ayya (Lingayat priest) of Charanti Math in the said village (Hatur) came to Sankeshwar Math personally and made a request through all of you that there is a Math in the said village and that there is no property for the said Math. So Shri be pleased to give some *inam* land on *karar* (agreement) so that he should live in the said Math in the village. Taking this into consideration and the fact that the Math of Ayya is old and it must be maintained, the land adjoining the Math on the western side measuring 5 *bighas*, the *khata* of which stands in the name of Devaji Bava is

given in *inam*; so the land within the said boundaries should be continued in the line of the disciples of the Ayya."

The plaintiffs' contention in all the three cases is that the terms of the grant implied that the land was granted in *inam* free of the liability to pay assessment, while the defendant contends that the grant was merely of the soil and not of the royal share of the revenue which had been reserved by the grantor to himself. There is admittedly nothing in the terms of the grants to show any express reservation of the right to recover assessment or rent. The grantor, who had himself been given an *inam* of both the soil, of the village and of the royal share of the revenue, made a grant to the predecessors-in-title of the plaintiffs as sub *inamdars* of certain lands in the village. The grants in these three cases are not grants from the Crown and they must, therefore be construed in favour of the grantees. Unless, therefore, the right to recover assessment or rent is expressly reserved the presumption would be that that right was also granted. The ordinary meaning of *inam* according to Molesworth's Marathi-English dictionary is "a grant in perpetuity without conditions," and the ordinary interpretation of the grants in these cases would, therefore be that they included the right to assessment, that is to say, that the lands were given free from the liability to pay rent or assessment. If that liability was reserved that should have been expressly stated in the documents of grants. This interpretation derives strong support from the fact that in all these three cases, in one of which the grant was made as far back as 200 years ago, and in the other two cases as far back as 100 to 125 years ago, there is no evidence adduced on behalf of the defendant to show that assessment had ever been demanded or recovered till the year 1928. It is difficult to believe that if the grants had not been intended by the grantors to be free from the liability to pay assessment, they and their successors for several generations would have allowed the lands to continue with the grantees without any demand of assessment. We, therefore agree with the view which the learned Appellate Judge has taken in the two Letters Patent appeals, and the view which both the trial and the Appellate Judges have taken in Second Appeal No. 190, that under the terms of the grants made to the predecessors-in-title of the plaintiffs in all the three cases the lands

had been granted free from the liability to pay assessment.

The question, however still remains whether the present Shankaracharya of the Sankeshwar Math is bound by the alienations made by his predecessors-in-title in 1735, 1803 and 1821 and it is in connexion with this question that the nature of the grant made to the defendant Math assumes great importance. If the grant was, as contended by the plaintiffs, a personal grant to the Shankaracharya of the Math, and not to the Math itself or in the nature of a *devasthan* grant, the alienations made by the previous Shankaracharyas would be binding on their successors. But if the *inam* was an *inam* of the nature of a *devasthan inam*, the Shankaracharya for the time being would have no power to alienate the property of the Math, whether by way of sale or a permanent lease so as to bind his successors, except in the case of alienations for legal necessity. In the three cases before us there is no question of the alienations having been made for any legal necessity. The alienations in all the three cases were without consideration. In the case of Letters Patent Appeal No. 45 the alienation was made by the Shankaracharya of the Sankeshwar Math to the priest or Ayya of a Lingayat Math, i. e., a Math not subordinate to the Shankaracharya's Math nor belonging to the same sect of Hinduism. The law dealing with the power of the head of a Math as regards alienations of Math property has been laid down by the Privy Council in several cases. In *Abhiram v. Shyama Charan* (1), it was held that :

"The power of the Mahant of the endowment for the time being to alienate *debottar* property is, like the power of the manager of an infant heir, limited to cases of unavoidable necessity, and apart from such necessity to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the Mahant... [and that such a] permanent lease granted by the Mahant of the endowment for the time being, on the most favourable construction, enures only for the lifetime of the grantor."

In the well-known case in *Vidya Varuthi Thirtha v. Balusami Ayyar* (2), it was held that :

"Except for unavoidable necessity, the head of a Math cannot create any interest in the Math property to

(1) 11 Bom. L R 1234; 4 Ind. Cas. 449; 36 O 1003; 36 I A 148; 10 O L J 234; 6 A L J 857; 19 M L J 530; 14 O W N 1 (P O).

(2) 48 I A 302; 65 Ind. Cas. 161; A I R 1922 P O 123; 44 M 831; (1921) M W N 449; 41 M L J 346; 3 U P L R (P O) 62; 15 L W 78; 30 M L T 66; 3 P L T 245; 26 O W N 537; 24 Bom. L R 629; 20 A L J 497 (P O).

endure beyond his life. A lessee, however, has not adverse possession under Art. 141 of the Schedule [to the Lim Act] until the death of the head who granted the lease. If the lessee's possession is consented to by the succeeding head, that consent can be referable only to a new tenancy created by him, and there is no adverse possession until his death."

The same principle was followed by their Lordships of the Privy Council in the subsequent case in *Ram Charan Das v. Naurangi Lal* (3), in which it was held that :

"Where a Mahant alienates property appertaining to the Math without any legal necessity, the alienation is not void, but is good though good only to the extent of creating an interest in the Math property which endures during his tenure of office of Mahant of the Math, with the result that the alienee's adverse possession of the property alienated only commences when the alienating Mahant ceases to be Mahant by death or otherwise. In this respect, there is no distinction in principle between a disposition purporting to be a grant of a permanent lease and a purported out and out grant by way of absolute sale. In each case, the disposition by the Mahant is good and effective so long as he continues to be a Mahant."

The Mahant, therefore, who made the *inam* grants in the three cases before us had no power to alienate permanently the right of the Math to recover assessment from the lands, or in other words to grant the lands permanently free of assessment. The grant would in each case endure only during the life-time of the Mahant who made it, and succeeding Mahants would be entitled to repudiate the grants and to recover assessment. It is admitted that the present Shankaracharya of the Sankeshwar Math became the head of the Math sometime after 1925, when his predecessor-in-office died, and he asserted his right to recover assessment, and actually recovered it in all the three cases with the assistance of the revenue authorities in 1928. No question of limitation therefore would arise. Section 10, Lim. Act, provides that :

"Notwithstanding anything herein before contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time."

And the amendment made in that section by Act I of 1929 provides that :

"For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof."

(3) 35 Bom. L R 530; 142 Ind. Cas. 214; A I R 1933 P O 75; 12 Pat. 251; 60 I A 124; Ind. Rul. (1933) P O 56; 14 P L T 185; 37 L W 512; 64 M L J 503; (1933) M W N 272; 10 O W N 455; 37 O W N 541; (1933) A L J 327; 57 O L J 229; 17 R D 751 (P O).

The defendant's *inam* being in the nature of a *devasthan*, that is, an *inam* to a religious institution, each succeeding head of the institution would not be bound by any alienations not for legal necessity made by his predecessor, and would be entitled to repudiate them within twelve years of his becoming Mahant. The defendant in the present case did so. It was contended by the learned Advocate on behalf of the respondents in Letters Patent Appeal No. 46 and Second Appeal No. 190 that the defendant Shankaracharya of the Sankeshwar Math had, by his conduct in filing assistance suits in which he described the position of the plaintiffs as that of inferior holders, accepted the grants made by the previous Shankaracharyas, and that it was not therefore open to him now to repudiate those grants, which on the view taken by us as well as by the Courts below were grants of the assessment also. We see no reason why the defendant should not be able to take up this position. It was his contention at the time he claimed and recovered the assessment that the original grant was not a grant of the assessment at all but only of the soil. Even on the view which we have taken that it was a grant of the assessment also, it was perfectly open to the present Shankaracharya to say that he had no desire to resume the grant so far as it related to the soil and that he desired to repudiate the grant only so far as it related to the payment of assessment. His act in demanding and recovering the assessment was in itself a clear indication that he was prepared to continue the grants, as each succeeding Mahant has a right to do if he chooses, so far as the lands themselves were concerned.

The fact that in the case of Second Appeal No. 190, the alienation was made in 1735, at a time when the property was presumably held by the Shankaracharya of the Sankeshwar Math under the terms of the Mogul grant, does not, in our opinion, make any difference. In discussing the terms of that grant we have held that although taken by itself that document might suggest that the grant was to the Shankaracharya of the Math personally, reading that document along with the subsequent Maratha document which refers to it and purports to continue the *inam*, it may be inferred that the grant was from the beginning a grant to the Math and not to the individual. In any case, we have to consider the position as it is at present. The property which was

alienated was property held in trust for a religious institution, and under the law as it now stands the present head of the Math would be entitled to repudiate the alienation made by his predecessor-in-office. On this ground therefore the plaintiffs in all the three cases must fail. The appeals will therefore be allowed and the plaintiffs' suits dismissed with costs throughout.

D.

Appeals allowed.

PATNA HIGH COURT

Appeal from Appellate Decree No. 519 of 1938

February 12, 1940

AGARWALA AND ROWLAND, JJ.

JAGA SINGH AND OTHERS—DEFENDANTS—
APPELLANTS

versus

BASDEO SINGH AND OTHERS—PLAINTIFFS—
RESPONDENTS

Bihar Tenancy Act (VIII of 1934), s. 26-O, Sch. III, Art. 3—Applicability of s. 26-O—Distinction when landlord is plaintiff and when he is defendant—Landlord's fees, if can be deposited after appellate decree but before it becomes conclusive—Applicability of Art. 3—Decree for rent arrears—Holding put to sale—Landlord himself purchasing—Tenant dispossessed—Article, if applies.

In the applicability of s. 26-O, Bihar Ten. Act, a distinction cannot be drawn between pending suits in which the landlord is a plaintiff and pending suits in which the landlord is a defendant. The title of the transferee would not become extinct by the passing of a decree against him unless and until such decree has become final as it might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. The landlord's transfer fee under s. 26-O can, therefore, be deposited after the trial Court as well as the Appellate Court has decreed the landlord's suit but before such decree becomes conclusive. 160 Ind. Cas. 105 (1), explained, 179 Ind. Cas. 104 (3), applied.

Where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession as auction-purchaser such dispossession of the tenant is not a dispossession by the landlord within the meaning of Art. 3, Sch. III of the Bihar Ten. Act so as to make that article applicable. A suit to recover possession is governed by the ordinary law of limitation. 125 Ind. Cas. 565 (4), followed.

A. from a decision of the District Judge of Muzaffarpur, dated February 19, 1938.

Messrs. N. K. Prasad II and Ramanugrah Prasad, for the Appellants.

Messrs. S. N. Sahay, D. L. Nandkeolyar and Gholam Mohammad, for the Respondents.

Judgment.—This appeal arises out of a suit to declare title and recover possession over 5 *bighas* 3 *kathas* 2 *dhurs* of land. It is common ground that this was formerly the

occupancy holding of Duli Rai. In 1927 the plaintiff-respondent brought a mortgage suit against Duli Rai to enforce a mortgage on this land. He obtained a preliminary decree dated June 23, 1928, and a final decree dated February 25, 1929. The mortgaged property was put to sale in Execution Case No. 12 of 1930 and was purchased by the decree-holder, now the plaintiff who took delivery of possession on September 19, 1930. The landlord's consent was not taken to the purchase of this property by the plaintiff but after the passing of the Bihar Ten. Amendment Act of 1934 he deposited the fee under s. 26-O of the Act with the Collector on March 12, 1937. That is the plaintiff's title which the Courts below have accepted and given him a decree against which an appeal is preferred by the principal defendant who is the landlord of the holding. This defendant brought Rent Suit No. 2376 of 1927 against Duli Rai and obtained an *ex parte* rent decree on which he took out Execution Case No. 992 of 1928 and put the holding to sale on December 18, 1928, about six months after the preliminary mortgage decree of the plaintiff. The landlord himself became auction-purchaser and took out his delivery of possession on September 28, 1930 that is 9 days after the delivery of possession in favour of the plaintiff. The plaintiff applied under O. XXI, r. 90, to set aside the sale alleging that the processes had been suppressed. The application was rejected by the first Court on April 7, 1931, and it is the plaintiff's allegation that his actual dispossession by the defendant took place on April 8, 1931. The plaintiff appealed against the order of April 7, dismissing his application under O. XXI, r. 90 and an event that took place sometime in the year 1931, was the death of the original tenant, Duli Rai. The plaintiff's appeal succeeded and the District Judge set aside the sale on April 16, 1932. On September 12, 1932 the plaintiff moved the Court for restitution of the property and obtained on February 13, 1933 an order of the first Court for restitution, but this order was on August 19, 1933, set aside on appeal by the District Judge because the rent decree had not been set aside or varied so as to import the provisions of s. 144 and also because it was not alleged by the plaintiff that his dispossession had been by the Act of the Court in delivering possession on September 28, 1930, but by an act of the opposite party, the auction-purchaser.

In revision this Court, on February 1, 1934, declined to interfere. The present suit was instituted on February 1, 1936 by the plaintiff to recover possession. In the meantime the amendments made in the Bihar Ten. Act, by the Local Act VIII of 1934 had received the assent of the Governor on October 31, 1934 and came into force in June, 1935. The enactment of s. 26-O gave the plaintiff a right to pay to the landlord or deposit with the Collector the prescribed fee in respect of the transfer and sub-s. (3) enacted that the consent of the landlord should be taken to have been given to the transfer on the day on which the receipt for the same is granted by the Collector. As already stated, the deposit was made on March 12, 1937, which is during the pendency of the suit. The suit has been decreed on the view that ss. 26-N and 26-O of the Bihar Ten. Act are retrospective and that the plaintiff by making the deposit referred to has perfected his title which cannot be defeated. The District Judge relies on the decision of the Privy Council in *K. C. Mukerjee v. Ram Ratan Kuer* (1) and subsequent decisions of this Court.

In second appeal it is contended that the object of ss. 26-N and 26-O being as was stated in the judgment of the Privy Council "to quiet old titles" they must be considered to have retrospective effect in favour of *raiyat* who is in possession of the land transferred to him but not in favour of one who is out of possession so as to enable him to disturb the landlord who has lawfully entered. The second point taken is that the suit is barred by the special period of two years' limitation laid down in Art. 3 of Sch. III to the Bihar Ten. Act. As to the first point we can find nothing in the judgment of the Privy Council in *K. C. Mukerjee v. Ram Ratan Kuer* (1) to suggest that their Lordships intended that distinction should be drawn between cases in which the landlord is the plaintiff and cases in which the tenant is the plaintiff. The case before their Lordships was one under s. 26-N; but in the course of their judgment their Lordships referred to s. 26-O and said:

"It will be seen that in the case of a transfer made after January 1, 1923, but before June 10, 1935 the provision is that the transferee may pay or deposit the landlord's transfer fee and thus perfect his title."

(1) 15 Pat. 268; 160 Ind. Cas. 105; A I R 1936 P C 49; 1936 O L R 69; 1936 A L R 101; 8 R P O 142; 40 C W N 263; 17 P L T 25; (1936) M W N 35; 2 B R 223; 70 M L J 105; 62 O L J 419; 43 L W 336; 63 I A 47 (P O).

There is no suggestion that a transferee shall be incompetent to make the payment or that the Collector shall refuse to receive money in any case in which the transfer is impugned in a pending suit. We find nothing here to warrant us in drawing a distinction between pending suits in which the landlord is a plaintiff and pendenciesuits in which the landlord is a defendant. In the cases of this Court to which we have been referred we are unable also to find that such a distinction is to be drawn. Mr. Nawal Kishore Prasad II was in fact forced to put his argument in this form because, so far as cases in which the landlord is plaintiff are concerned the decisions hopelessly concluded him.

In *Walihan v. Parmeshwar Narain Patakh* (2) the landlord's transfer fee under s. 26-O had been deposited after the trial Court as well as the Appellate Court had decreed the landlord's suit and it was contended that the title of the transferee had become extinct by the decrees already passed against him before he made the deposit. The contention was negatived. It was held that the title of the transferee would not become extinct by the passing of a decree against him unless and until such decree has become final as it might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. So far as s. 26-N is concerned there is a direct authority in *Thakur Rai v. Issardayal Parshad* (3) that in applying this section we cannot draw distinction between the cases in which the landlord is a plaintiff and cases in which the tenant is a plaintiff for the suit out of which the appeal arose was one instituted by the transferee to recover possession. The only case which has not yet directly arisen seems to be the case where both the transferee is the plaintiff and the section applicable is not s. 26-N but s. 26-O. In my opinion, it is not possible to draw a distinction and to say that the observations of the Privy Council do not apply in the case like the present either on the ground that the plaintiff is the transferee or on the ground that the section we are applying is s. 26-O and not s. 26-N. That being so the plaintiff was entitled to a decree unless the suit is barred by limitation.

Mr. Nawal Kishore Prasad II argued

(2) 16 Pat. 405; 171 Ind. Cas. 657; 18 P L T 602; A I R 1937 Pat. 582; 10 R P 233; 4 B R 48.

(3) 17 Pat. 333; 179 Ind. Cas. 104; A I R 1938 Pat. 559; 5 B R 176; 11 R P 327.

that the suit was well within the definition in Art. 3 of Sch. III of the Ten. Act, being a suit to recover possession of land claimed by the plaintiff as a *raiya* or *under-raiya* and the defendant in the suit being in fact the landlord of the holding. We have not however to give our own reading of the article as if the matter were *res integra*; we are bound to follow the decision of the Special Bench of this Court in *Gajadhar Rai v. Ram Charan Gope* (4). There, on a review of all the authorities, it was held that where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession as auction-purchaser such dispossession of the tenant is not a dispossession by the landlord within the meaning of Art. 3, Sch. III of the Ben. Ten. Act, so as to make that article applicable. A suit to recover possession is governed by the ordinary law of limitation. The case before the Special Bench was a case in which the landlord had obtained delivery of possession through the Court and Mr. Nawal Kishore Prasad II tries to distinguish it on the ground that in the present case, on the plaintiff's own pleading, the delivery of possession issued by the Court was fraudulently suppressed and the defendant did not take possession until April 8, 1931 when without the assistance of any Court Officer he is said to have forcibly dispossessed the plaintiff. But the distinction will not assist the defendant when we look to the occasion which led to the dispossession. It was on April 7, 1931, that the plaintiff's application under O. XXI, r. 90, was rejected and it was on the very next day that possession was taken by the defendant according to the pleadings. So there can be no doubt in what capacity the defendant considered himself to be taking possession or in what capacity the plaintiff thought the defendant to be ousting him. We hold, therefore, that the case falls within the principle of the Special Bench decision cited and the plaintiff was entitled to bring his suit within twelve years from the date of dispossession, that is to say, both points taken in the appeal fail and we dismiss the appeal with costs.

D.

Appeal dismissed.

(4) 9 Pat. 788; 125 Ind. Cas. 585; 11 P L T 197; A I R 1930 Pat. 256; Ind. Rul. (1930) Pat. 533 (F B).

NAGPUR HIGH COURT

Civil Revision No. 681 of 1936

July 30, 1937

POLLOCK, J.

DWARKAPRASAD—APPLICANT*versus***EMPEROR—OPPOSITE PARTY**

Criminal Procedure Code (Act V of 1898), ss. 476, 439—Proceedings under s. 476—Finding that inquiry into offence is expedient in interests of justice, if necessary—Mere omission to record such finding—Interference in revision.

In proceedings under s. 476, Criminal P. O., the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made, but the absence of such a finding does not mean that the point has not been considered and when it is clear that the Court has considered that an inquiry was necessary in the interests of justice and that a *prima facie* case had been made out, the High Court should not necessarily interfere in revision merely because the words of s. 476 have not been copied out. 134 Ind. Cas. 914 (1), 113 Ind. Cas. 842 (2), 132 Ind. Cas. 160 (3) and 140 Ind. Cas. 323 (4), relied on.

App. for revision of the order of the Court of the Additional District Judge, Bilaspur, dated September 7, 1936.

Mr. E. M. Joshi, for the Applicant.

Mr. N. T. Mangalmoorti, for the Complainant.

Mr. J. Sen, Govt. Pleader, for the Crown.

Order.—The applicant sued on a bond in the Small Cause Court, Janjgir, and relied on a payment endorsed on the bond to save limitation. It was held that the date of payment has been fraudulently altered by the plaintiff in order to save limitation, and in proceedings under s. 476 of the Criminal P. O., the Court ordered that the plaintiff should be prosecuted under ss. 193 and 471 of the I. P. O. On appeal the order for prosecution under s. 471, alone was upheld.

Section 476 of the Criminal P. O., provides that, when a Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into certain offences, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing. The learned Judge of the Small Cause Court did little beyond referring to his judgment in the civil case, but I think it is obvious that he thought that there was a *prima facie* case against the applicant and that it was expedient in the interests of justice that an inquiry should be made into the offence. Although these points were specifically raised before the Additional District

Judge, he gave no finding on the question whether an inquiry was necessary in the interests of justice or whether a *prima facie* case had been made out.

There has been some difference of judicial opinion on the point, but I respectfully agree with the decision of Rankin, O. J., in *Nawabali Khan v. Chandrakanta Banerji* (1), in which he explained his previous decision in *Keramat Ali v. Emperor* (2) and held that there should not necessarily be an interference in revision merely because the words of s. 476, have not been copied out. To the same effect is the decision in *Superintendent and Remembrancer of Legal Affairs, Bengal v. Ijjatulla Paikar* (3). I respectfully agree with the decision in *In re Chilukuri Ramayya* (4), that the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made, but I do not think that the absence of such a finding means that the point has not been considered and that it is necessary to interfere in revision. In *Balgovind v. Jamnabai* (5), it was stated that it was not incumbent on the appellate or revisional Court to assume that the first Court had properly considered the matter and come to a correct conclusion, but that does not mean that the Court must assume that the first Court has not considered the matter.

It is clear that the Appellate Court considered that an inquiry was necessary in the interests of justice and that a *prima facie* case had been made out, although it is unfortunate that it omitted to record a finding on either point. In the circumstances therefore I decline to interfere in revision. The application is dismissed with costs. No Counsel's fee.

s. *Application dismissed.*

(1) 58 O 965; 134 Ind. Cas. 914; A I R 1931 Cal. 760; Ind. Rul. (1931) Cal. 914 (2); 32 Cr. L J 1236 (1931) Cr. Cas. 1006.

(2) 55 O 1312; 113 Ind. Cas. 842; A I R 1928 Cal. 862; 30 Cr. L J 221.

(3) 58 O 1117; 132 Ind. Cas. 160; A I R 1931 Cal. 190; 53 O L J 177; 35 O W N 400; 32 Cr. L J 842; Ind. Rul. (1931) Cal. 514; (1931) Cr. Cas. 254.

(4) 56 M 157; 140 Ind. Cas. 323; (1932) M W N 1081; 63 M L J 670; 36 L W 636; Ind. Rul. (1932) Mad. 851; 33 Cr. L J 969; A I R 1933 Mad. 67 (1); (1933) Cr. Cas. 80.

(5) 31 N L R 370; 158 Ind. Cas. 496; A I R 1935 Nag. 199; 8 R N 87; 36 Cr. L J 1371; (1935) Cr. Cas. 1096.

PATNA HIGH COURT

Appeal from Original Decree No. 9 of 1937

February 26, 1940

HARRIES, C. J. AND MANOHAR LALL, J.
RAMNANDAN PRASAD

NARAYAN SINGH AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

CHANDRADIP NARAIN SINGH

AND OTHERS—PLAINTIFFS—RESPONDENTS

Registration Act (XVI of 1908), s. 28—Fraud on registration—Property not intended to pass included in mortgage deed to get document registered in sub-division, where it was situated—Whether fraud—Registration, if valid—Party to document, if can challenge registration—Proof of intention that the property was not intended to pass, if can be given—Evidence Act (I of 1872), s. 92, Proviso (1)—Insufficient description of such property, rendering it unidentifiable, if ousts jurisdiction of Sub-Registrar to register document.

There is no effective registration unless the deed of mortgage relates to land situate in the sub-district in which the deed is registered. It is not sufficient that the land mentioned in the sale or the mortgage deed exists. The document cannot be said to relate to land in a registration district unless it was the intention of the parties that such land, even if it exists, should in a sale deed be transferred or in a mortgage deed form part of the security. [p. 526, col. 2.]

Where the land certainly existed in Sub-Division where the deed was registered but the insertion of it in the mortgage deed gave the mortgagee no security whatsoever and the land being undefined could not effectually form part of the security, and on the evidence it was clear that it was never intended to form part of such security:

Held, that the registration of this mortgage deed must be held to be invalid. [*ibid.*]

[Case-law reviewed.]

Held, also that the mortgagor could raise this question of want of valid registration though he was a party to the fraud on the registration laws. 63 Ind. Cas. 770 (2) and 161 Ind. Cas. 29 (4), applied. [p. 527, col. 1.]

Held, further that there was nothing in s. 92 of the Evi. Act, to render evidence of the intention of the parties inadmissible. It was not evidence which varied the terms of the written document as between the parties and their representatives. It was evidence which went to show that the document did not relate to land within the jurisdiction of the Sub-Registrar who registered it. Further, it might well be said that evidence of this kind was evidence which tended to render the document invalid and such was admissible under the first proviso to s. 92 of the Evi. Act. 150 Ind. Cas. 545 (3) and 161 Ind. Cas. 29 (4), relied on. [p. 528, col. 2.]

Held, still further that it could not be held that the Registrar had no jurisdiction to register this sale deed by reason of the insufficiency of the description of the land situate. The Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in s. 87 of the Act; so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. [p. 529, col. 2.]

A. from a decision of the Subordinate Judge of Gaya, dated September 24, 1936.

Messrs. S. M. Mullick, B. P. Sinha, Shambhu Banneshwar Prasad, Prem Lall and J. C. Mullick, for the Appellants.

Sir Manmatha Nath Mukerji and Mr. Lal Narain Sinha, for the Respondents.

Harries, C. J.—This is a defendants' appeal from a decree of the learned Third Subordinate Judge of Gaya decreeing the plaintiffs' claim in a mortgage suit.

On July 9, 1921 the mortgage in suit was executed by defendants Nos. 1 and 2 in favour of Deoki Singh, the deceased father of plaintiffs Nos. 1 to 3 and grandfather of plaintiff No. 4. The mortgage was for a sum of Rs. 10,000 carrying interest at the rate of 13 annas 3 pies per cent. per mensem with annual rests. The claim was for Rs. 34,268-13-6. A mortgage decree was passed by the learned Subordinate Judge for Rs. 39,261-0-11 with future interest at six per cent. per annum till realisation.

The properties mortgaged consisted of a 16 annas share in a village called Bara Keyam Faridpore and 16 annas share in village Daniala covered by *Tauzi* No. 287 and situate in the District of Gaya together with 5 *kathas* of land in village Mera within the *Mahal* Akbarpore Bhadwa covered by *Tauzi* No. 4593 and situate in the District of Patna. The mortgage bond was registered in the District of Patna.

The defendants took a number of pleas in their written statement but for the purposes of this appeal it is only necessary to refer to one of them. They pleaded *inter alia* that the mortgage bond could not be enforced by reason of the fact that it had not been validly registered. According to the defendants, the only properties mortgaged effectually were the villages of Bara Keyam Faridpore and Daniala. Both these villages were situate in the Gaya District, and therefore the Sub-Registrar at Patna had no jurisdiction to register the mortgage. It was alleged by the defendants that the 5 *kathas* of land in village Mera situate in Patna District were never intended to form part of the mortgage security and that that parcel of land was only inserted in the mortgage deed as a device to defraud the registration laws.

The learned Subordinate Judge found all the issues except the one as to registration in favour of the plaintiffs. He, however, accepted the defendants' contention that the 5 *kathas* of land in village Mera in the Patna District were never intended to form part of the security and that the insertion of the same was a device to defeat the registration law. The Subordinate

Judge, however, came to the conclusion that the defendants were themselves parties to this fraud and, therefore, they could not set up their own fraud to avoid the effect of the mortgage bond which they had executed. The result of his findings was that he passed a decree as indicated previously.

The appellants' argument has been confined in the main to the question of registration. No point has been taken on any other of the issues which the learned Subordinate Judge decided against the defendants.

On this question of registration the defendants' case was that the 5 *kathas* of land in Mera in the Patna District had been inserted to defraud the registration law. According to the defendants, they were in urgent need of money. Defendant No. 1 had to meet the expenses of a criminal case which had been instituted against him and he had instructed a well-known lawyer in this district, namely, Mr. Hasan Imam, who required his fees in advance. It was estimated that Rs. 10,000 would be required for the expenses of the defence in this criminal case, and accordingly the defendants approached Deoki Singh for a loan of that amount. Deoki Singh agreed to lend the money and, it is said, that he was quite satisfied with 16 annas share in the two villages in the Gaya District. It appears that he already held a usufructuary mortgage of these two villages, but the interest of the mortgagor in the villages far exceeded the value of Rs. 10,000. As these two villages were situate in the Gaya District, registration would have to be effected either at Gaya or Jehanabad; but according to the defence, there was no time to go to either Gaya or Jehanabad as the presence of defendant No. 1 at Patna was essential to instruct his Counsel Mr. Hasan Imam. An attempt was made to obtain the money before the deed was registered, but Deoki Singh would not agree to this. On behalf of the defendants it is said that owing to this urgency Deoki Singh agreed that 5 *kathas* of land in Mera in the Patna District should be inserted in the mortgage in order to enable the deed to be registered in the Patna District and thus avoid the delay in going to Gaya or Jehanabad. It is to be observed that the 5 *kathas* of land in village Mera are not defined in any way. No boundaries are given, and there is nothing in the deed to suggest what kind of land in Mera was mortgaged. Mortgaging a mere

5 *kathas* of land without any description whatsoever would give the mortgagee no security of any kind. It would be impossible to bring such land to sale because it could not be identified.

On behalf of the plaintiffs, however, it was alleged that the 5 *kathas* of land in village Mera were intended to form part of the security. It is said that one Bedman Missir negotiated the loan and that he persuaded Deoki Singh to insist that some property in village Mera should be included. It was alleged that Bedman Missir who lived in Mera had acquired under a deed of gift some land in a village called Puran from his mother-in-law and Bedman Missir persuaded Deoki Singh to obtain a mortgage of some property in Mera so that Bedman Missir could exchange his property in Puran for property in Mera in the event of Deoki Singh enforcing his mortgage and obtaining possession of the Mera property by purchase in execution of his decree.

The learned Subordinate Judge declined to accept the plaintiffs' version of this transaction. It is clear that the explanation given by the plaintiffs of the part played by Bedman Missir in this transaction cannot possibly be true, as Bedman Missir did not obtain any property in Puran by deed of gift until May 20, 1922, whereas the mortgage in suit was dated July 9, 1921. Further, it would be extremely difficult to accept the plaintiffs' version that the land in village Mera was intended to form part of the security. As I have stated, the land is not described in any way and could not effectively be brought to sale in execution of a mortgage decree. Chandradip Narain (P. W. No. 2) admitted that he was aware that a full description of property should be given in deeds, and he admitted that when his father saw the draft mortgage bond he did not require the boundaries of the 5 *kathas* of land to be mentioned. Neither did they require defendant No. 1 to mention in the *kabala* the *khassra* number of the land at Mera nor whether the land was *raiya* *bakasht* or *sikan* or waste or cultivated land. From the evidence adduced on behalf of the plaintiffs, it is clear that the land at Mera was never inspected and Deoki Singh appears to have known little or nothing about this village. Yet 5 *kathas* of land in this village is stated to be part of the security.

On behalf of the defendants a number of witnesses were called who stated that the

5 *kathas* of land in Mera in the Patna District were mentioned in the mortgage deed merely for the purposes of registration. According to these witnesses, it was never the intention of either of the parties to the mortgage deed that this 5 *kathas* of land should be effectually mortgaged and form part of the mortgage security. Sir Manmatha Nath Mukerji who has appeared on behalf of the plaintiff-respondents has challenged the finding of fact of the learned Subordinate Judge and has asked the Court to accept the evidence of Raktoo Singh (D. W. No 5). This witness supported the defendants' story that there was great urgency in the matter. At p. 31 in the supplemental paper-book he stated :

"He (Deeki Singh) said that he would pay the money after the bond was registered. Ramnandan then said that as the Counsel wanted Ramnandan the next morning there was no time for registration of the deed and so he would execute the bond and get it attested by any Pleader if Deeki Singh so chose and on that Deeki Singh should advance the loan. But Deeki Singh said that he would not pay the money before the registration of the bond. Ramnandan then said that he could not go to Jehanabad to register the deed as his Counsel wanted him the following morning with the papers. To that Deeki Singh said that there was no necessity to go to Jehanabad to register the bond and that the bond could be registered at Patna if 2 to 4 *kathas* of land situate at Patna was given as security in the mortgage bond. Ramnandan agreed to this proposal. Ramnandan then asked Lalli Lal to say what 2 to 4 *kathas* of land in the District of Patna should be mortgaged by the bond and Lalli Lal said that 2 to 4 *kathas* of village Mera should be given as mortgage. Deeki Singh and Ramnandan agreed to the same."

It is true that this witness says that 2 to 4 *kathas* of land were agreed to be given in mortgage but it is clear that no attempt was made to identify this land and that the 2 to 4 *kathas* of land were only to be inserted in the mortgage to enable it to be registered at Patna. The other witnesses make it clear that the 5 *kathas* mentioned in the mortgage deed were never intended to form part of the security, and in my view that is the true effect of Raktoo Singh's evidence. The very fact that no attempt whatsoever was made by either of the parties to identify the land, though the plaintiffs well knew that such was essential, establishes to my mind beyond all doubt that 5 *kathas* of land in Mera in the Patna District were only mentioned in the mortgage deed to enable the document to be registered in Patna. The nature of the property and the urgency support the defendants' contention, and in my view the learned Subordinate Judge was right in holding that

the 5 *kathas* mentioned in the deed were never intended to form part of the mortgage security.

It has been urged by Sir Manmatha Nath Mukerji on behalf of the respondents that as the 5 *kathas* of land exists it must be regarded as having been mortgaged, and that being so the deed could validly be registered in the Patna District. Section 28, Indian Regis. Act, 1908, deals with the place for registering documents relating to land.

The section is in these terms :

"Save as in this part otherwise provided, every document mentioned in s. 17, sub-s. (1), cls. (a), (b), (c) and (d), and s. 18, cls. (a), (b) and (c), shall be presented for registration in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate."

A mortgage bond for Rs. 10,000 requires registration, and by the terms of s. 28 it can be registered in the office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which the mortgage relates is situate. The question to be decided in this case is whether this mortgage related to or included any property in the sub-district of the Sub-Registrar who registered it. If the document relates to no such property, then the mortgage bond has not been validly registered.

This section has been considered by their Lordships of the Privy Council in a number of cases. The first case was *Harendra Lal Roy Chowdhuri v. Haridasi Debi* (1). In that case the plaintiffs' (appellants') claim was based on a mortgage decree passed in a suit brought in the High Court at Calcutta on its Original Side to enforce a mortgage executed in the plaintiffs' favour. The defendants (respondents) were the mortgagor (who did not appear) and two other persons who disputed the mortgagee's title. These defendants (who had not been parties to the suit on the mortgage) alleged that the mortgage deed had not been legally registered, because no portion of the property mortgaged was situated in Calcutta where the deed had been registered and the decree had therefore been made by a Court which had no jurisdiction to entertain a suit on the mortgage, and the plaintiff had no title to maintain the suit. The only portion of the property in the mortgage deed alleged in the suit on the

(1) 41 O 972; 23 Ind. Cas. 637; 27 M L J 80; (1914) M W N 462; 16 M L T 6; 18 O W N 817; 19 O L J 484; 16 Bom. L R 400; 12 A L J 774; 1 L W 1050; 41 I A 110; A I R 1914 P C 67 (P O).

mortgage to be situate in Calcutta, was parcel No. 28 in the Schedule, and was described as "25 Guru Das Street;" but the property so described was found to be non-existent, the wrong description being said to be due to a mistake though no evidence of it was given. The Court directed an amendment, and the description was altered to "25 Ashutosh Dey Lane" which was in Calcutta, and was comprised within the same boundaries as those given in parcel No. 28 of the Schedule to the mortgage deed. In the present suit no evidence was given either by the mortgagor or the mortgagee to show that there had been any mistake in the description of the property; but it was proved by the defendants that the property contained within the boundaries given in parcel No. 28 was property which did not belong and never had belonged to the mortgagor. Both the Courts below, like the High Court in the suit on the mortgage, found without any evidence that there had been a mistake in the entry of parcel No. 28 and held that part of the property being in Calcutta the deed had been properly registered there, and that the decree in the mortgage suit had been rightly made, and with jurisdiction. It was held by their Lordships of the Privy Council, reversing the decision of the High Court, that it was open to the defendants (not having been parties to the mortgage suit) to contest the validity of the decree, and for the same reason the direction of the High Court that the entry in the Schedule should be amended did not affect them; and that under the circumstances of the case the onus was on the plaintiff to show that the entry in that parcel was not a fictitious entry, which onus he had not discharged. Further, their Lordships held on the conduct of the parties and the evidence in the case, that that parcel was in fact a fictitious entry and represented no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no part of the property actually charged and intended to be charged in fact existed, was a fraud on the registration law, and no registration obtained by means thereof was valid. No such fictitious item inserted to give a colourable appearance to the deed relating to property in Calcutta when in reality such was not the case, could bring the deed within the limited jurisdiction of the Court.

The High Court, therefore had no jurisdiction to make the decree; and the deed not having been registered in accordance with the Regis. Act (III of 1877), the mortgagee had no title to maintain the suit.

It will be noted in this case that the property inserted in the deed was a fictitious property which did not belong to the mortgagor. The mortgage deed, therefore, did not relate to any property in Calcutta and could not be registered there so as to give the High Court of Calcutta jurisdiction in the matter.

This case was followed in the case of *Biswanath Prasad v. Chandra Narayan Chowdhury* (2). In that case a mortgage bond for Rs. 8,000 which purported to mortgage a 7 anna share in a village in the Darbhanga District and 1 *kauri* share in the Muzaffarpur District was registered only in the Muzaffarpur District. The mortgagor had purchased the 1 *kauri* share shortly before the execution of the mortgage and in order that he might register in Muzaffarpur. He paid Rs. 50 for the 1 *kauri* share, but there was no registered instrument or delivery of possession as required by s. 54 of the T. P. Act, 1882. Their Lordships found that none of the parties intended that the 1 *kauri* share should vest in the mortgagor, or pass under the mortgage and subsequently, held that the mortgage was invalid under s. 54, T. P. Act, under which a mortgage for over Rs. 100 can be made only by a registered instrument. In this case the property inserted in the mortgage actually existed, though the mortgagor's title to it was defective. It was not fictitious property in the sense that it did not exist, but as the property had not vested in the mortgagor and was never intended to pass under the mortgage it was held that the document did not relate to any property situate in the Muzaffarpur District, and, therefore, the mortgage could not be validly registered in that district.

The matter was again considered by their Lordships of the Privy Council in the case of *Collector of Gorakhpur v. Ram Sunder Mal* (3). In that case a sale deed comprised four villages within the D sub-district for registration purposes and also a one-third share in a garden-room within the G sub-district. The deed gave the purchasers no

(2) 48 O 509; 63 Ind. Cas. 770; 48 IA 127 (P O).

(3) 26 A 468; 150 Ind. Cas. 545; 7 R P O 1; 11 O W N 889; A I R 1934 P O 157; 40 L W 217; (1934) A L J 779; 67 M L J 274; 15 P L T 531; 60 C L J 67; (1934) M W N 751; 36 Bom. L R 467; 38 O W N 1101; 61 IA 286 (P O).

access to the garden-room, and one of the purchasers admitted that it was of no value to them. The deed was registered in the G sub-district. It was held that the deed was not validly registered under the Indian Regis. Act, 1908, s. 28, as the evidence showed that the parties did not intend that the share in the garden-room should really be sold, its inclusion in the deed being a mere device to evade the Act. It was further held that the word "fictitious" used in *Harendra Lal Roy Chowdhury v. Haridasi Debi* (1), is not confined to non-existing property, it is satisfied if the deed does not relate to a specified property for any effective purpose of enjoyment or use. At p. 495* Lord Blanesburgh, who delivered the judgment of the Board, observed as follows:

"In reaching that conclusion, however, they failed to refer to or take into account all the circumstances which their Lordships have detailed, and it becomes the duty of the Board to consider the question afresh in their light.

They have done so and, having regard specially although not exclusively, to the facts that this undivided share in this sitting room was agreed by one of the purchasers to be of no value, that both in respect of the interest taken in it and in respect of its complete inaccessibility it was incapable either of being utilised or enjoyed by the purchaser, that the vendor refused to include in the sale any subject in Gorakhpur to which these disadvantages did not attach, they think that one of two inferences alone is possible: either that it was never intended by either party that the sitting room should for any purpose other than that of registration be subject of sale at all, or that the vendor only included it because he knew that it never could become an effective subject of enjoyment or occupation by the purchasers. The word "fictitious" used in *Harendra Lal Roy Chowdhury v. Haridasi Debi* (1) is not confined to non-existing properties. It is satisfied if the deed does not 'relate' to the specified property for any effective purpose of enjoyment or use."

The last case decided by their Lordships of the Privy Council is the case of *Inuganti Venkata Rama Rao v. Sobhanadri Appa Rao* (4). In that case in a sale of land situated in one registration district there was included a yard of land situated in another registration district in which the purchaser neither resided nor owned property. There was no explanation of the use to which he could put it. The title of the vendor to it was doubtful, the purchaser made no attempt to take possession of it and it was built over by the owner of adjacent property. In those cir-

cumstances, their Lordships held that there was no intention to convey the square yard of land and the registration of the sale deed in the district in which the yard of land was situated was a device to evade the law of registration. There was, therefore, no effective registration and the deed was invalid.

In my view these cases lay down that there is no effective registration unless the deed of mortgage or sale relates to land situate in the sub-district in which the deed is registered. It is not sufficient that the land mentioned in the sale or the mortgage deed exists. The document cannot be said to relate to land in a registration district unless it was the intention of the parties that such land, even if it exists, should in a sale deed be transferred or in a mortgage deed form part of the security. In the present case 5 *kathas* of land certainly exist in village Mera; but the insertion of these 5 *kathas* in the mortgage deed gave the mortgagee no security whatsoever. The land being undefined could not effectually form part of the security, and on the evidence it is clear that it was never intended to form part of such security. It follows, therefore, that if the defendants can raise this question the registration of this mortgage deed must be held to be invalid.

The learned Subordinate Judge, as I have already stated, came to the conclusion that as the defendants were a party to this fraud on the registration law, they could not now allege that the document had not been validly registered. The learned Judge relied upon the case of *Vadde Venkataswami v. Bomaraju Venkata Subbaya* (5) in which it was held that a vendor of immovable property cannot be allowed to plead or to take advantage of the invalidity of the registration of his sale deed on the ground that by the inclusion of a particular item of property in the document and getting the document so registered in an office where otherwise it could not have been registered a fraud on the registration law was committed, in which he participated. Their Lordships laid down that as a general rule a plaintiff cannot plead his own fraud or illegal act as a basis of his claim or as a necessary step towards the success of his claim. His position in that matter was not made better by showing that the defendant had

(4) 59 M 539; 161 Ind. Cas. 29; 1936 O L R 163; A I R 1936 P O 91; 1936 A L R 269; 1936 O W N 278; 2 B R 338; (1936) M W N 305; 8 R P O 10; 70 M L J 378; 43 L W 456; (1936) A L J 238; 40 O W N 145; 38 Bom. L R 457; 38 P L R 308; 19 N L J 89; 63 O L J 382 (P O).

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(5) 55 M 507; 139 Ind. Cas. 404; A I R 1932 Mad. 311; (1932) M W N 226; 35 L W 294; 63 M L J 77; Ind. Rul. (1932) Mad. 689.

joined him in the fraud or illegal act or by the fraud or illegal act not being pleaded but coming to light in the course of the trial of the suit or even in the hearing of an appeal. The rule applied even where the fraud or illegality disclosed was in contravention of some rule of public policy embodied in a statute. In this case Reilly, J., relied on a number of English authorities and did not refer to the decisions of their Lordships of the Privy Council to which reference has already been made in this judgment. Anantakrishna Ayyar, J., also referred to a large number of English cases and at the end of his judgment stated:—

"The Privy Council decisions in *Harendra Lal Roy Chowdhury v. Haridasi Debi* (1) and *Biswanath Prasad v. Chandra Narayan Chowdhury* (2) are not really applicable to the exact point that we are now considering. The question there was not whether the plaintiff could be allowed to set up his own fraud, but whether registration was properly and validly effected when the question arose with reference to third parties."

In my judgment, this Madras case is no authority for the proposition that a mortgagor defendant cannot raise this question of want of valid registration though he may be a party to the fraud on the registration laws. In *Biswanath Prasad v. Chandra Narayan Chowdhury* (2) a mortgagor defendant raised the same question; and their Lordships of the Privy Council held that the deed had not been validly registered. That was a case in which the executants of the mortgage deed were sued and where they, who were parties to the fraud, successfully pleaded want of valid registration. The question did not arise with reference to third parties, as stated by Anantakrishna Ayyar, J., but arose in a suit between the mortgagees and the mortgagors. Again in the most recent case, namely, *Inuganti Venkata Rama Rao v. Sobhanadri Appa Rao* (4) the plaintiff was allowed to put forward the fraud of his father who had acted as his guardian when the property in question was sold. It appears to me that the Court is bound to hold that the defendants are entitled to raise this plea having regard, in particular, to the decision of their Lordships of the Privy Council in *Biswanath Prasad v. Chandra Narayan Chowdhury* (2). In my view the learned Subordinate Judge was wrong in holding that the mortgagor defendants in this case could not raise the question of want of valid registration.

It was further urged by Sir Manmatha Nath Mukerji on behalf of the respondents

that the learned Subordinate Judge was wrong in admitting evidence as to the intention of the parties to this mortgage. He relied upon s. 92 of the Indian Evi. Act. That section is in these terms:—

"When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms."

To this section there are a number of provisos, and by proviso (1)

"Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law."

Sir Manmatha Nath Mukerji has relied upon a number of cases, the first of which is *Lachman Das v. Ram Prasad* (6) in which Ashworth, J., appears to have held that evidence as to intention was not admissible in considering the question of registration. The point was again expressly considered by Mukerji, J., in *Kunwar Ram Krishna v. Anand Krishna* (7). The learned Judge held that it was not open to a party to a registered sale deed to prove an oral agreement by evidence either oral or documentary contemporaneous with the sale deed, that in spite of a certain property, belonging to the vendor, being entered in the sale deed, title to it would not pass to the vendee. He further held that where the parties intended to hoodwink the Sub-Registrar by entering a piece of property within his jurisdiction in the sale deed, in order to give that officer jurisdiction, the parties contemplated a fraud on the law of registration and so should not be granted any relief in a Court of Justice. A similar view was taken by the Bombay High Court in the case of *Vishvanathbhat Annabhat Pujari v. Mallappa* (8). At p. 825 Macleod, C. J., stated:

"The appellant relies for his argument that there was a fraud on registration on two cases; *Harendra Lal Roy Chowdhury v. Haridasi Debi* (1) in which it was held that none of the properties appearing in the document to be registered was within the jurisdiction of the Registrar, and therefore, registration was invalid; and *Biswanath Prasad v. Chandra Narayan Chowdhury* (2) in which it was proved that the transferor had no title to the property mentioned

(6) A I R 1927 All. 422; 100 Ind. Cas. 1029; 25 A L J 349.

(7) A I R 1929 All. 578; 118 Ind. Cas. 589; Ind. Rul. (1929) All. 893.

(8) 49 B 821 (825); 92 Ind. Cas. 628; 27 Bom. L R 1103; A I R 1925 Bom. 514.

in the transfer deed which would bring it within the jurisdiction of the Registrar. Neither of those cases is applicable to the facts in the present case. But the appellant wishes us to extend those decisions to the facts before us. We are concerned at present with the registration of the sale deed. The Registrar had jurisdiction to register that document, because a portion of the property mentioned in the deed was within his jurisdiction. Clearly, if no property belonging to the transferor appearing in the document to be registered is within the jurisdiction of the Registrar, registration by such Registrar of that document would be invalid. But we are not prepared to go further and say that evidence can be led with regard to the intention of the parties at the time the principal document was registered to deal again with the portion of the property which was within the jurisdiction of the Registrar and which rendered its registration valid."

These cases certainly afford support for the contention that evidence as to the intention of the parties is not admissible; but in my view such evidence has been clearly admitted by their Lordships of the Privy Council in the cases to which I have referred. In the Calcutta cases evidence was adduced to show that the property was fictitious in *Harendra Lal Roy Chaudhury's case* (1), and that the mortgagor's title to it was imperfect in *Bawanath Prasad's case* (2). Further evidence was admitted in the latter case with a view to showing that the property was never intended to form part of security. In the case of the *Collector of Gorakhpur v. Ram Sundar Mal* (3) their Lordships at p. 494* made the following observation:—

"In the High Court the learned Judges were of opinion, and their Lordships think rightly so, that they were bound to go into this question of intention, and having done so they arrived at the conclusion that the entry of the sitting room in the deed was not a fictitious entry within the meaning of the decision of the Board already cited."

Here they expressly approved of the view of the learned Judges of the Allahabad High Court that the Court was bound to go into the question of intention. In the judgment of Lord Blanesburgh reference is made to the evidence. At p. 494* there appears this observation:

"And this conclusion is assisted by some evidence of Shiam Rathi, the scribe who prepared it. He asked his principal, Ram Ghulam, why a third share of the room was being entered in the deed, as it would be of no use, whatever. The answer given in no way disputes that statement of Shiam Rathi's who was an ingenuous witness. He knew, he said, that if he agreed that the room was mentioned in the deed merely to enable its being registered at Gorakhpur the suit would fail on the ground of invalid registration. Yet both Courts held that the registration was valid."

In this case their Lordships dealt at length with the question of intention and the evidence relating to it.

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In the most recent case, *Inugani Venkata Rama Rao v. Sobhanaari Appa Rao* (1) their Lordships again considered the question of the intention of the parties. It appears to me that if the question, which has to be decided, is the intention of the parties, evidence must be admissible though it may tend to show that property ostensibly mortgaged was not in fact intended to be mortgaged. In my view there is nothing in s. 92 of the Indian Evi. Act to render such evidence inadmissible. It is not evidence which varies the terms of the written document as between the parties and their representatives. It is evidence which goes to show that the document did not relate to land within the jurisdiction of the Sub-Registrar who registered it. Further, it may well be said that evidence of this kind is evidence which tends to render the document invalid and such is admissible under the first proviso to s. 92 of the Evi. Act. In my judgment the evidence as to the intention of the parties in this case was admissible and was rightly admitted by the learned Judge.

Lastly, it was contended by the appellants that the Sub-Registrar had no jurisdiction whatsoever to register this mortgage by reason of the fact that the property situate in Mera village was not sufficiently described. It was accordingly urged that this provided another ground for dismissing the plaintiffs' claim. This point does not appear to have been urged in the Court below. Section 21, Indian Regis. Act, provides:

"No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same."

It is urged that the land in Mera contains no description sufficient to identify it. What was said to be mortgaged was 5 *kathas* of land in Mera with no other description of any kind. The description is clearly inadequate to identify the property, and the question arises whether the Sub-Registrar had jurisdiction to register the same. Reliance has been placed by the appellants upon a number of cases. In *Bairj Nath Tewari v. Sheo Sahay Bhagat* (9) certain property was described in a mortgage bond as bearing *Touzi* No. 10, as paying a *sadr jama* of Rs. 719, and as lying within the jurisdiction of *thana kotwali* Sub-District Bhagalpur, Collectorate Bhagalpur. This description was so far erroneous, in that the property was in reality situated in *thana* Amarpur, (9) 18 C 553.

Sub-District Banka, and bore a *sadr jama* of Rs. 919-15-0. Banka was, however, within the area of the District of Bhagalpur. The mortgage bond was registered by the Sub-Registrar of Bhagalpur, who was, under s. 7 of the Regis. Act, authorized, in addition to his own duties, to exercise and perform the duties and powers of the Registrar of Bhagalpur. It was held by a majority of the Full Bench that the provisions of s. 21 of the Act, had not been complied with; that the description of the property was misleading and insufficient for the purposes of identification, and that therefore no registration of the document had been effected within the provisions of the Regis. Act. The Regis. Act referred to in this case is the Act of 1877. Section 21 of that Act was, however, in the same terms as s. 21 of the present Act. A similar view was taken by a Bench of the Calcutta High Court in *Nahar Lal Shah v. Baij Nath Shah* (10). It was held that when several immovable properties are mortgaged by the same deed, defect of description in respect of any one of them is sufficient to invalidate the registration of the whole deed. In that case a *katha* of land in Arrah was misdescribed and the description was not sufficient to identify the same. The Court held that the registration was invalid.

A Bench of the Allahabad High Court in *Sayed Mahmud v. Muhammad Zubair* (11), expressed a similar view and held that where a letter purported to transfer immovable property and was presented as a non-testamentary document for registration but was refused on the ground that it contained no description of the property "sufficient to identify the same", such refusal was under the circumstances proper.

The effect of breaches of certain provisions of the Regis. Act was considered by their Lordships of the Privy Council in *Ma Pwa May v. S. R. M. M. A. Chettyar Firm* (12). Their Lordships were not called upon directly to express an opinion on the point which I am now considering; but Lord Atkin, who delivered the judgment of the Board, expressly approved of a dictum of Sir Barnes Peacock in the case of *Sah*

Mukhun Lall Pandey v. Sah Koondun Lall (13). At p. 216 of that report Sir Barnes Peacock observed:—

"In considering the effect to be given to s. 49 that section must be read in conjunction with s. 88 and with the words of the heading of part 10, 'Of the Effects of Registration and Non-Registration'. Now, considering that the registration of all conveyances of immovable property of the value of Rs. 100 or upward is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provision of ss. 19, 21 or 3, or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance."

Sections 21 and 88 of the Regis. Act, 1866, referred to by Sir Barnes Peacock have now been replaced by ss. 21 and 81 of the Indian Regis. Act, 1908; but it is to be observed that the sections are in the same terms. As I have stated, this dictum of Sir Barnes Peacock is expressly approved by Lord Atkin in the Rangoon case and, therefore, I am extremely doubtful whether the cases of the Calcutta High Court and the Allahabad High Court, to which I have referred, can now be regarded as good law. I am, therefore, unable to hold that the Registrar had no jurisdiction to register this sale deed by reason of the insufficiency of the description of the land situate in Mera.

For the reasons which I have given, I am satisfied that the parties in this case committed a fraud on the registration law and that the registration of the document was consequently invalid. The mortgage, therefore, cannot be enforced and the plaintiffs' claim must fail.

The appellants also relied on s. 7, Bihar Money-lenders (Regulation of Transactions) Act, 1939, and contended that in any event a decree could not be passed for more than Rs. 20,000. That contention appears to be well-founded; but it is unnecessary to consider it as I hold that the claim fails in its entirety.

I would, therefore, allow this appeal, set aside the decree of the Court below and dismiss the plaintiffs' claim. The defendants unsuccessfully raised a number of issues in the Court below and have not challenged the findings in this Court. I would, therefore, give the defendant-appellants

(13) 2 I A 210 (216); 15 B L R 228; 24 W R 75; 3 Sar 509; 3 Suther 170 (P O).

(10) 32 O W N 241; 113 Ind. Cas. 855; 47 O L J 124; A I R 1928 Cal. 385.

(11) 31 A 523; 3 Ind. Cas. 506.

(12) 7 R 624; 120 Ind. Cas. 645; A I R 1929 P C 279; 30 L W 281; 34 O W N 6; 6 O W N 829; (1929) M W N 941; Ind. Rul. (1930) P C 5; 51 O L J 6; 56 I A 379; 32 Bom. L R 117; 58 M L J 59; (1930) A L J 533 (P O).

their costs in this Court and direct the parties to pay their own costs in the trial Court.

Manohar Lall, J.—I agree.

D. Appeal allowed.

CALCUTTA HIGH COURT

Civil Rule No. 541 of 1939

May 29, 1939

HENDERSON AND LATIFUR RAHMAN, JJ.

ACHINTA NATH SASMAL—PETITIONER

versus

GOBINDA PRASAD DAS AND OTHERS—

—OPPOSITE PARTY

Bengal Tenancy Act (VIII of 1885), s. 26-G (5)—
Order on application under, if appealable.

The right of appeal is the creation of the statute and should not be inferred from analogy or deduced by implication. The words "shall have the effect of a decree" in Ben. Ten. Act do not provide for an appeal. Section 26-G (5) of the Act does not take away the ordinary jurisdiction of the Civil Courts. It is optional with the mortgagor to make an application under the section and it is optional with the Court to make an order. No appeal, therefore, lies from an order passed on an application under s. 26-G (5).

O. Rule issued from an order of the District Judge, Midnapore, dated February 25, 1939.

Mr. Sarat Chandra Jana, for the Petitioner.

Mr. Saraj Kumar Maity, for the Opposite Party.

Henderson, J.—This is a rule calling upon the opposite parties to show cause why an order of the District Judge dismissing an appeal summarily should not be set aside. The opposite party filed an application under s. 26-G, sub-s. 5, Ben. Ten. Act of 1938, asking that he might be restored to possession of the property. An objection was filed by the petitioner *inter alia* on the ground that the mortgage was not a usufructuary mortgage. The Munsif allowed the application. The petitioner appealed to the District Court and the learned District Judge dismissed the appeal summarily on the ground that it was incompetent. The petitioner then obtained this rule. The question for our decision therefore is whether an appeal lies in these cases. The solution of the problem depends upon the meaning to be attached to the words "such order shall have the effect of a decree of a Civil Court" in sub-s. 6. In our opinion it is not necessary to consider now what precise meaning is to be attached to this provision. Undoubtedly, difficult and complicated questions of *res judicata* may arise which will have to be considered

on an appropriate occasion, for example, the case, which is before us may raise the question whether the Munsif's decision that the mortgage is a usufructuary mortgage is *res judicata* or not. It will be an important question whether it is open to the petitioner to challenge that decision in a title suit. As I have already said, we do not propose to consider that matter now. The only question that arises for our decision is whether an appeal lies. The Ben. Ten. Act provides for many appeals in clear and specific terms. The right of appeal is the creation of the statute and should not be inferred from analogy or deduced by implication. In the present case if we seek to deduce an appeal by implication, an immediate practical difficulty will arise. It is to be noticed that these applications may be made either to a Court or to a Revenue Officer. The Civil P. O., makes no provision for the hearing of appeals from the decisions of Revenue Officers and, if we are to hold that the present section provides for such appeals, it will be very difficult to say what Court is competent to hear them.

The learned Advocate who appeared for the opposite party drew our attention to the fact that the Amending Act has amended s. 26-G and s. 26-F. In the latter case an appeal was provided for in clear and specific terms. He also drew our attention to the provisions of s. 158 of the Act. Sub s. 3 of that section is in these terms:

"The order on any application under this section shall have the effect of, and be subject to the like appeal as, a decree."

In our opinion this is conclusive. It shows that at any rate in this Act the words "shall have the effect of a decree" do not provide for an appeal. In the course of the argument, Mr. Janah informed us that this point was considered by Edgley, J., in an unreported case (Civil Rule No. 361 of 1939 *Gadadhar Mandal v. Gobinda Prasad* (1)). We accordingly sent for the record and have considered the judgment. It appears that the learned Judge did not give any reason for the conclusion at which he arrived. He seems to have assumed that there must be an appeal. He appears to have been pressed by the consideration that the question whether the applicant was an occupancy *raiyyat* and whether the mortgage was a usufructuary mortgage could not be subsequently challenged in a proper suit. I have already said that we do not propose to consider that question, because, in our

(1) A I R 1939 Cal. 458; 182 Ind. Cas. 745; 12 R C 100.

opinion it does not arise in connection with this matter. But at any rate, one thing appears to be reasonably plain. The section does not take away the ordinary jurisdiction of the Civil Courts. It is optional with the mortgagor to make an application under the section and it is optional with the Court to make an order. There can be no doubt that this procedure provides a cheap and expeditious remedy by which a mortgagor can recover possession of the land and be awarded compensation for any time during which he may have been improperly deprived thereof. If the intention of the Legislature is that the decree shall have no more effect than that, then no useful purpose would be served by providing for an appeal. After all, cases in which the status of the applicant and the nature of the mortgage are in dispute, will be comparatively few. For the reasons given above, we are of opinion, that the learned Judge was right when he decided that the appeal was incompetent. The Rule is accordingly discharged with costs—hearing-fee one gold *mohur*.

Latifur Rahman, J.—I agree.

B. Rule discharged.

MADRAS HIGH COURT

Application No. 2003 of 1938 in O.P.

No. 158 of 1938

October 14, 1938

GENTLE, J.

In the matter of TRAVANCORE
NATIONAL AND QUILON BANK LTD.:
S. BARKATALLY AND OTHERS—
PETITIONERS

K. ANANTARAMAN—DEBTOR—APPLICANT
versus

JAMES VOCE PIRRIE AND CYRIL GILL,
OFFICIAL LIQUIDATORS—RESPONDENTS

Company—Liquidation—Debt not presently payable, if can be set-off against money owing to company—Transfer of Property Act (IV of 1882), s. 130—Fixed deposit receipt—Endorsement on back—Effect.

A debt, although not presently payable, can be set off against moneys owing to a company in liquidation. To allow such a set off would not amount to a fraudulent preference. *In re, Washington Diamond Mining Co. (1)*, distinguished.

The fixed deposit receipt is not a negotiable instrument and an endorsement on the back does not have the same effect as an endorsement of a bill of exchange or promissory note.

Messrs. K. S. Sankara Iyer and M. Sundaram, for the Applicant.

Mr. C. Krishnaswami Iyer, for the Respondents.

Judgment.—The applicant is a debtor of the company in liquidation. On February 17, 1938, he borrowed from this banking company a sum of Rs. 1,000, and as security for his loan he deposited 450 shares of two other companies. On May 30, 1938 repayment of this loan was demanded by the company. The applicant wrote a letter to the agent of the company on June 4, 1938. This letter is not available, but the contents are set out in the applicant's affidavit in support of his application in para. 4, and it is not controverted that his recollection in regard to the contents is accurate. The letter was to the effect that the applicant was the holder in due course of a fixed deposit receipt with the Bank for a sum of Rs. 1,000 standing in the name of Sri Bageerathi Ammal maturing on July 28, 1939, and he requested an adjustment of this debt from the company against the amount due from the applicant. An interview took place on the day of, or shortly after, the letter I mentioned, between the applicant and the agent. The substance of this interview is set out in para. 3 of the counter-affidavit and is not challenged by the applicant in his reply. At this interview, the applicant informed the agent that the depositor of Rs. 1,000, the subject of the fixed deposit receipt, had attempted to obtain payment from the company for the amount covered by the receipt but was unsuccessful, and the applicant requested that he should be allowed to set off against his debt to the company the debt which was maturing in favour of the depositor. The recollections of the applicant and the agent are now at issue in regard to what subsequently transpired. The applicant says in his affidavit that the agent promised to allow a set off; on the other hand, the Official Liquidator in his affidavit says that he was informed by the agent that he promised, on being given the fixed deposit receipt signed by the depositor, to place the matter before the management and ascertain their views. Whatever may have been said, in my view, it is quite clear from the letter of the applicant dated June 18, 1938 what was the position he accepted. Two days previously, he had been told by the company that an adjustment could not be allowed against his debt before the date of maturity of the fixed deposit receipt but that this was being held as collateral security for the loan. The applicant's reply in his letter of June 18, 1938 was that he had

paid the depositor the purchase consideration and he requested that the fixed deposit should be transferred to his name if it were not possible for the company to reconsider his original request to be allowed to set off. He also asked for return of the share certificates deposited as security. It is quite clear that, whatever may have been stated, he accepted the position that on that day there was no set off and the debt due from him was still outstanding to the company.

It is urged on behalf of the applicant that no matter what may have transpired in June 1938, he is now entitled to set off against moneys due from him the moneys which ordinarily would have become due on the maturity of the fixed deposit receipt. In the light of the admissions and concessions which Mr. Krishnaswami Ayyar has made on behalf of the Official Liquidators, it is not necessary for me to go into the question of the right to set off. It is conceded that a debt, although not presently payable, can be set off against moneys owing to a company in liquidation. The application of the applicant was opposed on these grounds: (1) that there was no valid assignment; and (2) if there was, to allow a set off would amount to a fraudulent preference. It is now conceded that if the assignment in favour of the applicant is binding and established, then the applicant is entitled to set off. What is disputed is whether there was a valid assignment in law.

There was a loan made to the applicant which he was requested to repay. At about the date when repayment was demanded, the depositor of the Rs. 1,000 endeavoured to obtain repayment of the money, the subject of the receipt from the bank. It was then that the applicant commenced his negotiations to set off against his debt the moneys deposited with the company by the depositor. The only documents supporting an assignment are, (a) the deposit receipt which on the back bears the signature of the depositor which signature is merely one evidencing discharge of the moneys due from the bank; (b) a letter dated June 16, 1938 signed by the depositor and addressed to the company in which it is stated that the depositor had assigned her assigned her rights in the fixed deposit receipt to the applicant and authorized the company to apply the amount towards the applicant's loan account. In the affidavit supporting this application the applicant contents himself with saying that he was the holder

of this fixed deposit receipt in due course. In the counter-affidavit, in para. 10, it is stated that the Official Liquidators do not admit and put the applicant to strict proof that he is a *bona fide* assignee for value of the amount covered by the fixed deposit. In his reply the applicant merely says that he is a *bona fide* assignee for value. Seeing that it is contested that he is a *bona fide* assignee of this deposit receipt, one would have thought in his reply he would have set out the consideration which he paid. There is not a word about that. Learned Counsel on behalf of the applicant has referred me to s. 130, sub-s. (1), T. P. Act, 1882, which provides that

"a transfer of an actionable claim whether with or without consideration shall be effected only by the execution of an instrument in writing signed by the transferor or his duly authorized agent."

There is no such document, although Counsel informed me that the assignment was effected by means of a written document. The letter written by the depositor dated June 16, 1938 to the bank to which I have referred is not an assignment. It is merely a notice to the bank that an assignment has been made. The fixed deposit receipt is not a negotiable instrument and an endorsement on the back does not have the same effect as an endorsement of a bill of exchange or promissory note. It has been argued on behalf of the applicant that the company before the winding up, accepted him as the assignee inasmuch as, having been given the fixed deposit receipt with the signature of the depositor upon the back it retained this document as a collateral security. In my view, one cannot infer from this that an assignment had been recognized. It is not infrequent that third parties' property or documents are held as security against a loan. On the one hand, the depositor was trying to obtain the amount of the deposit from the bank, upon which there was a run at the time; on the other hand, the applicant had borrowed money from the bank which he was being asked to repay. The company did not repay its debt upon the unmatured fixed deposit receipt nor did the applicant return to the bank the money he borrowed. When the Official Liquidators stepped in, having been appointed provisionally in the first instance, negotiations took place between the applicant and the liquidators as set out in para. 7 of the counter-affidavit, which is not disputed.

On July 25, the applicant wrote to the provisional liquidators asking them to

make necessary adjustments in the loan account and to return to him the share certificates held by the bank as collateral security. The liquidator replied on the same day regretting that they were unable to comply with his request; on the 30th the applicant wrote that the depositor was willing to give another fixed deposit receipt in substitution for the earlier one, the other fixed deposit receipt maturing on July 28, 1938. It seems strange that if there had been an absolute assignment of fixed deposit receipt, which is being questioned in this application, why this lady was willing to exchange it for another maturing at an earlier date. It seems to me that what had happened was that there had been an understanding between the depositor and the applicant for their mutual benefit. It is significant that no reference has been made by the applicant to the consideration which had passed. I can only assume that there was none. There is no assignment in writing as required by s. 130, T. P. Act, and quite apart from that, the applicant has been put to strict proof and, it is insufficient for him to say 'I am a *bona fide* assignee,' and nothing more. Bearing all these circumstances in mind, in my view, the applicant has not satisfied me that he is or ever was an assignee at all. The result is that this application fails.

There has been addressed to me on behalf of the Official Liquidators an argument that if a set off were allowed, it would amount to a fraudulent preference. In my view that argument is unsound. In support of it there was cited to me *In re Washington Diamond Mining Co.* (1). In my view, that case is not in point in the present instance. In the case cited, a share-holder, holding shares in respect of which calls upon unpaid share moneys were due, purported to have liquidated this by means of transaction which in effect was setting off against the calls moneys due to him. Since there is no set off in respect of unpaid calls upon shares due from contributories, the transaction was held to be a fraudulent preference. No question of calls upon shares arises in the present case, and in my view, if the assignment had been established, a set off should have been allowed in respect of the applicant's debt. However, the result is that this application is dismissed with costs. Certified for Counsel.

N.S.

Application dismissed.

(1) (1893) 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681.

PATNA HIGH COURT

Criminal Reference No. 8 of 1940

February 26, 1940

AGARWALA, J.

KESRILAL KEDIA AND ANOTHER

versus

EMPEROR—

Defence of India Act (XXXV of 1939), s. 2—Rules under—Rr. 34 (6) (g), (6) (p)—Increase in price of pair of dhotis by 10 per cent. over the price ruling on September 1, 1939—Offence under Rules, if committed—Absence of order fixing price—Effect.

An increase of roughly 10 per cent. in the price of a pair of dhotis can hardly be said to be an act likely to cause fear or alarm to the public or to any section of it, within the meaning of r. 34 (6) (g), whatever other consequences it may have on the public mind. Such an act is not likely to have any bearing on the efficient prosecution of the war and the defence of India or the public safety nor can it be said to prejudice the public interest within the meaning of r. 34 (6) (p).

Profiteering was not intended to be included in the definition of "prejudicial act" in r. 34 (6).

In the absence of any order fixing the price of cloth in the district it cannot be held that the accused has committed any offence under the Defence of India Rules if he increases the price of a pair of dhotis roughly by 10 per cent. over the price ruling on September 1, 1939.

Cr. Ref. made by the Sessions Judge of Darbhanga in his letter No. 188 Cr., dated January 20/24, 1940.

Mr. C. P. Sinha, In favour of the Reference.

The Government Pleader, Against the Reference.

Judgment.—This is a reference under s. 438 of the Criminal P. O., by the Sessions Judge of Darbhanga. The facts were as follows:—On September 24, 1939, the accused sold for Rs. 2-6 a pair of dhotis similar to a pair which they had sold on September 5, for Re. 1-13-6. The Police submitted a Namokamal charge-sheet alleging the commission of an offence under rr. 34 (h)/38 of the Indian Ordinance Act of 1939. The accused persons were sent in custody to the Sub-Divisional Magistrate who remanded them to *hajat* until September 27, 1939. The learned Sessions Judge recommends the setting aside of this order taking cognizance of the offence on the ground that no offence has been made out by the facts alleged. The sections referred to in the charge-sheet are presumably rules embodied in the Defence of India Rules framed by the Central Govt. under s. 2 of the Defence of India Ordinance, 1939. There is no r. 34 (h) but there is a r. 34 (6) which defines what is meant by "a prejudicial act" and sub-r. (h) includes within the definition of

"prejudicial act" any act which is intended or is likely to impede, delay or restrict the distribution of any essential commodity. Essential commodity is defined in r. 34 (3) as food, water, fuel, light, power, or any other thing essential for the existence of the community which is notified in this behalf by Govt. There is no evidence before me that the Govt. has notified clothing to be an essential commodity within the meaning of this rule. Under sub-r. (g) of r. 34 (6) it is also a prejudicial act to cause fear or alarm to the public or to any section of the public. An increase of roughly 10 per cent. in the price of a pair of *dhotis* can hardly be said to be an act likely to cause fear or alarm to the public or to any section of it, whatever other consequences it may have on the public mind. It has also been suggested that the act complained of falls within sub-r. (p) of r. 34 (6). This sub-rule refers to acts intended or likely to prejudice the efficient prosecution of the war and the defence of British India or the public safety or interest. The increase in the price of this pair of *dhotis* is not likely to have any bearing on the efficient prosecution of the war and the defence of India or the public safety; nor, in my opinion, can it be said to prejudice the public interest that a shoopkeeper increased the price of a pair of *dhotis* by 10 per cent. I am confirmed in my view that this rule is not aimed at profiteering by a comparison of rr. 38 (5) and 81 (4). Rule 38 (1) (a) prohibits the doing of any "prejudicial act" as defined in r. 34 (6), and r. 38 (5) provides that any person who contravenes the provisions of r. 38 shall be punishable with imprisonment for a term which may extend to five years and shall also be liable to fine. It is apparently sought to punish the accused under s. 38 (5) and if that sub-rule applies the accused is liable to imprisonment for five years for what is popularly known as profiteering.

Now, r. 81 (2) authorises the Central Govt. for the purpose, *inter alia*, of maintaining supplies and services essential to the life of the community, to provide for the control of prices at which articles or things of any description whatsoever may be sold, and sub-rule (4) provides that any person who contravenes the provisions of this rule shall be punishable with imprisonment for a term that may extend to three years and shall also be liable to fine. It will be observed, therefore that in the rule which specifically refers to the

control of prices the punishment is limited to three years whereas the punishment for doing a "prejudicial act" may extend to five years. This distinction, I think, supports the view that profiteering was not intended to be included in the definition of "prejudicial act" in s. 34 (6).

The next question to be considered is whether the accused is liable by reason of r. 81 (4). For this purpose it is necessary to enquire whether in fact there has been any order controlling the price of cloth. Section 2 (4) (b) of the Defence of India Ordinance, 1939, empowers a Local Govt. to direct that any of the powers conferred upon it by sub-r. (1) shall be exercised by any Provincial Govt. or by any officer or authority subordinate to such Govt. Rule 2 (1) authorises the Central Govt. to make rules for maintaining supplies and services essential to the life of the community. In exercise of the powers conferred by sub-r. (4) of r. 2 the Central Govt. has directed that the powers conferred on it by sub-r. (2) of r. 81 of the Defence of India Rules to provide for controlling prices shall also be exercisable by any Provincial Govt. (see Notification of the Department of Commerce No. 20 dated September 8, 1939). The notification provides that the powers thus conferred on the Provincial Govt. shall only be exercised, *inter alia*, in respect of the cheaper qualities of cotton cloth and that the orders issued by the Local Govt. shall not subject the prices to a minimum lower than 10 per cent. above the ruling price on September 1, 1939.

Now, in the first place, the learned Subordinate Judge pointed out that no scale of prices for cloth in the Darbhanga district had been promulgated before September 21, 1939; nor has any order fixing the price of cloth in that district been brought to my notice. Furthermore, even if the Local Govt. has fixed or does fix the price of cloth it is bound to allow 10 per cent. above the price ruling on September 1, last. Assuming that the price of the *dhotis* with which I am concerned was Rs. 1-13-6 on September 1, 1939, the Local Govt. was bound by any order which it issued to permit the dealer to charge up to Rs. 2 and some odd pies. In the present instance it has exceeded that price by less than six pies; but it has not been shown that the Local Govt. or the Central Govt. has in fact fixed the price of cloth in exercise of

the powers conferred on them. In the absence of any order fixing the price of cloth in the Darbhanga district it cannot be held that the accused has committed any offence under the Defence of India Rules.

The reference is, therefore, accepted and the order of the Sub-Divisional Magistrate taking cognizance of the case is set aside.

It may be observed that the Defence of India Ordinance, 1939, has been repealed and replaced by the Defence of India Act, 1939, which received the assent of the Governor-General on September 29, 1939. Rule 21 of the Act provides that rules made under the Ordinance shall be deemed to have been made in exercise of powers conferred by or under the Act as if the Act has come into operation on September 3, 1939. It has not been shown that any fresh rules have been issued under this Act relevant to the present question.

D.

Order accordingly.

CALCUTTA HIGH COURT.

Appeal No. 655 of 1937

May 19, 1939

EDGLEY, J.

Smt. ASHAMAYI BASU, w/o
CHARU CHANDRA BASU

—PLAINTIFF—APPELLANT
versus

BARANAGORE JUTE FACTORY
Co., LTD.—DEPENDANTS AND OTHERS—
RESPONDENTS

*Bengal Revenue Sales Act (XI of 1859), s. 37—
Suit to annul tenure—Defendant pleading niskar
grant made prior to Permanent Settlement—Proof of
long possession without payment of rent, nature of—
Auction-purchaser, if can eject under-tenant holding
under-tenure partly within his estate—Revenue sale
—Suit to recover possession on basis of such sale—
Onus lies on plaintiff to prove that land lies within
his regularly assessed estate.*

It is true that in a case for the assessment of rent evidence of long possession without payment of rent might in certain circumstances lead to an inference that a former proprietor of the estate had created a rent free title in respect of the land in suit. But even in such a case it would be essential that such evidence should be of a definite character and cover a sufficiently long period to allow such an inference to be drawn. In a case in which it is sought to annul a tenure under s. 37 of the revenue sale law *a fortiori* the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *niskar* grant in respect of the tenure had been made prior to the Permanent Settlement. 99 Ind. Cas. 189 (5), relied on. [p. 537, cols. 1 & 2.]

The auction-purchaser is entitled to eject all under-tenants who hold their land entirely within

his estate but he is not entitled by this section to eject an under-tenant who holds an under-tenure partly within his estate and partly within other estates. Where, therefore, the tenures are held by the defendants not only under the *touzi* purchased at a revenue sale by the predecessor-in-interest of the plaintiff but also under other *touzies*, these tenures cannot be annulled in part and, therefore, the plaintiff is not entitled to any relief by any way of ejectment. *Ashamoyee Basu v. Baranagore Jute Factory*, S. A. No. 797 of 1936, *Sooharam Barma v. Doorga Charan Das* (6), 55 Ind. Cas. 645 (7) and 135 Ind. Cas. 765 (10), relied on, *Kamal Kumari v. Kiran Chandra Roy* (8) and *Preonash Mitter v. Kiran Chandra Roy* (9), distinguished. [p. 538, col. 2.]

In a case in which the plaintiff is seeking to recover possession of property on the basis of a revenue sale the initial onus must lie on the plaintiff to show that the land lies within his regularly assessed estate or *mahal* and not merely that it lies within the ambit of his *zemindari*. Even if he has succeeded in discharging this onus the entry in the Record of Rights in favour of the defendants has the effect of throwing the onus back on the plaintiff in order to prove that the land did not appertain to a *niskar* tenure. Once the plaintiff has discharged the initial onus which lies upon him in a matter of this sort it would be for the defendant to prove that his case would fall within one of the exceptions to s. 37 of Ben. Revenue Sales Act. 71 Ind. Cas. 984 (1), *Sashi Bhushan v. Abdulla* (2) and 126 Ind. Cas. 128 (3), relied on. [p. 536, col. 2.]

A. from the appellate decree of District Judge, 24 Parganas, dated October 13, 1936

Messrs. Hiralal Chakravarty and Surendranath Basu (Sr.), for the Appellant.

Dr. Basak and Mr. Pannalal Chatterjee for the Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiff, Smt. Ashamoyee Basu, sued the defendants for the establishment of her title on recovery of possession of a certain property which had been purchased by her predecessor-in-interest at a revenue sale which was held on January 13, 1922. The plaintiff's case was to the effect that Kazi Rasid Jaman purchased *Touzi* No. 166 of the 24 Parganas Collectorate on January 13, 1922 and his heirs had conveyed this estate to her on January 26, 1929. Thereafter she issued a notice annulling the various tenures under *Touzi* No. 166 including two tenures which are recorded in *Khatians* Nos. 426 and 322 of the settlement records and comprise certain lands mentioned in Schs. Ka, and Kha attached to the plaint. From the terms of the plaint, it appears to have been admitted by the plaintiff that these particular tenures which were the subject-matter of the suit were held by the defendants not only under *Touzi* N. 166 but also under several other *touzies*, namely

Touzies Nos. 63, 163, 168 and 222 of the 24 Parganas Collectorate. In the Record of Rights, the land included in Sch. Ka had been recorded as *niskar* by reason of possession and as regards the land in Sch. Kha the entry in the Record of Rights was to the effect that it was liable to assessment of rent. The plaintiff claimed that by reason of the annulment of these tenures she was entitled to eject the defendants from the land appertaining thereto.

The main case for the defendants in respect of these two tenures was to the effect that the plaintiff, as the successor-in-interest of the auction-purchaser, was not entitled to possession as the land in suit appertained to certain *niskar* tenures which had been created before the time of the Permanent Settlement. In paras. 8 and 9 of their written statement a further point was taken by the defendants to the effect that the two tenures mentioned in the plaint could not be legally annulled and that the plaintiff was also not entitled to the relief claimed by her in view of the fact that she had obtained only an undivided fractional interest in the land in suit and was in the position of a co-sharer landlord in respect of this land. Admittedly, the case proceeded to trial on the question as to whether or not the defendants were entitled to protection having regard to the existence of their alleged *niskar* right in the tenures which were the subject-matter of the suit and in the trial Court no further question seems to have been raised as to the right of the plaintiff to annul the tenures either by reason of her fractional interest in the *touzies* under which the tenures were held or on account of the fact that these tenures were held not only under *Touzi* No. 166 but also under several other *touzies*.

The first Court decided that, as regards the land included in Sch. Ka, the defendants had established their case. As regards the Kha Schedule land the plaintiff's suit was decreed and she was allowed possession in the terms of the relief sought by her in the plaint. The plaintiff then appealed with reference to the Ka Schedule land and the defendants at the same time preferred a cross-objection with regard to the decision against them with reference to the Kha Schedule land. The lower Appellate Court dismissed the plaintiff's appeal but allowed the cross-objection which had been filed by the defendants. As a result therefore of the decision of the lower Appellate Court the plaintiff's suit was dismissed in its entirety.

The plaintiff has therefore preferred this second appeal to this Court.

The first point urged by the learned Advocate for the appellant in this case is that the decision of the lower Appellate Court with regard to the Ka Schedule land cannot be supported. As already pointed out, the entry in the Record of Rights with regard to this property is in favour of the contention which has been raised by the defendants. In a case of this sort in which the plaintiff is seeking to recover possession of property on the basis of a revenue sale the initial onus must lie on the plaintiff to show that the land lies within his regularly assessed estate or *mahal* and not merely that it lies within the ambit of his *zamin-pari*, *Jagdeo Narain Singh v. Baldeo Singh* (1), *Sashi Bhusan v. Abdulla* (2), *Mokhan Lal v. Rup Chand* (3). Having regard to the fact that the Ka Schedule land is recorded as being *niskar* in the Record of Rights and in view of the presumptive correctness of this entry it cannot, in my opinion, be said that the plaintiff has discharged the initial onus which lies upon her in this matter. Even if it be assumed however that she has succeeded in discharging this onus the position is that the entry in the Record of Rights is in favour of the defendants. This fact would, in my opinion, have the effect of throwing the onus back on the plaintiff in order to prove that the Ka Schedule land did not appertain to a *niskar* tenure. This onus the plaintiff has failed to discharge. In this view of the case I am of opinion, that the decision of the lower Appellate Court with regard to the Ka Schedule land is correct.

As regards the land described in Sch. Kha the entry in the Record of Rights is to the effect that this land is liable to assessment of rent. The first Court gave the plaintiff a decree with regard to the land of this schedule and pointed out that the defendants had adduced no evidence to discharge the onus which lay on them by reason of the entry in the Record of Rights beyond adducing certain evidence to the effect that they had not paid rent for a certain number of years. When the plaintiff appealed with regard to the dismissal of her suit in respect of the Ka Schedule land, as already pointed out, the defendants

(1) 49 I A 399; 71 Ind. Cas. 984; A I R 1922 P O 272; 2 Pat. 38; 3 P L T 605; 36 O L J 499; 32 M L T 1; (1923) M W N 361; 27 O W N 925; 45 M L J 460 (P O).

(2) 28 O W N 143; A I R 1924 Cal. 328.

(3) 33 O W N 1168; 126 Ind. Cas. 128; A I R 1930 Cal. 164; 51 O L J 41; Ind. Rul. (1930) Cal. 672.

preferred a cross-objection with regard to the land covered by Sch. Kha. This cross-objection was allowed by the lower Appellate Court on the ground that the land in question had been in the possession of the defendants for a long time without payment of rent. It may however be mentioned that para. 7 of the grounds attached to the memorandum of cross-objection was to the effect that the learned Munsif was wrong in holding that the defendants' tenure could be annulled and that he should have held that the tenure was not liable to be annulled under the law and was not and could not, in fact, be annulled by the plaintiff as regards the land comprised in Sch. Kha. In view of the line of reasoning adopted by the learned Additional District Judge no occasion arose in the lower Appellate Court to consider the defendant's case in the light of the contention raised in para. 7 of the memorandum of cross-objection.

As already pointed out, the initial onus must lie upon the plaintiff to show that the land in suit lies within her regularly assessed estate or *mahal*. Having regard to the entry contained in the Record of Rights this initial onus appears to have been discharged. The question then arises as to whether or not it can be said that the defendants have succeeded in discharging the onus which lies on them to prove that the Kha Schedule land appertains to a *niskar* tenure. In holding that the defendants have succeeded in discharging this onus the learned Additional District Judge adverts to the fact that the defendants had been in long possession of this land without payment of rent and he holds that this is a circumstance which should be taken into consideration as evidence in support of the defendants' contention. The lower Appellate Court places considerable reliance upon the decision of R. O. Mitter, J., in *Kanta Mohan Mallik v. Makhan Santra* (4). In that case the learned Judge was dealing with an appeal which arose with reference to a suit brought by the plaintiffs for the assessment of rent and he pointed out that long possession without any demand or payment of rent would be evidence of a grant of a rent-free title. It is true that in a case for the assessment of rent evidence of long possession without payment of rent might in certain circumstances lead to an inference that a former proprietor of the estate had created a rent free title in respect of the land in suit. But even in

(4) 39 O W N 277.

such a case it would be essential that such evidence should be of a definite character and cover a sufficiently long period to allow such an inference to be drawn. In this connexion it was pointed out by Sir Lancelot Sanderson, C. J., in *Brojendra Kishore v. Mohim Chandra* (5) that:

"The time during which the defendants have been in possession, in my judgment, has been left indefinite and I am not prepared to hold that when the period during which the defendants have been in possession is left in an indefinite and nebulous state that is sufficient even when taken with the fact that no rent has been paid to show that the entry in the Record of Rights is incorrect."

If such is the law with regard to a suit for the assessment of rent, in my opinion, in a case in which it is sought to annul a tenure under s. 37 of the Revenue Sale Law *a fortiori* the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *niskar* grant in respect of the tenure had been made prior to the Permanent Settlement. It certainly cannot be said that any such definite proof has been given on behalf of the defendants in the suit out of which this appeal arises. On the other hand the entry in the Record of Rights clearly indicates that no such *niskar* grant could ever have been made and in my opinion, this entry stands un rebutted.

With regard to this point it was argued by the learned Advocate for the respondents that in a case in which the plaintiff is seeking to annul an under tenure, the onus would lie upon him to prove that the tenure in question had been created after the Permanent Settlement and could therefore be annulled. This proposition, in my opinion, it is not one which can be reconciled with the principles which have been laid down in *Jagdeo Narain Singh v. Baldeo Singh* (1), and the other two cases cited above in which that decision has been explained. I consider that there can be no doubt that in a case in which the plaintiff has discharged the initial onus which lies upon him in a matter of this sort it would be for the defendant to prove that his case would fall within one of the exceptions to s. 37 of Act II of 1857. This onus the defendants have not been able to discharge. It would therefore follow that, in my opinion, the decision of the lower Appellate Court with regard to Kha Schedule land is wrong and had the matter rested there, it would have been

(5) 31 O W N 32; 99 Ind. Cas. 183; A I R 1927 Cal. 1.

necessary for me to reverse the decision of the lower Appellate Court on this point.

In this connection it is urged by the learned Advocate for the respondents that in any event the plaintiff cannot be entitled to a decree having regard to the fact that admittedly the tenures which she is seeking to annul are held by the defendants not only under *Touzi* No. 166 but also under other *touzis* of the 24 Parganas Collectorate. It is argued on behalf of the appellant that the respondents should not be allowed to raise this point at this stage in view of the fact that no argument was raised on this contention at any stage of the case in the Courts below. Having regard to the position taken by the defendants in paras. 8 and 9 of their written statement it is perhaps surprising that they did not forcibly urge in the trial Court that their tenures could not be partially annulled. As already pointed out, their case in the first Court was merely to the effect that they were protected by reason of their *niskar* title. It would appear to be probable however that the defendants did not raise this particular point in the first Court in view of the fact that the same learned Munsif had decided a similar point against them in a connected case, namely Title Suit No. 14 of 1931 which was decided in the Court of Babu Sailendranath Chatterjee on January 23, 1935. In that particular suit the main contention of the defendants was to the effect that the plaintiff could not legally annul the tenures which were the subject-matter of that suit inasmuch as these tenures were held by the defendants under the five *touzis* of the 24 Parganas Collectorate to which reference has already been made. When this point was decided against them in the first Court they took the matter on appeal to the Court of the Subordinate Judge and thence to the High Court where they obtained a decision in their favour in Second Appeal No. 797 of 1936 *Ashamoyee Basu v. Baranagore Jute Factory* which was decided by M. O. Ghose and Bartley, JJ., on March 31, 1938. The decision in that case is based on two previous decisions of this Court in *Soocharam Barma v. Doorga Charan Das* (6), and in *Mahamed Ghuran v. Basarat Ali*, 55 Ind. Cas. 645 (7). Reference was made in the judgment to two other decisions of this Court in *Kamal Kumari v. Kiran Chandra Roy* (8), and that in *Preonath*

Mitter v. Kiran Chandra Roy (9). As regards the two latter cases I agree with Ghose and Bartley, JJ., in thinking that they have no application in connection with this particular matter as the points decided in those cases did not relate to any question in which it was sought to annul any part of a tenure held by the tenure-holders under several different *touzis*. I entirely agree with the view which has been taken by M. O. Ghose and Bartley, JJ., to the effect that, if the words of s. 37 of the Revenue Sale Law be given

"their natural meaning it is clear that the auction-purchaser is entitled to eject all under-tenants who hold their land entirely within his estate but he is not entitled by this section to eject an under-tenant who holds an under-tenure partly within his estate and partly within other estates."

Although the defendants did not rely on this point in the first Court, the circumstances in which they failed to do so were certainly peculiar. They did however recite the point indirectly (Ground No. 7 of their memorandum of cross-objections) although no occasion arose for the learned Additional District Judge to consider this ground. In the circumstances of the case I think that for the ends of justice the defendants should be allowed to take this ground at this stage. It follows therefore that although the plaintiff has, in my opinion, succeeded in discharging the onus which lies on her with reference to the Kba Schedule land, she nevertheless cannot succeed in obtaining the relief which she seeks as she cannot obtain possession of any portion of the land in suit without annulling the tenure to which that land appertains: *Turner Morrison & Co., Ltd. v. Monmohan Chowdhary* (10). As the two tenures with which we are concerned are held by the defendants not only under the *touzi* purchased at a revenue sale by the predecessor-in-interest of the plaintiff but also under other *touzis*, these tenures cannot be annulled in part and, therefore the plaintiff is not entitled to any relief by any way of ejectment. The appeal must therefore be dismissed. The parties will bear their own costs. Leave to appeal under s. 15 of the Letters Patent is refused.

s.

Appeal dismissed.

(9) 27 O 290.

(10) 36 O W N 29; 135 Ind. Cas. 765; A I R 1931 P O 314; 59 O 728; 58 I A 440; 54 O L J 462; 62 M L J 86; Ind. Rul. (1932) P O 45 (P O).

(6) 5 O L J 264.

(7) 55 Ind. Cas. 645; A I R 1920 Cal. 920.

(8) 2 O W N 229.

PATNA HIGH COURT

Appeal from Appellate Decree No. 217
of 1939

February 28, 1940

FAZL ALI AND MEREDITH, JJ.

Mst. DEORATI KUER—APPELLANT

versus

DASARATH DUBEY AND ANOTHER—

RESPONDENTS

Bihar Tenancy Act (VIII of 1934), Sch. III, Art. 3—Applicability—Simple money decree against original tenant—Landlord getting dakhil dehani—Suit by transferee for possession—Limitation applicable—Landlord, if should take possession as landlord as such.

Where the decree obtained is only a money decree and in execution of the decree against the original tenant the landlord obtains *dakhil dehani* from the Court, the landlord, is auction-purchaser only of the right, title and interest of the original tenant whatever that might be and not of the holding or of the tenancy right of the transferee from the original tenant. Therefore, in dispossessing the transferee the dispossession is not really in the capacity of auction-purchaser of his interest, but merely upon the excuse of being an auction-purchaser. This is clearly a case where the special limitation under Art. 3, Sch. III, Bihar Ten. Act is applicable to a suit by the transferee for possession.

Obiter.—The special two years' limitation as provided by Art. 3, Sch. III, Bihar Tenancy Act, applies even where the landlord takes possession as auction-purchaser. That Article does not provide, even by implication, that dispossession must be by the landlord.

[Case-law referred to.]

A. from a decision of the Subordinate Judge of Arrah, dated December 2, 1938.

Messrs. *Hareeshwar Prasad Sinha* and *Rajeswari Prasad*, for the Appellant.

Mr. *Rai Indra Behari Saran*, for the Respondents.

Meredith, J.—This case has been referred to a Division Bench by a learned Judge sitting singly. The appeal is by the landlord, defendant No. 1 in the suit, and the only point that arises is one of limitation, namely, whether the suit is governed by the special rule of limitation under Art. 3, Sch. III of the Bihar Ten. Act, which provides two years' limitation from the date of dispossession in the case of a suit to recover possession of land claimed by the plaintiff as a *raiyyat* or an under-*raiyyat*, or governed by the general rule of limitation whereby 12 years is provided under Art. 142 of the Lim. Act.

The respondent brought a suit for recovery of possession of a *sarahmoayan* holding bearing *Khata* No. 311 in village Chorain in the Shahabad District. This holding originally belonged to defendant No. 3 and the plaintiff purchased it on

June 9, 1923. Later on the landlord (defendant No. 1) brought a rent suit against defendant No. 3 (the original tenant) obtained a decree, and in execution of that decree obtained *dakhil dehani* from the Court on September 12, 1929. The plaintiff sued on the allegations that he was not a party in that suit, knew nothing about it and was not dispossessed by the *dakhil dehani*. In 1933 however, a criminal case was brought against the plaintiff by defendant No. 2, a servant of defendant No. 1, in which the plaintiff was convicted and his conviction was maintained by the High Court in revision on December 18, 1933. Taking advantage of this decision the landlord dispossessed him on December 30, 1933.

The present suit was brought on December 18, 1936. If two years' limitation applies, it would be barred by limitation. If twelve years, it would not.

The Courts below came to concurrent findings that the decree obtained by the appellant against defendant No. 3 was only a money decree that the plaintiff remained in possession after the delivery of possession by the Court and that he was only dispossessed, as alleged by him, after his conviction in the criminal case. The learned Munsif held that the case was governed by two years' limitation under Art. 3, Sch. III and so the claim was barred by limitation. The learned Subordinate Judge was of opinion, however, that the case was governed by Art. 142 and twelve years' limitation and so he decreed the suit.

The basis for the decision of the learned Subordinate Judge was the Full Bench ruling of this Court in *Gajadhar Rai v. Ram Charan Gope* (1) where it was laid down that where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession through Court, such dispossession of the tenant is not a dispossession within the meaning of Art. 3, Sch. III of the Ben. Ten. Act, 1885. The learned Subordinate Judge in holding that this decision was applicable to the case seems to have forgotten his own finding that the ouster was not under the decree but took place forcibly years later as a result of the plaintiff's conviction in the criminal case. It is quite obvious that in the present case the dispossession was not through Court at all

(1) 9 Pat. 788; 125 Ind. Cas. 565; 11 P. L. T. 197; A. I. R. 1930 Pat. 256; Ind. Rul. (1930) Pat. 533 (F. B.).

and the Full Bench ruling has no application.

It is argued for the respondent that though dispossession may not have been through Court, still it was by the landlord, not as such, but as auction-purchaser, and, that where the dispossession is by the landlord, *qua* not landlord, but as auction-purchaser, the special two years' limitation does not apply. It is sought to make the *Gajadhar Rai v. Ram Charan Gope* (1). Full Bench case authority for this proposition, but it is not such authority. It merely laid down that the special limitation did not apply where both features were present, namely, dispossession through Court, and as auction-purchaser. The judgment in this Full Bench case was delivered by Kulwant Sahay, J., and what Kulwant Sahay, J.'s opinion on the point in question really was is to be found clearly expressed in *Mahadeo Rai v. Pargash Rai* (2) in which case this learned Judge observed, no doubt by way of *obiter*.

"If in execution of the decree, only the right, title and interest of the judgment-debtor was sought to be delivered to the purchaser and after taking possession of the holding which represented the right, title and interest of the judgment-debtor, the purchaser subsequently dispossessed the plaintiff, then in that case Art. 3 of Sch. III to the Ben. Ten. Act would have applied."

The point which has been raised was considered at length by the Calcutta High Court in a Letters Patent Appeal *Satish Chandra Banerji v. Hasemali Kazi* (3) where it was held that the special two years' limitation applied even where the landlord took possession as auction-purchaser, and it was pointed out that Art. 3, Sch. III does not provide, even by implication, that dispossession must be by the landlord as such. The same view was taken by the Calcutta High Court in *Amir-ud-Din Sircar v. Nasaruddin Sarkar*, 175 Ind. Cas. 697 (4) where the Court held that dispossession by the landlord as auction-purchaser comes under the provisions of the special law of limitation under Art. 3, Sch. III, Ben. Ten. Act.

If I may say so, these decisions appear to me to express the correct view. In any case, however, I think that the point does not really arise in the present case, since the finding is that the decree obtained against the original tenant was only a

(2) 8 P L T 243; 97 Ind. Cas. 629; A I R 1927 Pat. 43.

(3) 54 C 450; 103 Ind. Cas. 124; 31 O W N 634; A I R 1927 Cal. 488.

(4) 175 Ind. Cas. 697; A I R 1938 Cal. 276; 10 R O 815.

money decree and the tenancy continued. The landlord, therefore, was auction-purchaser only of the right, title and interest of the original tenant (defendant No. 3), whatever that might have been, and not of the holding or of the tenancy right of the plaintiff. Therefore in dispossessing the plaintiff, the dispossession was not really in the capacity of auction-purchaser of his interest, but merely upon the excuse of being an auction-purchaser, just as it was upon the excuse of having got the decision of a Criminal Court in the landlords' favour.

In my opinion, this is clearly a case where the special limitation under Art. 3, Sch. III, Bihar Ten. Act is applicable. I would, therefore, allow the appeal and dismiss the suit with costs throughout.

Fazl Ali, J.—I agree.

D. Appeal allowed.

LAHORE HIGH COURT

Second Appeal No. 567 of 1939

November 11, 1939

BRIDE, J.

Malik NARAIN DAS—PLAINTIFF
—APPELLANT

versus

DISTRICT BOARD, JHANG—

DEFENDANT—RESPONDENT

Master and servant—Illegal removal from service of servant of District Board—Jurisdiction of Civil Court to entertain suit for damages.

The position of an employee in the service of a local authority like the District Board is the same as that of a Govt. servant in this respect and the tenure of his service is 'at the pleasure' of that authority. Therefore, Civil Court has no jurisdiction to entertain a suit for damages on the ground of illegal removal of a servant from service by a District Board. 166 Ind. Cas. 516 (6), relied on; 175 Ind. Cas. 875 (7) and 148 Ind. Cas. 637 (9), distinguished.

S. A. from a decree of the District Judge, Jhang at Sargodha, dated January 30, 1939.

Mr. J. N. Aggarwal, for the Appellant.

Messrs. Barkat Ali and Mahmud Ahmad Janjua, for the Respondent.

Judgment.—Plaintiff Narain Das, who was an accountant in the service of the District Board, Jhang, sued in this case for recovery of Rs. 2,000 as damages on the ground that he had been removed from service by the District Board wantonly, illegally, and without any justification. The suit was resisted by the District Board inter

alia on the plea that Civil Courts had no jurisdiction to entertain such a suit. The Courts below, however, passed a decree for Rs. 472-4-0 in favour of the plaintiff relying chiefly on a Division Bench ruling of this Court reported in *Girdhari Lal v. Secretary of State* (1). That ruling follows *inter alia* *Satish Chandra v. Secretary of State* (2) and *Bimalacharan v. Trustees for the Indian Museum* (3) and *J. R. Baroni v. Secretary of State* (4); in preference to *R. T. Rangachari v. Secretary of State* (5). These rulings were, however, recently considered by their Lordships of the Privy Council in *R. Venkata Rao v. Secretary of State* (6), and the view taken by the Madras High Court in *R. T. Rangachari v. Secretary of State* (5), was approved. In the circumstances, the present case must be decided in the light of the principles laid down by their Lordships in *R. Venkata Rao v. Secretary of State* (6). The facts of that case were similar to those of the present case except that the plaintiff in that case was a Govt. servant while the plaintiff in the present case is an employee of a District Board. It seems, however, well-established that the position of an employee in the service of a local authority like the District Board is the same as that of a Govt. servant in this respect and the tenure of his service is 'at the pleasure' of that authority: *vide* Aiyangar's Law of Municipal Corporations in British India, p. 124, and the rulings referred to therein. This view is accepted even in *Prabhu Lal Upadhyaya v. District Board, Agra* (7), on which the learned Counsel for the plaintiff relied. The only other point of distinction to which the learned Counsel for the plaintiff has invited my attention is that in the present case the conditions of service of the plaintiff were governed by rules framed by the Local Govt. under the Punjab District Boards Act. In the case before their

(1) A I R 1937 Lah. 226; 159 Ind. Cas. 1107; 39 P L R 514; 8 R L 473.

(2) 54 O 44; 101 Ind. Cas. 581; A I R 1927 Cal. 311.

(3) 57 O 231; 125 Ind. Cas. 647; A I R 1930 Cal. 404; Ind. Rul. (1930) Cal. 567.

(4) 8 R 215; 120 Ind. Cas. 695; A I R 1929 Rang. 207; Ind. Rul. (1930) Rang. 55.

(5) 57 M 857; 154 Ind. Cas. 884; A I R 1934 Mad. 516; 67 M L J 123; 40 L W 146; 7 R M 535.

(6) I L R (1937) Mad. 532; 166 Ind. Cas. 516; 1937 O L R 49; 1937 A L R 91; 1937 O W N 116; 9 R P O 146; 3 B R 241; A I R 1937 P O 31; (1937) M W N 103; 18 P L T 132; 45 L W 146; (1937) A L J 213; 41 O W N 554; 64 I A 55; (1937) I M L J 529; 39 Bom. L R 699 (P O).

(7) I L R (1938) All. 252; 175 Ind. Cas. 875; A I R 1938 All. 276; 1938 A L J 351; 1938 A L R 505; 11 R A 3.

Lordships of the Privy Council, the conditions of service were governed by classification rules framed under the Govt. of India Act. But I am unable to see that this would make any material difference. Section 96-B, Govt. of India Act of 1919, which was considered by their Lordships of the Privy Council in *R. Venkata Rao v. Secretary of State* (6), laid down that the tenure of a civil servant will be at the pleasure of the Crown but subject to the provisions of the Govt. of India Act and the rules thereunder.

Although the rules were framed under the Act their Lordships held that the terms of the section only amounted to a 'solemn assurance' that the service, though at the pleasure of the Crown, will not be subject to capricious or arbitrary action, and will be regulated by rule, and did not import any special kind of employment with an added contractual term that the rules must be observed. In the present instance, s. 27, District Boards Act, which relates to employment of officers and servants does not say that the servants of the District Board will hold their offices at the pleasure of the local authority but that is the usual condition of the tenure of service of a local authority as pointed out above. Unlike s. 6-B, Govt. of India Act, 1919, s. 27, Punjab District Boards Act, does not even say that the tenure of service will be subject to the rules framed under the District Boards Act. Section 55 of that Act s. 55 of that Act, empowers the Local Govt. to frame rules as regards the employment, payment, suspension and removal of officers and servants employed under s. 27 and the plaintiff's contention in the present case was that these rules had not been complied with. I am unable to see how the position of the plaintiff in this case can be said to be in any way better than that of the plaintiff in the case before their Lordships of the Privy Council in *R. Venkata Rao v. Secretary of State* (6).

The learned Counsel for the plaintiff referred to *Prabhu Lal Upadhyaya v. District Board, Agra* (7), but the facts of that case are distinguishable inasmuch as it was found in that case that the statutory provisions of s. 71, United Provinces District Boards Act, had not been complied with. The case thus came within the exceptional class of cases to which the rule laid down in *Gould v. Stuart* (8), applies accor-

(8) (1896) A C 575; 65 L J P O 82; 75 L T 110.

ding to the view taken by their Lordships of the Privy Council in *R. Venkata Rao v. Secretary of State* (6). In *Gould v. Stuart* (8), the conditions of service were enacted in the body of the New South Wales Civil Service Act. It was therefore held that these were inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. *Clifford B. Reilly v. Emperor* (9), on which the learned Counsel for the plaintiff relied was also a case of a different type and was decided on its special facts. I must, therefore, hold that the present case is governed by the rule laid down by their Lordships of the Privy Council in *R. Venkata Rao v. Secretary of State* (6), and that a Civil Court has no jurisdiction to entertain the suit.

I accordingly dismiss the appeal of the plaintiff and accepting the appeal of the defendant District Board dismiss the plaintiff's suit. In view of all the circumstances I leave the parties to bear their costs throughout.

B.

Appeal dismissed.

(9) A I R 1934 P O 60; 148 Ind. Cas. 637; 39 L.W. 287; 6 R P O 129; (1934) A L J 255; 66 M L J 639 (P O).

CALCUTTA HIGH COURT

Suit No. 2025 of 1936

August 22, 1938

PANCRIDGE, J.

THIN YEN—PLAINTIFF

versus

SECRETARY OF STATE AND ANOTHER—
DEFENDANTS

Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), s. 226 (1)—Confiscation of goods by Customs Authorities under s. 167 (36), Sea Customs Act (VIII of 1878)—Suit by owner for declaration that order was illegal—Jurisdiction of High Court to entertain it on original side—Sea Customs Act (VIII of 1878), ss. 182, 191—Decision of Chief Customs Authority modified by Governor-General in Council under s. 191—If can be questioned in Civil Court.

Where the goods of the plaintiff have been confiscated by the Customs Authorities under s. 167 (36), Sea Customs Act on the ground that the plaintiff removed them with the intention of defrauding the revenue, after they had been landed and before they had been passed through the Customs House, and the plaintiff brings a suit for a declaration that the order of confiscation was illegal with a prayer for return of the goods, or for a decree for their value, the Original Side of the High Court has no jurisdiction to entertain such a suit. The Court cannot examine the circumstances to see if the action of the Authorities was lawful, because, no irregularity of procedure and no error in the conclusions arrived at can per se exclude the application of the Govt. of India Act,

105 Ind. Cas. 576 (2) and 48 Ind. Cas. 790 (3), relied on. 172 Ind. Cas. 771 (5) and 137 Ind. Cas. 535 (6), explained.

It is a well-known principle that where a statute creates a duty or imposes a liability, and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, no remedy can be taken but the particular remedy prescribed by the statute. The Legislature intended that the sole remedy open to those who were aggrieved by a decision or order passed by an Officer of Customs under the Sea Customs Act, should be the appeal to the Chief Customs Authority provided by s. 188. The order passed by the Governor-General in Council under s. 191 of the Act can in no case, be questioned in the Civil Courts, except possibly orders which while purporting to be made under it are clearly outside it. An order by the Governor-General in Council enhancing penalty would possibly be such an order. Generally speaking, however, what the section contemplates are revisional orders of an executive character.

Messrs. P. B. Mukherjee and R. Guha, for the Plaintiff.

The Advocate-General and Mr. S. R. Das, for the Secretary of State.

Judgment.—This suit has been set down for the trial of the issue whether this Court has jurisdiction to entertain it. The following are the facts: In December 1934 two consignments of goods arrived in Calcutta by sea per s. s. *Hosang* for the plaintiff. A person named Achan was the plaintiff's authorized clearing agent. One consignment consisted of 66 packages, and I will call it the "A" consignment, the other consignment consisted of 35 packages and I will call it the "B" consignment. There was a bill of entry in respect of the "A" consignment which showed that the packages bore no marks; it also showed that there were no silk goods among the contents. On December 14, 1934 seven packages were seized by the Customs House Authorities of which one was subsequently released. As regards the remaining six the Customs House Authorities assert that they were seized in the public street outside the Customs House, whither the plaintiff's agent had caused them to be removed. The plaintiff's case is that they were still within the precincts of the Customs House, awaiting examination. When the packages were examined they were found to contain dutiable silk goods of considerable value. The packages were admittedly part of the "B" consignment, and the Customs House Authorities suggest that what the plaintiff's agent was doing was attempting to remove them without paying duty, under cover of the bill of entry relating to the "B" consignment, the contents of which were either not dutiable at all, or only dutiable to a trifling extent.

Subsequently the plaintiff received a notice to show cause why the goods in the packages which had been seized should not be confiscated and a penalty imposed on him under s. 167 (37) (c) and (38), Sea Customs Act, 1818. An enquiry followed, and on July 11, 1935 the second defendant in his capacity as Collector of Customs passed an order for confiscation of the goods under s. 167 (37) of the Act subject to a redemption penalty of Rs. 3,500, and imposed a penalty of Rs. 4,000 under s. 167 (38). Section 167 creates certain offences against the Act, and provides maximum punishments for committing them. Under item No. (37) (c) of the Schedule, if it be found, when any goods are entered at, or brought to be passed through, a Customs House, either for importation or exportation, that the contents of such packages have been misstated in regard to sort, quality, quantity, or value, such packages together with the whole of the goods contained therein shall be liable to confiscation. Under item No. 38, if when any goods are passed by tale or by package, any omission or misdescription thereof tending to injure the revenue be discovered, the person guilty of such omission or misdescription shall be liable to a penalty not exceeding ten times the amount of the duty which might have been lost. It is not disputed that the order was one which under s. 182 of the Act the Collector of Customs had power to make. That section is a part of Chap. XVII of the Act, which is headed "Procedure relating to offences, appeals etc." Section 188, which is part of the same Chapter, gives a right of appeal to the Chief Customs Authority to any person deeming himself aggrieved by any decision or order passed by an Officer of Customs under the Act. The plaintiff appealed under this section to the Central Board of Revenue, but on October 2, 1935 the Board dismissed the appeal.

With regard to these orders the plaintiff states that they were altogether void, invalid, illegal and inoperative, and not binding on him. No offence under s. 167 (37) or (38), Sea Customs Act, had been committed. Alternatively no offence under such sections or either of them had been committed by the plaintiff. Prior to the passing of the Collector's order the plaintiff had not been charged with any offence under either of such sections, nor had he been called upon to meet or answer any such charges. Further there was no, or

alternatively no proper, adjudication arrived at in manner provided by the Sea Customs Act; and the proceedings were not conducted in accordance with the principles of natural justice. Under s. 191 of the Act the Governor-General in Council may, on the application of any person aggrieved by any decision or order passed under the Act by an Officer of Customs or Chief Customs Authority, and from which no appeal lies, revise or modify such decision or order. The plaintiff petitioned the Governor-General in Council under this section, and on March 2, 1936 the Governor-General in Council modified the Collector's decision by setting aside the penalty, although he upheld the order for confiscation. The Governor-General's order stated that he was satisfied that the goods were removed from the Customs House with the intention of defrauding the revenue. He was of opinion however that the facts did not fall under item No. 37 or 38 of s. 167, and that the imposition of a penalty under Item No. 38 was therefore not justified. In upholding the order for confiscation he stated that it should have been passed under s. 167 (36), which provided that if after any goods have been landed, and before they have been passed through the Customs House, the owner removes them or attempts to remove them, with the intention of defrauding the revenue, such goods shall be liable to confiscation.

The plaintiff challenges the legality of this order, and he states that no offence under s. 167 (36) had been committed, that he had never been charged under s. 167 (36), nor had he been called upon to meet or answer any such charge. Further there was no, or alternatively no proper, adjudication arrived at in the manner provided by the Sea Customs Act, and the proceedings were contrary to the principles of natural justice. A declaration that the orders for confiscation were illegal is asked for, and there are also prayers for return of the goods, or for a decree for their value. The issues which I have now to try are raised by paras. 4 and 10 of the written statement of the Secretary of State:

"Paragraph 4.—The decision of the Chief Customs Authority as modified by the Governor-General in Council is final and binding upon the plaintiff and is not liable to be challenged or impugned by any suit or proceedings.

"Paragraph 10.—This Court has not and cannot exercise any original jurisdiction in respect of the subject-matter of the suit inasmuch as the same concerns the revenue or the collection thereof."

I will first deal with the issue raised by para. 10. The history of the law on this point begins with the practical difficulties occasioned by the fact that the Supreme Court claimed to exercise jurisdiction in respect of acts done by the servants of the East India Company in collecting the revenues of Bengal, to which the Company was entitled by virtue of the grant of the "Diwani." As its Preamble indicates 21 Geo. III Cap. 70 was passed by Parliament for the purpose of preventing the interference of the Supreme Court in revenue matters, s. 8 of that Statute provides that the Court shall not have or exercise any jurisdiction in any matter concerning the revenue, or concerning any act or acts ordered or done in the collection thereof, according to the usage and practice of the country, or the Regulations of the Governor-General-in-Council. Parliament has since seen fit to impose similar limitations upon the jurisdiction of the Original Side of the High Courts.

It is true that there was no such provision in the High Courts Act, 1861, 24 & 25 Vict. c. 104, nor in the Letters Patent issued under it. Indeed, it appears from para. 17 of the Secretary of State's despatch of May 14, 1862, that he considered that the restrictions on the jurisdiction of the Supreme Court enacted by 21 Geo. III, Cap. 70, did not apply to the High Courts established by Letters Patent under the Act of 1861. Moreover, in 1876 in *Collector of Sea Customs v. Chithambaram* (1) a majority of the Court held that a similar restriction contained in the Charter of 1800 establishing the Supreme Court of Madras did not operate to exclude suits against Revenue Officers for acts done *ultra vires*, from the jurisdiction of the Madras High Court. This question is, however, academic in view of s. 106 (2), Govt. of India Act, 1915, and s. 226 (1), Govt. of India Act, 1935. These sub-sections run as follows:

"106 (2). The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

226 (1). Until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It is admitted that for the purposes of the present case the sub-sections may be

(1) 1 M. 89 (F. B.).

regarded as identical. As the Advocate-General points out, there is direct authority on the matter in Madras: see *Govindarajulu Naidu v. Secretary of State* (2). In that case certain goods belonging to the plaintiff were seized by the Customs Authorities, and the Collector of Customs ordered confiscation and sale of the goods on the ground that they had been smuggled into British India and had not paid duty. After an unsuccessful appeal to the Governor in Council the plaintiff sued the Secretary of State on the ground that what was done amounted to a wrongful conversion of the goods. Though the orders complained of were not made under the Sea Customs Act the principles were the same as those applicable in the present case. Courts-Trotter, C. J., and Beasley, J., both held that s. 106 (2), Govt. of India Act, 1915, was a bar to the suit on the Original Side of the Madras High Court. Courts-Trotter C. J., said:

"Finally the point is taken on behalf of the Secretary of State that this is a matter affecting the revenue and that s. 106 (2), Govt. of India Act, covers the matter. On that subject, I have nothing to add to what I said in my own considered judgment which is reported in *Best and Co. Ltd. v. Collector of Madras* (3) where I had to consider all the decisions affecting this matter and came to the conclusion that, however antiquated the section is and however useless to present conditions, so long as it was allowed to stand in the statute book it must be given effect to and the effect is this, that in matters affecting the revenue the Original Side of this Court and that side alone is debarred from interfering in revenue matters. The section came to birth, nearly hundred years ago, when there was a conflict of jurisdiction between the Sudder Courts and the High Courts. That conflict has utterly vanished and there is no justification whatever for preserving this antiquated fossil on the statute book; but there it is, and so long as it is there we have to abide by it. I am quite clear that this is a matter affecting the collection of revenue though it be in the nature of a penalty and that therefore this Court had no jurisdiction to entertain the suit on that ground."

Beasley, J.'s view was as follows:

"It is contended by the defendant that this is a matter concerning the revenue or concerning an act done in the collection thereof and it is not out of place in this connection to mention what is done with goods seized and confiscated. They are sold and the proceeds go to the Customs. Part of the revenue of the country is derived from the Customs and the collection of the Customs is a collection of part of the revenue of the country and I am prepared to hold that the sale of seized and confiscated goods and the taking by the Customs Authorities of those proceeds is the collection of Customs and therefore of revenue. It is admitted by Mr. Narasimha Ayyar that penalties in the shape of double or treble imposed on smuggled goods would be revenue. Yet he contends that the

(2) 50 M 449; 105 Ind. Cas. 576; A I R 1927 Mad. 689; 53 M L J 355; 39 M L T 304; 26 L W 558.

(3) 35 M L J 23; 48 Ind. Cas. 790; A I R 1919 Mad. 715.

money derived from the sale of seized or confiscated goods is not. I cannot myself see any distinction whatever. I may conjecture that one of the objects of the sale is to recoup the customs for the unpaid duty which, had it been paid, would have been revenue. But there is another obvious reason for this penalty and it is this: persons who bring dutiable goods into the country are required to declare their possession of them and to pay the proper duty which is then collected from them and becomes part of the revenue of the country. That is clearly the collection of revenue. If, however, persons smuggle dutiable goods into the country they prevent the collection of the duties and so the revenue. The object of the seizure and confiscation is two-fold, to punish the offender and to deter others from preventing or hindering the collection of revenue; and it seems to me impossible to hold that the seizure and confiscation of smuggled goods is not an act ordered or done in the collection of revenue, as it is obviously designed to facilitate the collection of Customs and therefore the revenue.

The decision in *Aicock, Ashdown and Company, Ltd. v. Chief Revenue Authority of Bombay* (4), has in my opinion no application to this case. That case dealt with a mandamus to the Income-tax Officer to make an assessment and was a matter which was merely a preliminary towards the assessment of the assessee. The acts complained of in this case were not in any sense preliminary but in my view directly related to the collection of Custom. I may add that the question as to whether or not s. 106 (2), Govt. of India Act, does prohibit the exercise by this Court of its original jurisdiction in revenue matters has been decided by the learned Chief Justice in *Best & Co. Ltd. v. Collector of Madras* (3) and he there decided that the section was an express prohibition against the exercise of such powers. I need not say more than that I entirely agree with his judgment and with the reasons he gave therein."

Mr. Mukherjee, who has argued the plaintiff's case with great ability, has drawn my attention to two decisions of the Privy Council, *Ford Motor Co. of India Ltd. v. Secretary of State* (5) and *Vacuum Oil Co. v. Secretary of State* (6). Both suits were instituted on the Original Side of the High Court of Bombay, and in both of them the plaintiffs sued to recover duty said to be overpaid. In *Vacuum Oil Co. v. Secretary of State* (6) the trial Judge made a decree in the plaintiff's favour which was reversed on appeal. The Judicial Committee however set aside the decree of the Appellate Court dismissing the suit, and restored the decree passed by the trial Judge. In *Ford*

Motor Co. of India Ltd. v. Secretary of State (5) the Judicial Committee upheld the decree of the Appellate Court dismissing the plaintiff's suit. Both cases turned on the construction of s. 30, Sea Customs Act. Mr. Mukherjee argues very pertinently that it was never suggested that either suit was incompetent, and that from the fact that in one of them the decree obtained by the plaintiff was restored, it follows that the Judicial Committee must have considered that the Original Side of the Bombay High Court had jurisdiction to try it. The Advocate-General had not attempted to argue that these two suits were not "matters concerning the revenue," but he says that as the point was not raised, Govt. must be taken in each case to have deliberately waived it with a view to obtaining an authoritative and final decision on the question of construction. In the report of the Ford Motor Company's case in *Ford Motor Co. of India Ltd. v. Secretary of State* (5) it is stated at p. 258 that it was agreed that the defendant would waive "certain technicalities" with a view to a speedy decision of the case. Whether one of them was the question of jurisdiction I have no means of saying. It must be borne in mind however that cases are only authorities for what is actually decided, and not for propositions which appear to follow logically therefrom. I feel I cannot from the fact that the Privy Council restored a decree made on the Original Side of High Court of Bombay draw an inference that it thereby decided that the suit was competent, when the question of jurisdiction was not in issue.

Mr. Mukherjee next submits that this is not a matter concerning the revenue but rather concerning an act ordered or done in the collection thereof, a submission which I am disposed to accept. He then argues that the jurisdiction of the Court is only ousted if such an act be ordered or done according to the usage and practice of the country on the land for the time being in force. Therefore he says that the Court must examine the circumstances to see if the action of the authorities was lawful, because, if it was not lawful the section does not protect it. A similar argument was unsuccessfully urged in *Best & Co. Ltd. v. Collector of Madras* (3), a case in which the plaintiffs sued for a declaration that an agreement made between the parties with reference to the liability of the plaintiffs for income-tax was binding on the defendant. The defendant repudiated the agreement because he took the view that in

(4) 47 B 742; 75 Ind. Cas. 392; A I R 1923 P O 138; 50 I A 227; 21 A L J 689; 25 Bom. L R 920; (1923) M. W. N 557; 33 M L T 267; 45 M L J 592; 18 L W 918; 39 O L J 302; 28 C W N 762 (P O).

(5) 65 I A 32; 172 Ind. Cas. 771; A I R 1938 P O 15; 42 O W N 257 (258); 32 S L R 264; I L R (1938) Bom 249; 1938 O L R 76; (1938) A L J 87; 4 B R 287; 10 R P O 175; 1938 O W N 188; 47 L W 205; (1938) M W N 134; 1938 A L R 110; (1938) I M L J 161; 40 Bom. L R 269; 66 O L J 466 (P O).

(6) 59 I A 258; 137 Ind. Cas. 535; A I R 1932 P O 168; 56 B 313; Ind. Rul. (1932) P O 203; 34 Bom. L R 1057; 55 O L J 520; 36 C W N 854; 36 L W 156; 63 M L J 437 (P O).

consequence of subsequent legislation it was no longer effective. Coutts-Trotter, J., held that s. 106 (2), Govt. of India Act, 1915, was a bar to the suit. In dealing with the argument now advanced the Court observed at p. 26*:

"Mr. Grant took the further point that the fetter in my jurisdiction was only with regard to 'acts ordered or done in the collection of the revenue according to usage and practice of the country or the law for the time being in force,' and he says, 'If you go into the facts, on the merits you will find that my contention is well founded, that this was an illegal repudiation of the agreement.' That contention, I think, was disposed of as long ago as 1848 in a judgment of their Lordships of the Privy Council in *Spooner v. Juddow* (7). In that case the Court put a construction on a protective statute of this kind which, so far as I know, has never been departed from, and it is put in much clearer words than I can put it, by Lord Campbell in giving their Lordships' opinion at p. 379† of the report. What he says is this, 'The point therefore is whether the exception of jurisdiction only arises where the defendants have acted contrary, and the Regulations of the Governor and Council. But upon this supposition the proviso is wholly nugatory: for if the Supreme Court is to enquire whether the defendants in this matter concerning the public revenue were right in the demand made, and to decide in their favour only if they acted in entire conformity to the Regulations of the Governor and Council of Bombay, they would equally be entitled to succeed, if the statute and the charters contained no exception or proviso for their protection. Our books actually swarm with decisions putting a contrary construction upon such enactments, and there can be no rule more firmly established, than that if parties *bona fide* and not absurdly believe that they are acting in pursuance of statutes, and according to law, they are entitled to the special protection which the Legislature intended for them, although they have done an illegal act.' It is not suggested in this case that the Collector of Madras or the Secretary of State acted *mala fide* or purported to seek the protection of the statute with the full knowledge that all that was being done was to commit a mere act of aggression. Whether they were right or wrong, they thought clearly and honestly that they were taking advantage of the provisions which the statute allowed them to take advantage of, in terminating this agreement. I am therefore compelled to hold that this Court had no jurisdiction to entertain this suit."

I think similar observations are applicable to the case before me. None of the very vague statements in the plaint amounts to an averment that the Collector of Customs directed the confiscation of the goods *mala fide*, or in the exercise of powers conferred on him by Sea Customs Act in the circumstances to which he knew the provisions of the Act were not applicable. In my opinion, no irregularity of procedure, and no error in the conclusions arrived at can *per se* exclude the application of the Govt. of India Act. I accordingly accept

the reasoning in the Madras decisions to which I have referred, and I hold that this is a suit which the Original Side of this Court has no jurisdiction to entertain.

The issue raised by para. 4 of the written statement must also, in my opinion, be decided in the defendants' favour. It is a well-known principle that where a statute creates a duty or imposes a liability, and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, no remedy can be taken but the particular remedy prescribed by the statute. Lord Esher observed in *The Queen v. Essex County Court Judge* (8) at p. 707, "where the Legislature has passed a new statute giving a new remedy that remedy is the only one which can be pursued." In my view the Legislature intended that the sole remedy open to those who were aggrieved by a decision or order passed by an Officer of Customs under the Sea Customs Act should be the appeal to the Chief Customs Authority provided by s. 188. The matter is, I think, placed beyond doubt by the concluding words of the section—"Every order passed in appeal under this section shall subject to the power of revision conferred by s. 191 be final." I have been referred to a decision of Gentile, J. of the Madras High Court reported in one of the unauthorized series of reports, in which he takes this view of the effect of s. 188, and I find myself in entire agreement with him. It would be contrary to all principle to permit the plaintiff after unsuccessfully agitating his grievances before the statutory appellate authority then to seek the assistance of the Court. I have had before me an admitted brief of the documents in the case. A perusal of it produces a conviction in my mind that at every stage the representations of the plaintiff received careful consideration, and that the conclusions of the Collector and of the Central Board of Revenue were arrived at in good faith. What is however more important is that learned Counsel for the plaintiff was constrained to admit that, although he was prepared to criticize the conduct of the proceedings before the Collector, he could not point to anything improper or unjudicial in the manner in which the Board exercised the jurisdiction conferred on it by s. 188.

The order passed by the Governor-General in Council under s. 191 of the Act can be briefly dealt with. I incline to the

(8) (1887) 18 Q B D 704 (707); 56 L J Q B 315; 57 L T 643; 35 W R 511; 51 J P 549.

(7) 4 M I A 353; 6 Moo. P C 257; 1 Sar. 363 (P O).

*Page of 35 M. L. R.—[Ed.]

†Page of 4 M. I. A.—[Ed.]

view that orders made under this section can, in no case, be questioned in the Civil Courts, except possibly orders which while purporting to be made under it are clearly outside it. An order by the Governor-General in Council enhancing penalty would in my opinion, possibly be such an order. Generally speaking however what the section contemplates are revisional orders of an executive character. It should be pointed out that the order of confiscation is the order of the Collector and not the order of the Governor-General in Council. It is true that in upholding it the revising authority expressed the opinion that it should have been made under s. 167 (36) and not under s. 167 (37). This observation has enabled the plaintiff to argue that his goods have been confiscated in respect of an offence with which he was never charged. Although it is true that the original notice to show cause only referred to s. 167 (37) and s. 167 (36), an examination of the record of the proceedings shows that his grievance in this respect is illusory. On October 11, 1935 a lengthy memorial was submitted to the Finance Department of the Govt. of India on the plaintiff's behalf in support of his application under s. 191. The first fifteen paragraphs of the memorial dealt with the facts.

Two paragraphs follow which contain submissions as to the law applicable if the revising authority is in agreement with the Board of Revenue on the facts. These submissions are to the effect that the offence shown, if the facts are held to be established, is one under s. 167 (36). To quote the memorial "Further if s. 167 (36) does not fit the case under enquiry like a glove, what case will fit it?" It is ridiculous for the plaintiff to complain that the Governor-General in Council accepted his submission of law and accordingly set aside the penalty imposed by the Collector. I hold that this suit must be dismissed with costs, because the Court lacks jurisdiction to entertain it for the reasons set out in paras. 4 and 10 of the written statement of the Secretary of State.

S.

Suit dismissed.

ALLAHABAD HIGH COURT

Full Bench

First Appeal No. 406 of 1937

December 18, 1939

THOM, C. J., RAOHHPAL SINGH AND
GANGA NATH, JJ.

RAMDEO—PLAINTIFF—APPELLANT

versus

SRI SADAITAN PANDE AND OTHERS—

DEFENDANTS—RESPONDENTS

U. P. Encumbered Estates Act (XXV of 1934), s. 9 (5) as amended by Act XI of 1939—Creditor wanting to recover proportion of debt due to him by joint debtor who had not applied under the Act—Procedure.

Under the amended U. P. Encum. Estates Act, the creditor wanting to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encum. Estates Act, must wait until the amount due by the joint debtor who had not made an application under the Encum. Estates Act has been determined by the Special Judge. Thereafter he may apply to the Civil Court for a decree for that amount against the debtor. He cannot institute a separate suit for that.

F. A. from the decision of the Civil Judge, Mirzapur, dated August 25, 1937.

Order of Reference to a Full Bench.

Iqbal Ahmad and Bajpai, JJ.—This is a plaintiff's appeal arising out of a suit for the recovery of a sum of Rs. 22,645 odd on the basis of a *sarkhat* dated June 17, 1934, executed by three brothers named Pandit Sri Sadaitan Pande, Srish Chandra Pande and Sri Kar Pande in favour of the plaintiff firm Thakuri Sao and Purshottam Das. The plaintiffs firm carried on business in Sarguja in the Central Provinces and the three brothers named above carried on the business of commission agents in the district of Mirzapur. It is common ground that there were dealings between the parties and it is alleged by the plaintiff that on the settlement of accounts on June 17, 1934, a sum of Rs. 67,936 was found due to the plaintiff firm from the three brothers and that with respect to this amount a *sarkhat* was executed in favour of the plaintiff firm. The suit giving rise to the present appeal was directed only against Sri Sadaitan Pande and was for the recovery of one-third of the amount alleged to be due on the basis of the *sarkhat*. The other two brothers, viz. Srish Chandra Pande and Sri Kar Pande, were impleaded as *pro forma* defendants in the suit. The Court below holding that the suit was barred by s. 7 (1) (b) of the Encum. Estates Act (IV of 1935) dismissed the suit.

There is no controversy about the facts which are briefly as follows: On or before July 23, 1936 separation was effected between the three brothers named above by means of an award. Thereafter on September 30, 1936, Sri Chandra Pande and Sri Kar Pande filed an application under s. 4, Encum. Estates Act, and the Collector, in pursuance of the provisions of s. 6 of the Act, transmitted the application to the Special Judge. In their application the applicants admitted their liability to the plaintiff firm to the extent of two-thirds of the amount due to the plaintiff firm. The plaintiff firm then filed a written statement on April 15, 1937 before the Special Judge in accordance with the provisions of s. 10 of the Act and prayed that Sri Sadaitan Pande be made a party in the case. It however appears that prior to the date on which the written statement was filed by the plaintiff Sri Sadaitan Pande had already been made a party to the case. During the pendency of the case under the Encum. Estates Act the suit giving rise to the present appeal was filed on May 17, 1937. Sri Sadaitan Pande contended that the suit was barred by s. 7 (b) of the Act, and this contention was accepted by the learned Civil Judge.

In appeal before us it is contended that the decision of the Court below is erroneous and that s. 7 (b) of the Act has no application to the case and in support of this contention reliance has been placed on the decision of a learned Judge of this Court in *Swadeshi Bima Co. Ltd. v. Shiv Narain* (1). This decision finds support from certain observations contained in the judgment of this Court in Civil Revision No. 470 of 1936 decided on November 24, 1937, by Harries and Rachhpal Singh JJ. On behalf of the respondent reliance has been placed on the decision of Thom and Rachhpal Singh JJ., in *Inamullah v. Babu Ram* (2) and the decision of Sulaiman, O. J. and Harries, J., in *Babu Ram v. Manohar Lal* (3) and on the decision of Bennet and Varma, JJ., in *Souti Raghubar Doyal v. Amba Prasad* (4). The cases

(1) (1938) A L J 1153; 180 Ind. Cas. 114; A I R 1939 All. 75; I L R (1939) All. 115; 1938 R D 876; 11 R A 430.

(2) (1937) A L J 346; 169 Ind. Cas. 616; A I R 1937 All. 360; I L R (1937) All. 561; 1937 R D 174; 1937 A L R 560; 10 R A 35.

(3) (1937) A L J 886; 173 Ind. Cas. 157; A I R 1938 All. 6; I L R (1938) All. 22; 10 R A 466; 1938 R D 84; 1938 A L R 98.

(4) (1938) A L J 576; 176 Ind. Cas. 401; A I R 1938 All. 390; I L R (1938) All. 670; 11 R A 92; 1938 R D 589; 1938 A L R 669.

relied upon by the parties are not easily reconcilable and the question that arises for decision in the present appeal is one of general importance. Accordingly we consider that it is desirable that there should be an authoritative pronouncement on the question. We, therefore, direct that the case be laid before the Hon'ble the Chief Justice with the request for the constitution of a Full Bench.

Messrs. Shiva Prasad Sinha, B. C. Ganguli and Muhammad Najmuddin, for the Appellant.

Messrs. N. Upadhaya and K. L. Misra, for the Respondents.

Judgment of the Full Bench

Thom, C. J.—This is a plaintiff's appeal arising out of a suit in which the plaintiff claims a decree against the defendant for the sum of Rs. 22,645-9-6. The defendant along with his two brothers executed a *sarkhat* on June 17, 1934. The amount sued for represents one-third of what is due under the *sarkhat*. The three brothers who executed the *sarkhat* separated on July 23, 1936. Thereafter the defendant's two brothers filed an application under s. 4, Encum. Estates Act. An order was passed thereon by the Collector under s. 6 of the Act. The application was transmitted to the Special Judge for disposal. In the application which they filed under the Act the defendant's brothers admitted liability to the extent of two-thirds of the amount due under the *sarkhat*. In the proceedings under the Encum. Estates Act, the plaintiff in the present suit filed a written statement on April 15, 1937. He pleaded that the defendant in the present suit be made a party to these proceedings. It appears however that the defendant had already been made a party. The suit has been dismissed by the learned Civil Judge. The learned Judge held that the suit did not lie, an application having been made by two out of the three joint debtors under the provisions of the Encum. Estates Act.

It was contended in appeal that the provisions of the Act did not bar the suit. It was urged that the plaintiff was entitled to recover what was admittedly due from the joint debtor who had not applied under the Act. It was argued for the respondents on the other hand that sub-s. (b) of s. 7 of the Act clearly barred the suit. Sub-s. (b) enjoins that

"no fresh suit or other proceedings other than an

appeal or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any Civil or Revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order."

This provision is undoubtedly very wide in its terms and it would appear from s. 9, sub-s. (5) (b) that the remedy of the creditor against the non-applying debtor was by way of execution of a decree passed by the Special Judge. Section 9, sub-s. (5) (b) is as follows:

"If all the joint debtors have not applied under s. 4 the creditor shall have a right to recover from the debtors who have not applied only such amount on account of the joint debt as may be decreed by the Special Judge to be due by them."

The question as to whether under the Act before amendment the creditor was entitled by a separate suit to recover what was due by a joint debtor who had not preferred an application under the act is one which is not free from difficulty. We are however absolved from deciding the question in view of the amendment to the Act, and in view of the procedure which we think it is appropriate to follow in disposing of this appeal. The Encum. Estates Act of 1935 has been amended by Act XI of 1939. In particular s. 9, sub-s. (5) (b) has been amended and for the word "decreed" in that sub-section the word "determined" has been substituted. Section 11 of the 1939 Act enjoins

"(c) where no suit has been instituted or where no application for execution of a joint decree has been made in any other Court in respect of such joint debt or joint decree the creditor may on application to any Court having jurisdiction to entertain such suit, or execute such decree; obtain a decree or get the decree executed against non-applicant joint-debtors, for the amount so determined, subject to the payment of the court-fee payable on such execution application, or on a plaint in a suit for the amount determined by the Special Judge."

Under the amended Act, therefore, the creditor must wait until the amount due by the joint debtor who had not made an application under the Encum. Estates Act has been determined by the Special Judge. Thereafter he may apply to the Civil Court for a decree for that amount against the debtor.

When the suit out of which this appeal arises was filed, the law as to the procedure to be adopted by the creditor to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encum. Estates Act was somewhat in doubt. The procedure to be followed is now made plain by the amendment above referred to. In these circumstances we are of the opinion that the appropriate course would be for this Court

to allow the appeal and direct the record to be sent to the Court below. That Court will then treat the suit as an application under s. 11 of Act XI of 1939 and dispose of it according to law after the amount due by the defendant has been determined by the Special Judge. In the result, the appeal is allowed and the order of the learned Civil Judge is set aside. The record will be returned to the Court of the learned Civil Judge with the direction that the plaint be treated as an application under s. 11 of Act XI of 1939. This application will be disposed of according to law after the amount due by the defendant has been determined by the Civil Judge in the proceedings under the Encum. Estates Act. In all the circumstances we direct the parties to bear their own costs in this appeal. Costs in the Court below will abide the result.

D.

Appeal allowed.

ODDH CHIEF COURT

Civil Miscellaneous Application No. 402
of 1939

March 1, 1940

THOMAS, C. J. AND ZIA-UL HASAN, J.

B. JAGDISH BAHADUR—APPELLANT—
APPLICANT

versus

MAHADEO PRASAD AND OTHERS—

RESPONDENTS—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXII, rr. 12, 8, 3, 4, 9—Appeal out of execution proceedings—Such appeals, if exempted from operation of r. 8—Applicability of rr. 3, 4 and 8 in such case—Ignorance of death of respondent—Whether "sufficient cause" within r. 9.

Order XXII, r. 12 of the Civil P. C., does not exempt pending appeals from the operation of r. 8 of that Order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also rr. 3, 4 and 8 would never apply. 122 Ind. Cas. 148 (1), not followed. 144 Ind. Cas. 391 (2), followed. 110 Ind. Cas. 662 (3), 74 Ind. Cas. 577 (4) and 150 Ind. Cas. 425 (5), relied on.

Mere ignorance of the death of a respondent is not a sufficient cause within the meaning of O. XXII, r. 9. *Bhagwan Din v. Muru* (6), applied.

C. Misc. App. and (Execution of Decree Appeal No. 39 of 1938).

Mr. Hargovind Dayal, for the Applicants.

Mr. H. D. Chandra, for the Opposite Party.

Order.—This application for substitution

arises in an execution of decree appeal. It came up for hearing before a learned Judge of this Court who has, under s. 14 (2) of the Oudh Courts Act, referred it to a Bench for decision, as in the opinion of the learned Judge there was a divergence of opinion in different High Courts and that there was no decision of this Court in respect of the point involved in the application.

It is now admitted by the learned Counsel on behalf of the applicant that Mahadeo Prasad, respondent No. 1 died on January 14, 1939, and this application for substitution was presented on July 12, 1939, that is beyond ninety days, but on the first day on which this Court re-opened after the long vacation.

The application was made under O. XXII, r. 4 for substitution of the names of the two sons of Mahadeo Prasad deceased, and it was urged that he had died on May 28, 1939. The application was opposed by the respondents Nos. 2 to 4 on the ground that Mahadeo Prasad had died on January 14, 1939, and the application therefore was barred by time. The parties were given an opportunity to prove the date of the death of Mahadeo Prasad. The appellant then put in an application admitting the date of the death of Mahadeo Prasad to be January 14, 1939, and prayed that the former application of July 12, 1939, be treated as an application under O. XXII, r. 9 of the Civil P. O., for setting aside the abatement.

In this application the sufficient cause shown for setting aside the order of abatement is that the deceased lived 34 miles away in a village. The applicant is a lawyer practising at Gonda. The contention on behalf of the applicant is that an appeal or an order arising out of an order in the course of proceedings in execution of the decree does not abate on the death of the respondent in cases where an appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law because the appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and therefore r. 12 of O. XXII is applicable to such appeals. In support of this contention the learned Counsel has relied on a Full Bench decision of the Patna High Court reported in I. L. R. 9 Patna 372 (*Hakim Syed Mohammad Taki v. Rai Fateh Bahadur Singh*) (1). It is true that the above decision supports

the contention of the learned Counsel on behalf of the applicant, but this view was not followed by the Allahabad High Court in the case of *Chhanga Mal v. Ram Dularay Lal*, reported in I. L. R. 55 Allahabad, 509 (2), in which it was held that O. XXII, r. 12 of the Civil P. O., does not exempt pending appeals from the operation of r. 8 of that order even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also rr. 3, 4 and 8 would never apply.

The case reported in I. L. R. 9 Patna 372, (*Hakim Syed Mohammad Taki v. Rai Fateh Bahadur Singh*) (1), was referred to before the learned Judges of the Allahabad High Court but they preferred to follow the decision of the Madras High Court in the case of *Sundayee Ammal v. Krishnan Chetti* I. L. R. 51 Madras 858 (3).

In the Lahore High Court in the case of *Mir Khan v. Sharfu* reported in 74 Ind. Cas. 577 (4), a learned Judge held the opinion that rr. 3 and 4 of O. XXII of the Civil P. O., had no application to appeals arising out of execution proceedings by virtue of the provisions of r. 12 of that Order.

There is a Bench decision of this Court which was not brought to the notice of the learned Judge of this Court who has made this reference. It is reported in 11 O. W. N. 917 (*Hari Saran Das Mahant v. Har Kishan Das*) (5), in which it was held that

"if during the pendency of an appeal by the judgment-debtor arising out of execution of a decree for mesne profits and cash, the decree-holder respondent who happens to be a tenant for life dies, an application by the appellant-judgment-debtor, who happens to be the remainderman, stating that the rights of the deceased in the decree had come to vest in him and that another person who claimed to be a legal representative of the deceased was not such representative, is maintainable. The provisions of O. XXII, r. 5, Civil P. O., impose an obligation on the Court to determine whether the applicant or the opposite party is the legal representative of the deceased and the proceedings in appeal from any decree or order in proceedings in execution are not proceedings in execution so as to exclude application of r. 4 by r. 12 of O. XXII, Civil P. O., they being

(2) 55 A 509; 144 Ind. Cas. 391; A I R 1933 All. 388; Ind. Rul (1933) All. 429; (1933) A L J 706.

(3) 51 M 858; 110 Ind. Cas. 662; (1928) M W N 385; A I R 1928 Mad. 772; 28 L W 351; 55 M L J 497.

(4) 74 Ind. Cas. 577; 5 Lah. L J 163; A I R 1923 Lah. 560.

(5) 11 O W N 917; 150 Ind. Cas. 425; 6 R O 648; A I R 1934 Oudh 337.

(1) 9 Pat. 372; 122 Ind. Cas. 148; A I R 1929 Pat. 565; 10 P L T 763; Ind. Rul. (1930) Pat. 180 (F B).

proceedings in appeal and r. 11 making the whole of O. XXII, applicable to appeals."

This view is in accordance with the view taken by the Allahabad High Court in *Chhanga Mal v. Ram Dularey Lal*, I. L. R. 55 Allahabad 509 (2).

We are of opinion, that the law laid down in 11 O. W. N. 917 *Hari Saran Das Mahant v. Har Kishan Das* (5), is correct and therefore hold that O. XXII, r. 12 of the Civil P. O., does not exempt pending appeals from the operation of r. 8 of that Order, though the appeals arise out of execution proceedings. In our opinion, an appeal stands on a different footing, in this respect, from an application for execution. R. 12 does not contemplate that if an appeal has been preferred from an order in execution then also rr. 3, 4 and 8 would never apply.

The next point urged on behalf of the applicant is that as the applicant lived about 34 miles away from the village in which Mahadeo Prasad deceased lived, he could not come to know of his death and the delay was due to his ignorance of the death of Mahadeo Prasad. This in the opinion of the learned Counsel was the sufficient cause for not applying to bring the legal representatives of the deceased on record within the prescribed period of limitation.

On behalf of the opposite party it is urged that the applicant is a permanent resident of village Achalpur and the deceased was also a resident of the same village as the mortgage deed dated June 30, 1922, would show in which the residence is given as Achalpur. The residence of the deceased in the plaint is different. Whether the deceased was a resident of village Achalpur or not, we do not attach much importance, because, in our opinion, mere ignorance of the death of a respondent is not a sufficient cause within the meaning of O. XXII, r. 9.

In the case of *Bhagwan Din v. Muru* reported in 1940 O. W. N. 219 (6), it was held that

"the procedure provided for the disposal of suits and appeals demands an active prosecution and great vigilance on the part of the parties to a litigation and the appellant in the prosecution of his appeal is under an obligation to keep himself informed as to the existence of his opponent. Mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate."

The applicant has failed to satisfy us that there was sufficient cause for not filing the application within the period of limitation.

We therefore reject the application with costs, and refuse to set aside the abatement.

(6) 1940 O W N 219

It is conceded by the learned Counsel on behalf of the applicant that the whole appeal has abated. We therefore dismiss the appeal. No order as to costs.

D.

Appeal rejected.

LAHORE HIGH COURT

Second Appeal No. 1185 of 1938

December 20, 1938

ADDISON AND ABDUL RASHID, JJ.

RADHA KISHAN AND OTHERS—DEFENDANTS

—APPELLANTS

versus

SAFDAR ALI AND ANOTHER,—PLAINTIFFS
AND ANOTHER—DEFENDANT—RESPONDENTS

Punjab Custom (Power to Contest) Act (II of 1920), s. 6—Possession of insolvent's property taken by Official Receiver—Suit by insolvent's son for declaration that property belonged to him under will of his grandfather—S. 6, if applies—Official Receiver, whether can resist suit on ground that will was not valid.

A person who was disinherited by his father was adjudged insolvent and the Official Receiver took possession of the property in dispute as belonging to the insolvent. The plaintiffs preferred an objection in the Insolvency Court on the ground that the property in dispute had been bequeathed to them by insolvent's father who was their grandfather. This objection was dismissed by the Insolvency Court. Thereupon the plaintiffs instituted a declaratory suit to the effect that the property in dispute was owned and possessed by them, that it did not belong to insolvent, and that it was not liable to attachment and sale in the insolvency proceedings against him. The creditors of the insolvent were also made defendants in the case. The defendants pleaded, *inter alia*, that the will relied upon by the plaintiffs was never executed by the insolvent's father, that the property in dispute was ancestral, and that deceased was not entitled to will it away in favour of the plaintiffs according to custom:

Held, that s. 6, Punjab Custom (Power to Contest) Act had no applicability to the facts of the case as the Official Receiver had not instituted any suit to contest an alienation of ancestral immovable property made by the insolvent's father. The Official Receiver as the representative of the insolvent was fully entitled to resist the suit of the plaintiffs on the ground that the will made by the deceased in their favour was not valid.

S. A. from the decree of the District Judge Hoshiarpur, dated May 12, 1938.

Mr. D. N. Aggarwal, for the appellants.

Mr. Achhru Ram, for the Respondents (Plaintiffs).

Abdul Rashid, J.—Badar Bakhsh had three sons, namely Ghulam Mohi-ud-Din, Ahmad Ali and Aziz Din. Aziz Din's son Safdar Ali and his wife Mst. Rahmi are the plaintiffs in the suit which has given rise to the present appeal. On June 29, 1934 Badar Bakhsh made an unregistered

will whereby he bequeathed one-third of his property to Ghulam Mohi-ud-Din, one-third to Ahmad Ali and one-third to Safdar Ali and *Mst. Rahmi*. He disinherited his son Aziz Din. On March 7, 1935 Badar Bakhsh died. Aziz Din (defendant No. 1) was adjudged insolvent and the Official Receiver, Lala Rattan (defendant No. 18) took possession of the property in dispute as belonging to the insolvent. The plaintiffs preferred an objection in the Insolvency Court on the ground that the property in dispute had been bequeathed to them by Badar Bakhsh. This objection was dismissed by the Insolvency Court on August 12, 1936. Thereupon the plaintiffs instituted the present declaratory suit to the effect that the property in dispute was owned and possessed by them, that it did not belong to Aziz Din, insolvent, and that it was not liable to attachment and sale in the insolvency proceedings against him. The creditors of Aziz Din were also made defendants in the case. The defendants pleaded, *inter alia*, that the will relied upon by the plaintiffs was never executed by Badar Bakhsh, that the property in dispute was ancestral, and that Badar Bakhsh deceased was not entitled to will it away in favour of the plaintiffs according to custom. The following issues were framed by the trial Court:

"(1) Whether Badar Bakhsh was competent to bequeath the property in dispute, in favour of the plaintiffs by means of the will in dispute according to custom? (2) Whether Badar Bakhsh validly made the will in dispute in favour of the plaintiffs? (3) Whether the Official Receiver or the creditors of defendant No. 1 has or have a *locus standi* to challenge the validity of the will in dispute on the ground of its being against the rules of custom? (4) Relief."

The trial Court held that Badar Bakhsh deceased had no authority to make the will in favour of the plaintiffs under the Customary Law, that the will in dispute had not been proved to have been executed by Badar Bakhsh, and that the Official Receiver had a *locus standi* to challenge the validity of the will. On these findings the plaintiffs' suit was dismissed. Against this decision the plaintiffs preferred an appeal in the Court of the learned District Judge. The learned Judge held that Badar Bakhsh being a Rajput of the Hoshiarpur District had no power to alienate his property by means of a will. It was also held that under s. 6, Punjab Act II of 1920, the power to contest alienation by a will of ancestral immovable property is limited to a person, who is a descendant of the great grandfather of

the testator in the male line, and that the Official Receiver and the creditors were not entitled to contest the will. The judgment of the Court of first instance was reversed by the learned District Judge who granted a decree to the plaintiffs with costs throughout. The creditors of Aziz Din have preferred a second appeal to this Court.

In my opinion, s. 6, Punjab Custom (Power to Contest) Act II of 1920, has no applicability to the facts of the present case. That Act was enacted in order to impose restrictions on the power of descendants or collaterals to contest an alienation of immovable property or the appointment of an heir on the ground that such alienation or appointment is contrary to custom.

The Official Receiver has not instituted any suit to contest an alienation of ancestral immovable property made by Badar Bakhsh. On the other hand, the grandson and the daughter-in-law of Badar Bakhsh have come into Court relying on a certain will in their favour. They have made the Official Receiver a defendant in the case, and the main defence of the Official Receiver is that he stands in the same position as Aziz Din, insolvent, and is entitled to raise all the defences that were open to Aziz Din. Under s. 28 (2), Prov. Insol. Act, on the making of an order of adjudication, the whole of the property of the insolvent vested in the Receiver and became divisible among the creditors. Under sub-s. (4), all property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge vests in the Official Receiver. In these circumstances, so far as the present suit is concerned, the Official Receiver represents the estate of Aziz Din. Under s. 59, Prov. Insol. Act, the Official Receiver is entitled to institute, defend or continue, any suit or other legal proceeding relating to the property of the insolvent for the purposes of realizing the property of the debtor and distributing it among the creditors entitled thereto. The Official Receiver is resisting the suit of the plaintiffs in order to realize the entire property of Aziz Din for the purposes of distributing it among the creditors. In the eye of the law the Receiver and the insolvent are one and the same person so far as the estate of the insolvent is concerned. It cannot be said that the Official Receiver is the representative of Aziz Din in every respect, but the Official Receiver can raise the same pleas in defending a

suit that Aziz Din could have raised himself. No authority, directly in point, was quoted at the bar. It was held in *Thakur Singh v. Uttam Kaur* (1), that

"a reversioner entitled to succeed to the property on the death of a widow, cannot during her lifetime transfer his right to succeed, so as to invest the transferee with a right to sue. Where however succession has opened out on the death of the widow and the quondam reversioner has become the real owner of the property, though he is still out of possession, there is no bar to his assigning the whole or a part of it to third parties, and consequently the plaintiff-assignees in this case were entitled to sue."

In my view the Official Receiver is the representative of Aziz Din for all purposes and he is fully entitled to resist the suit of the plaintiffs on the ground that the will made by Badar Bakhsh in their favour is not valid. For the reasons given above, I would accept this appeal, set aside the judgment and the decree of the learned District Judge and restore that of the trial Court dismissing the suit of the plaintiffs. Having regard to all the circumstances I would leave the parties to bear their own costs throughout.

Addison, J.—I concur.

S.

Appeal accepted.

(1) 10 L 613; 118 Ind. Cas. 449; A I R 1929 Lah. 295; 30 P L R 328; Ind. Rul. (1929) Lah. 753.

OUDH CHIEF COURT.

Criminal Revision Application No. 129
of 1939

March 18, 1940

ZIA-UL HASAN, J.

MATHRA AND OTHERS—ACCUSED—

APPLICANTS

versus

KAMTA—COMPLAINANT—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 192—Case under s. 427, Penal Code (Act XLV of 1860), transferred to Third Class Magistrate—Trial by latter is without jurisdiction—Illegality held not curable by s. 537, Criminal Procedure Code (Act V of 1898).

The Court's jurisdiction must be determined on the allegations made in the complaint and on the complainant's statement in support of the complaint.

If the Magistrate to whom a case is transferred under s. 192, Criminal P. O., lacks jurisdiction to try the case the order of transfer is bad in law. A First Class Magistrate taking cognizance of a case under s. 427, I. P. O., cannot transfer it to a Third Class Magistrate. It may be that after a trial, it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress the statement of the complainant in a criminal case and the statement of the plaintiff in a civil case has to be accepted for the purpose of jurisdic-

tion. Hence, the trial of the case by the Third Class Magistrate is illegal. The case is not covered by s. 537, Criminal P. O., as a question of jurisdiction is involved and a defect of jurisdiction is not curable by s. 537.

[Case-law relied on.]

Cr. R. App. of the order of the Sessions Judge of Unao, dated September 26, 1939.

Mr. B. K. Dharon, for the Applicant.

Order.—This is an application in revision against an order of the learned Sessions Judge of Unao dated September 26, 1939, rejecting the applicants' application for revision of the appellate order of a Magistrate.

One Kamta Teli filed a complaint under ss. 427, 447 and 323, I. P. O. and s. 24 of the Cattle Trespass Act against the present applicants. The learned Sub-Divisional Magistrate to whom the complaint was made transferred it for trial to a Tahsildar Magistrate who had third class powers. The Tahsildar summoned the accused to answer charges under ss. 426, 447 and 323, I. P. O. and s. 24 of the Cattle Trespass Act. The accused were convicted under s. 24 of the Cattle Trespass Act only and while two of them were fined Rs. 10 each the other two were fined Rs. 2 each. The accused appealed but their appeal was dismissed. Thereupon the accused applied to the learned Sessions Judge in revision mainly on the ground that as the allegation in the complaint was that crops worth about Rs. 60 were damaged by the accused by means of their cattle, the case could not be tried by a Magistrate of the third class. The learned Judge however held that as the witness under s. 202, Criminal P. O., as well as the complainant and other witnesses during the trial stated that the damages amounted to Rs. 30 or Rs. 40 there was no defect of jurisdiction in the trial Court. On this ground he rejected the revision application. The applicants now come to this Court and raise the same ground again.

It cannot be doubted that an offence under s. 427 is, according to column 8 of the Second Schedule of the Criminal P. O., triable by a Magistrate of the first or the second class and not by a Magistrate of the third class. Under s. 192 of the Code a Magistrate of the first class empowered by the District Magistrate has power to transfer a case of which he has taken cognizance for inquiry or trial to another Magistrate in the district who is "competent to try the case or to commit him for trial." From this it is clear that

if the Magistrate to whom a case is thus transferred lacks jurisdiction to try the case the order of transfer is bad in law. This view is fully supported by the cases of *Raghu Singh v. Abdul Wahab*, (I. L. R. 23 Cal. 442) (1) and *Budhan Mahto v. Issur Singh*, (I. L. R. 34 Cal. 926) (2). In the case of *Raghunandan Prasad v. King-Emperor*, (A. I. R. 1925, All. 290) (3) it was held that the jurisdiction of the Court to hear a case depends on the allegations with which its help is sought. Further on it is said:

"It may be that after a trial, it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress the statement of the complainant in a criminal case and the statement of the plaintiff in a civil case has to be accepted for the purpose of jurisdiction."

In the present case not only was the amount of damage fixed at Rs. 60 in the complaint but the plaintiff in his statement also said that he suffered a loss of about Rs. 60.

It was only when a witness was examined under s. 202, Criminal P. O., that the amount of loss was reduced to Rs. 40. The order of transfer was passed before this witness was examined and so the Court's jurisdiction must be determined on the allegations made in the complaint and on the complainant's statement in support of the complaint. This being so the order of transfer to the Court of the Tahsildar passed by the Sub-Divisional Magistrate was, under s. 192, Criminal P. O., illegal and therefore the trial of the case by the Tahsildar was without jurisdiction. The case is not, in my opinion, covered by s. 537, Criminal P. O., as a question of jurisdiction is involved and a defect of jurisdiction is not curable by s. 537 (*vide Khuda Bakhsh v. Emperor*, (A. I. R. 1933 Lahore, 100) (4)).

I therefore accept this application and set aside the conviction and sentences of the applicants. As regards re-trial I am of opinion, that in view of the facts that the accused were acquitted under all the charges other than that of s. 24 of the Cattle Trespass Act and that the matter is a trivial one, it is not necessary that the accused should be re-tried.

D.

Application accepted.

(1) 23 O 442.

(2) 34 O 926.

(3) A I R 1925 All. 290; 85 Ind. Cas. 730; 47 A 64; L R 6 A 39 Cr.; 26 Cr. L J 586.

(4) A I R 1933 Lah. 1009; 147 Ind. Cas. 737; (1933) Cr. Cas. 1554; 35 Cr. L J 514; 35 P L R 289; 6 R L 444.

ALLAHABAD HIGH COURT

Full Bench

Miscellaneous Case No. 636 of 1936

January 10, 1940

IQBAL AHMAD, BAJPAI AND BRAUND, JJ.

COMMISSIONER OF INCOME-TAX—

APPLICANT

versus

INDRA SEN RAIZADA, MEERUT—

OPPOSITE PARTY

Income Tax Act (XI of 1922), ss. 4 (3) (viii), 24 12, 66—Held on materials before High Court that assessee was not entitled to claim set off of losses either on racing establishment or on betting accounts. —Maintenance of racing stable, when amounts to business—Betting, when vocation—"Business," meaning of—Value of English decisions in interpreting words "business," "profession," "vocation" or "occupation"—Receipts from maintenance of racing stable or betting whether casual and recurring—Exemption from taxation—Onus—Question referred by Commissioner—High Court, if can reframe it—Accuracy or otherwise of inference from proved facts, is question of law—Statement accompanying reference under s. 66—"Income" as used in s. 4 (3), scope of—"Casual," in s. 4 (3) (vii), meaning of.

An assessee who was a money-lender also dealt in precious stones and maintained and ran horses in races. He betted in races on his horses. He kept account books in regular course of business and also maintained an account styled as the "racing account." In this latter account, the stakes money received from the race clubs and the amount won on his bets were entered on the credit side and the losses and expenses in the maintenance of the horses on the debit side. The stakes money represented the prize paid to the assessee as the owner of the horses which won the races. In the accounting year, according to the entries in the account book, the assessee suffered a loss of Rs. 7,458 in betting and Rs. 425 in running the horses at the races but made profit in money-lending business and in the purchase and sale of precious stones:

*Held, (per Bajpai and Braund, JJ.)—*That upon the material before the Court the assessee was not entitled to claim a set-off of losses either on the racing establishment or on the betting account.

(*Per Iqbal Ahmad, J., contra.*)—There was no material on which it could be held that the maintenance of the racing stable and the series of betting transactions by the assessee did not constitute his business. The assessee was entitled to have the loss of Rs. 425 and Rs. 7,458 deducted from his assessable income for the year in dispute.

Per Iqbal Ahmad, J.—The words "business," "profession" and "vocation" have been interpreted in some English decisions and though those decisions cannot furnish an infallible guide, they are of assistance in interpreting those words. *Commissioners of Inland Revenue v. Marine Steam Turbine Co., Ltd.* (7), referred to.

The word "business" has been used in the Act to denote the continuous and systematic exercise of an occupation or profession with the object of making income or profit, and where the element of continuity is wanting in a particular activity, that activity cannot be characterized as "business" within the meaning of the Act. "Profession" or "occupation" can amount to business only if it is continuously and systematically exercised. It

follows that the words "profession" and "occupation" are words of wider import than the word "business."

[Case-law referred to.]

Whether the maintenance of a racing stable does or does not in a particular case amount to "business" must depend on the facts and circumstances of each case. It is impossible to lay it down as a general proposition of universal application that, in all cases where an element of sport or amusement is involved, a particular activity, howsoever systematically and continuously exercised, cannot amount to business. The question in each case must be what was the dominant intention. If the dominant intention was to get income or make profits or gains the activity of the description referred to above must amount to "business."

It cannot be said that betting, under no circumstances, can constitute vocation or occupation of a particular individual and, that the winnings from the same cannot amount to profits or gains chargeable to income-tax. Where the assessee has offered bets on numerous occasions such betting, in the case of the assessee, does certainly constitute his vocation or occupation. *Graham v. Green* (1), dissented from.

The receipt of stakes money by owners of racing stables is a matter of frequent occurrence and such receipts cannot, therefore, be characterized as of a non-recurring nature but casual and recurring.

Taxation under the Act is, the rule and exemption the exception. All income from whatever source derived must, therefore, be chargeable to income-tax, and the burden of proving that a particular class of income is not so chargeable must necessarily lie on the person claiming exemption from the liability to pay income-tax. 137 Ind. Cas. 557 (6), relied on.

In view of the limited jurisdiction given to the High Court by cl. (5) of s. 66, it is not permissible for the High Court to re-frame the questions referred by the Commissioner. 142 Ind. Cas. 437 (5), relied on.

The question of the accuracy or otherwise of an inference from proved facts is always a question of law and if the Commissioner has stated the proved facts and has asked the High Court to decide as to whether on those facts the conclusion arrived at by the Assistant Commissioner was correct in law, the question raised would undoubtedly be a question of law.

Only questions of law can be referred to the High Court for decision under s. 66, and the reference under that section must be accompanied by "a statement of the case" by the Commissioner. The "statement" must contain a full and exhaustive narration of the facts giving rise to the questions of law, so that the High Court may straightway proceed to apply the law to the set of facts stated and be relieved from the necessity of enquiring as to what the real facts are.

Per *Braund, J.*—The word "income" as used in the sub-s. (3) of s. 4 embraces every form of receipt of the kind which but for the exemption would, or might, have been embraced by the words "income, profits or gains" in s. 4 (1).

The word 'casual' in s. 4 (3) (vi) must be read as meaning the antithesis of that which is governed by something more than mere chance, something out of which, according to the probabilities of business or to the known course of practical experience, a rational expectation of profit arises. And that does not, apply to a mere bet.

Misc. Case from a reference submitted by the Commissioner of Income-tax, Central and United Provinces as per his letter, dated September 30, 1936.

Order of Reference to a Full Bench.

Iqbal Ahmad and Bajpal, JJ.—The questions that arise for decision in the present case, which is a reference by the Income Tax Commissioner under s. 66 (2), Income Tax Act, are of such general importance and are beset with such difficulties that we consider it desirable that they be decided by a Full Bench. Lala Inder Sen Raizada, the assessee, is a money-lender and deals in precious stones. He also owns some horses, keeps a stable and runs the horses in races. He also bets in races on his horses and other horses. An account styled as the "racing account" is maintained by the assessee in his account books. That account shows that in the "previous year," which was the accounting year, the assessee suffered a total loss of Rs. 8,064. Out of this amount, the loss incurred in betting was Rs. 7,454 and the loss in running horses at the races was Rs. 610. It may here be mentioned that out of this sum of Rs. 610, Rs. 185 were spent in purchasing a stop-watch, and it is agreed on all hands that this amount cannot be treated as a loss. The assessee claimed deduction of the amount of the loss incurred by him in the computation of his income for the purposes of assessment to income-tax. The claim of the assessee was however overruled by the Income-tax Officer and his decision was affirmed on appeal by the Assistant Commissioner. The Commissioner of Income-tax also agreed with the decision of the Assistant Commissioner.

The Income-tax authorities relying on the decision of Rowlatt, J., in *Graham v. Green* (1), held that the loss incurred in betting could not be taken into account in determining taxable income of the assessee. So far as the loss incurred by the assessee in maintaining the horses owned by him and running them in races was concerned, the Income-tax Officer held that the assessee indulged "in this hobby by way of pastime and it is not done in the nature of profession." He therefore held that the loss incurred by the assessee "or the income made in pursuance of this pastime do not attract the provisions of the Income Tax Act." On appeal the Assistant Commissioner did not differentiate between the loss incurred in

(1) (1925) 2 K B 37; 94 L J K B 494; 133 L T 367; 9 Tax Cas. 309; 69 S J 478; 41 T L R 372.

betting and in maintaining the horses and held as a matter of law that "the efforts of the appellant in maintaining horses and betting on them and others howsoever systematically organized they may be" do not "constitute a business." The Income-tax Commissioner expressed the same view as the Assistant Commissioner. In the present reference it is maintained by the learned Counsel for the assessee that the maintenance of horses with a view to run them in races constituted "business" within the meaning of the Act and, as such, the loss incurred by the assessee in that connection should be set off against his income under any other head as provided for by s. 24, Income Tax Act. He also argues that the loss incurred in betting should on similar ground have been set off against the assessee's income, in view of the provisions of s. 4 (3) (vii) of the Act which provides that the Act shall not apply to.

"any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature"...."

It is argued that the income from betting was not of "a casual and non-recurring nature" and as such, the loss incurred in betting came within the purview of s. 24 of the Act. In the course of his argument, the learned Counsel placed reliance on a case reported in *In the matter of Chunni Lal Kalyan Das* (2), and on a case reported in: *In the matter of Chunni Lal Kalyan Das* (3). It was held in the former case that cl. (vii) of s. 4 (3), Income Tax Act, exempts only receipts of a casual and non-recurring nature, which are not receipts from business or the exercise of a profession or occupation by an assessee. The latter case is an authority for the proposition that the profits or losses arising from wagering contracts are to be taken into account in assessing income-tax. It is contended on the authority of these decisions that the loss incurred by the assessee in betting should have been taken into account.

The learned Advocate General on the other hand maintains that the receipts arising from betting are not receipts arising "from business or the exercise of a profession, vocation or occupation" as held by Rowlatt, J., in the decision quoted above. He also contends that such receipts are of a casual and non-recurring nature and therefore cannot be taken into account in

making the assessment, and in support of this contention he places reliance on the decision of the Judicial Committee in *Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.* (4), and contends that receipts from betting are not taxable income in accordance with the provisions of the Act. It has been brought to our notice that on the question of the loss incurred in the maintenance of horses the department has taken contradictory views. For the reasons stated at the inception of this judgment, we direct that the case be laid before the Hon'ble the Chief Justice with the request for the constitution of a Full Bench.

Mr. N. P. Asthana, for the Applicant.
Messrs. G. S. Pathak and C. B. Agarwala,
for the Opposite Party.

OPINION

Iqbal Ahmad, J.—The following questions have been referred to this Court for decision by the Commissioner of Income-tax under s. 66 (2), Income Tax Act (XI of 1922):

"(1) Was there any material on which it could be found that (a) the maintenance of the racing stable, and (b) the series of betting transactions did not constitute "business" of the assessee?"

(2) If so, was the assessee in the face of such a finding entitled to have the loss either (a) of Rs. 425 in the racing account, or (b) Rs. 7,458 in the betting account, or both losses, deducted from his assessable income for the year in dispute?"

I confess I have had considerable difficulty in dealing with the present reference and the difficulty, though partly due to the obscurity in which the relevant provisions of the Income Tax Act are involved, is in a large measure attributable to the slipshod manner in which the matter under consideration has been investigated and dealt with by the Income-tax authorities, and in particular to the extremely unsatisfactory form in which the questions referred have been formulated by the Commissioner. It is obvious that only questions of law can be referred to this Court for decision under s. 66, and the reference under that section must be accompanied by "a statement of the case" by the Commissioner. The "statement" must contain a full and exhaustive narration of the facts giving rise to the questions of law, so that this Court may straightway proceed to apply the law to the set of facts stated and be relieved from the

(2) 47 A 368; 86 Ind. Cas. 169; A I R 1925 All. 469; 23 A L J 65.

(3) 47 A 372; 86 Ind. Cas. 95; A I R 1925 All. 287; 23 A L J 63.

(4) (1932) A L J 588; 136 Ind. Cas. 742; A I R. 1932 P O 138; 59 I A 206; 59 C 1343; Ind. Rul. (1932) P O 156; 9 O W N 515; 36 O W N 653; (1932) M W N 618; 55 O L J 386; 34 Bom. L R 1033; 36 L W 63; 63 M L J 124 (P.O.).

necessity of enquiring as to what the real facts are. In the present case, what the Income-tax Officer and the Assistant Commissioner actually did was to decide the question of law without deciding the requisite questions of fact, and the statement of the case by the Commissioner is also conspicuous by an absence of a narration of such facts as would have greatly facilitated the answer to the questions stated above. Indeed the statement of the case by the Commissioner is so unsatisfactory that, at the inception of the hearing of the reference, I was tempted to refer the case back to the Commissioner under cl. (4) of s. 66 with the direction to re-state the case. But after hearing the arguments of both sides, I have come to the conclusion that, in all the circumstances, it is desirable to decide the questions of law that arise in the case, even though the available materials are scanty and it would have been more satisfactory if the facts were ascertained in greater detail. The dispute in the present case is with respect to the assessment year 1933-34 and it is about time that that dispute is set at rest. Further it was stated at the bar that the very questions of law that arise in the present case did arise in connection with the assessment of the income of the assessee in the subsequent years and the assessments for those years have not been finally made in view of the pendency of the present reference. I therefore proceed to answer the questions of law raised in the present reference.

The facts stated by the Commissioner are as follows: Raizada Inder Sen, the assessee, is a money-lender and deals in precious stones. He also owns three horses, maintains racing stable and runs the horses in races. He bets in races on his horses and other horses. The assessee keeps account books in the regular course of business and in those books an account styled as the "racing account" is maintained. In the racing account the stakes money received from the Race Clubs and the amounts won on his bets by the assessee are entered on the credit side and the losses in betting and the expenses incurred in the maintenance of horses and the racing stable are entered on the debit side. The stakes money represents the prize paid to the assessee as the owner of the horses which won the races. In the "accounting year," according to the entries in the account book, the assessee suffered a loss of Rs. 7,458 in betting and Rs. 425 in running the horses at the races, but made

profit in money-losing business and in the purchase and sale of precious stones. During the assessment year 1933-34 the assessee claimed set-off with respect to the losses incurred by him in the maintenance of racing stable and on bets against the profits made by him in accordance with the provisions of s. 24 (1) of the Act which provides that:

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in s. 6, he shall be entitled to have the amount of the loss set-off against his income, profits or gains under any other head in that year."

The Income-tax Officer, relying on the decision of Rowlatt, J., in *Graham v. Green* (1) declined to allow set-off as regards the losses in betting and, in the course of his order quoted the following observations made by Rowlatt, J., in his judgment:

"Now we come to the other side, the man who bets with the book-maker, and that is this case. These are mere bets. Each time he puts on his money at whatever may be the starting price, I do not think he could be said to organize his effort in the same way as a book-maker organizes his. I do not think the subject-matter from his point of view is susceptible of it. In effect all his doing is just what a man does who is a skilful player at cards, who plays everyday. He plays to-day and he plays tomorrow and he plays the next day, and he is skilful on each of the three days, more skilful on the whole than the people with whom he plays and he wins. But I do not think that you can find, in his case, any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language which I think presents great difficulty of thought. There is no tax on habit. I do not think 'habitual' or even 'systematic' fully describes what is essential in the phrase 'trade, adventure, profession or vocation.' All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains."

The Income-tax Officer also declined to allow set-off as regards the loss incurred by the assessee in the maintenance of horses and running them in races on the ground that the loss did not arise in the course of a vocation or profession." In this connexion he remarked that:

"The assessee indulges in this hobby by way of pastime and it is not done in the nature of profession. The loss sustained by him or the income made in pursuance of this pastime do not attract the provisions of the Income Tax Act."

On appeal by the assessee the Assistant Commissioner upheld the order of the Income-tax Officer. The Assistant Commissioner did not differentiate between the

loss incurred in betting and the loss in the maintenance of the racing stable and held as a matter of law that "the efforts of the appellant in maintaining horses and betting on them and others, howsoever systematically organized they may be" do not "constitute a business." He held that the keeping of a stable "in an organized manner does not constitute a business." He went on to observe that "betting is only a hobby which does not amount to business." He also quoted *in extenso* the observations of Rowlatt, J., noted above.

Neither the Income-tax Officer nor the Assistant Commissioner took trouble to ascertain or to find as to in how many races the assessee's horses ran in the course of the accounting year, nor did they record any finding on the question as to on how many occasions did the assessee offer bets in races during that period. They treated the question of set-off raised by the assessee as an abstract question of law, and the fundamental idea underlying their decision is that the maintenance of racing stable and betting on the race course can, under no circumstances, fall under any of the heads of income enumerated in s. 6 of the Act.

Being aggrieved by the decision of the Assistant Commissioner, the assessee filed a joint application under s. 33 for review and under s. 66 (2) for reference of questions of law to this Court, and the prayer contained in the application was that, in the event of the Commissioner refusing to exercise the power of review vested in him by s. 33, he may refer the following question for decision to this Court:

"Whether the profit or loss of racing and betting is taxable;

(a) when a heavy investment has been made with an intention to earn regular profits from this line;

(b) when the line is a well-established one and profit and losses are running side by side throughout the year."

The application of the assessee was first considered by Mr. Kher, the then Commissioner, and he called upon the Income-tax Officer to submit a report showing (a) what amount was invested by the assessee in keeping a racing stable; and (b) whether the loss suffered by the assessee was on betting on his own horses or on horses belonging to others also. The Income-tax Officer then reported that in the year in question the assessee invested a sum of Rs. 4,200 in the purchase of three horses and two of those horses ran at the various races. He further reported that "the racing account contains a consolidated

record for bettings and stakes," and that the assessee incurred loss in betting on his own horses and on horses belonging to others.

Mr. Kher was succeeded by Mr. Verma who has made the present reference. The opinion expressed by Mr. Verma in the course of the reference is that "except in the case of the professional trainer and the bookmaker" the presumption is that racing and betting "are undertaken merely as a hobby" and the profit made or losses incurred in racing and betting cannot be taken into account in making the assessment under the Act. The questions that the Commissioner has referred for decision to this Court have been set out at the inception of this judgment, and the obvious comment that question No. 1 provokes is that the assumption underlying that question is that maintenance of racing stable and betting transactions do or at any rate may constitute "business" within the meaning of the Income Tax Act, even though that was the most debatable question in the case. Further it is manifest from the facts stated by the Commissioner that the questions of law that arose in the case were, whether the income accruing from (a) maintenance of racing stable, or (b) betting at the race course, comes within the purview of any of the clauses of s. 6. If it does, it is obvious that the loss resulting from such a venture is to be set-off in accordance with the provisions of s. 24. The Commissioner however framed these questions in most involved language and question No. 1 was in particular so framed as to make it doubtful whether it was a question of law. That question in effect amounted to an invitation to this Court to decide, whether there was any evidence to support the finding of the Assistant Commissioner that the maintenance of the racing stable and the series of betting transactions do not constitute business or, was that finding based on no evidence. It is needless to observe that this was a matter for the Commissioner to decide while exercising the power of review under s. 33 and was hardly a matter for the decision of this Court. While making these observations I am alive to the well-established proposition of law that the question of the accuracy or otherwise of an inference from proved facts is always a question of law and if the Commissioner had stated the proved facts and had asked this Court to decide as to whether on those facts the conclusion arrived at by the Assistant Commissioner

was correct in law, the question raised would undoubtedly have been a question of law. But this the Commissioner did not do.

I am constrained to make these observations as to the form of the questions in view of the limited jurisdiction given to this Court by cl. (5) of s. 66 which provides that "the High Court upon the hearing of any such case shall decide the questions of law raised thereby." In view of this provision it is not permissible for this Court to re-frame the questions referred by the Commissioner. To this effect is the decision of their Lordships of the Privy Council in *Commissioner of Income-tax B. & O. v. Maharajahdiraja of Darbhanga* (5). Their Lordships in that case made the following observations:

"The Commissioner unfortunately omitted to formulate any question of law arising out of this transaction. The duty of the High Court under s. 66, sub-s. 5, is to 'decide the questions of law raised' by the case referred to them by the Commissioner and it is for the Commissioner to state formally the questions which arise. Here the High Court itself formulated the question to be decided as being.... Their Lordships deprecate this departure from regular procedure, but in the circumstances have not thought it proper to decline to express their view on the question thus informally presented."

The unsatisfactory nature of the questions also inclined me to the view, at one stage of the arguments, to call upon the Commissioner to re-frame the questions. But, having regard to the wide scope of question No. 2, and primarily with the object of expediting the settlement of a dispute that dates back to the year 1934, I decided to answer the question of law that arises in the case. After all, the real question in the case is whether the losses suffered by the assessee can be set-off under s. 24 and this question comes within the purview of question No. 2 framed by the Commissioner. I am therefore in a position to decide the question of law raised without reframing the questions formulated by the Commissioner and this I proceed to do. In order to entitle an assessee to have the amount of the loss suffered by him in any particular year set-off against his income, profits or gains in that year it is necessary, in accordance with the provisions of s. 24, that the loss must be "under any of the heads mentioned in s. 6." The decision of the reference, therefore, depends on the

answer to the following question:

Does the income accruing from (a) maintenance of racing stable; or (b) betting at the race course, fall under any of the heads mentioned in s. 6? In order to satisfactorily decide this question it is necessary to keep in view the scope and the scheme of the Income Tax Act. By s. 4 (1) the Act is subject to the provisions contained in the Act, made applicable to.

"all income, profits or gains, as described or comprised in s. 6, from whatever source derived, accruing or arising, or received in British India or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

The following provision is then made by s. 6:

"Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely: (1) Salaries. (2) Interest on securities. (3) Property. (4) Business. (5) Professional earnings. (6) Other sources."

A reference to these sections puts it beyond doubt that the Act is of very wide application and subject to the exemptions contained in the Act, all income (barring allowable deductions in the computation thereof) from whatever source derived is chargeable to income-tax. This is further made clear by s. 12 (1) which enacts that

"the tax shall be payable by an assessee under the head 'other sources' in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)."

This section is so framed as to make the sixth head in s. 6, namely, "other sources," a true residuary group embracing within it all sources of income, profits and gains. These provisions are, however, subject to sub-s. (3) of s. 4 which makes the Act inapplicable to the classes of income specified therein. It follows that all income from whatever source derived is chargeable to income-tax unless it falls under any of the classes of income detailed in sub-s. (3) of s. 4. In other words, taxation under the Act is the rule and exemption the exception. All income from whatever source derived must, therefore, be chargeable to income-tax, and the burden of proving that a particular class of income is not so chargeable must necessarily lie on the person claiming exemption from the liability to pay income-tax. The view that I take is in consonance with the decision in *Commissioner of Income-tax, Madras v. Pan-*

(5) 60 I A 146; 142 Ind. Cas. 437; A I R 1933 P. C 108; 12 Pat. 318; Ind. Rul. (1933) P. C 77; (1933) M W N 439; 64 M L J 612; 37 L W 701; 37 O W N 598; (1933) A L J 527; 14 P L T 341; 35 Bom. L R 731; 57 C L J 318 (P. C.).

chapakesa Iyer (6). It was held in that case that s. 12 of the Act is sufficiently wide to bring into its net income, profits or gains from whatever source derived and it is for the person who receives the same to show that it is exempt from payment of income-tax and this can be done only by showing that the income is of a class specified in s. 4 (3) of the Act.

The maintenance of racing stable, or betting at the race course, does in some, if not in most cases result in income, profits and gains and the argument is, therefore, available to the assessee in the present case that the "income, profits and gains" from these sources fall within one of the heads mentioned in s. 6 or, at any rate, come under the omnibus head "other sources." He is, therefore, entitled to claim exemption for the loss sustained by him in the year in question in accordance with the provisions of s. 24, unless the department succeeds in showing that the income from these sources falls in any of the classes of income enumerated in sub-s. (3) of s. 4. Reliance has been placed on behalf of the department on cl. (vii) of sub-s. (3) of s. 4 which provides that the Act shall not apply to

"any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature....."

This clause was considered by this Court in: *In the matter of Chunni Lal Kalayan Das* (2) and it was held that the clause exempts from liability to income-tax only receipts of a casual and non-recurring nature, which are not receipts from business or the exercise of a profession, vocation or occupation by an assessee. It is argued by the learned Advocate-General that the receipts from the maintenance of racing horses and racing stable or bets at the race course are of a casual and non-recurring nature, and are not "receipts arising from business or the exercise of a profession, vocation or occupation," and, therefore, the Act has no application to such receipts. Mr. Pathak, the learned Counsel for the assessee, on the other hand maintains that the receipts from the maintenance of racing horses and racing stable, or receipts from bets at the race course (a) are not of a casual and non-recurring nature, and (b) even if such receipts are of a casual and non-recurring nature they arise from business or the exercise of a

profession, vocation or occupation; and, as such, cl. (vii) of sub-s. (3) of s. 4 has no application to the case.

The arguments of the learned Counsel for the parties necessitate the consideration of the following points: (1) whether receipts arising from the maintenance of racing stable and running the horses in races, or betting at the race course are of a casual and non-recurring nature; and (2) are receipts from the sources mentioned in the preceding question, receipts arising from business or the exercise of a profession, vocation or occupation? If either of these points is decided in favour of the assessee he would be entitled to the set-off claimed by him on account of the losses incurred in the year under consideration. I proceed first to deal with point No. 1 noted above. Neither the word "casual" nor the word "non-recurring" has been defined in the Act and these words must therefore be construed in their plain and ordinary sense. In Murray's Dictionary the word "casual" is said to mean:

(1) Subject to, depending on, or produced by chance; accidental, fortuitous.

(2) Occurring and coming out at uncertain times; not to be calculated on, uncertain, unsettled.

(3) Subject to chance or accident.

The word "recurring" connotes the idea of repetition and of occurring more than once. The winning of a particular horse in a particular race or the winning of bets at the race course is undoubtedly uncertain and a matter of chance, and the receipts from these sources are, in my opinion, therefore casual. But in order to attract the provisions of cl. (vii) the receipt must be both casual and non-recurring. If the receipt, though casual, is recurring, cl. (vii) can have no application and it is therefore necessary to decide whether or not receipts from the sources under consideration are of a non-recurring nature. Receipts from these sources, are in my judgment, not of a non-recurring nature. A person who maintains race horses and habitually runs them at the race course does so in the expectation of winning the races and getting stakes money and the receipt of stakes money, in most cases, may recur. It is to be remembered in this connexion that the words used in the Act are of "a casual and non-recurring nature." In view of these words, it is the nature of the receipt, irrespective of the facts of a particular case, that is to be the guiding factor. The receipt of stakes money by owners of racing stables is a matter of frequent occurrence and such receipts cannot therefore be charac-

(6) A I R 1932 Mad. 424; 137 Ind. Cas. 557; 62 M. L. J. 656; Ind. Rul. (1932) Mad. 398; (1932) M. W. N. 664; 35 L. W. 777.

terized as of a non-recurring nature. In every race, the stakes money must be paid to the owner of at least one of the horses that took part in the race. In short, the receipt of stakes money is not a phenomenon of rare occurrence, but is bound to follow every race. Similarly, bets yield receipts to bettor on horse racing and if a particular bettor wins on repeated occasions it is impossible to say that the receipts arising from bets in his case were not of a recurring nature. It is true that the winning of bets is a matter of chance, but this fact by itself does not make receipts from betting of a non-recurring nature. To put the matter in another way, bets on horse racing do bring receipts, though at irregular intervals, and such receipts are therefore of a recurring nature. To my mind, the volition of a particular individual in making bets on numerous or few occasions is immaterial for the decision of the question under consideration. Either receipts from bets are of a recurring nature or they are not. If they are of a recurring nature they must be so even in the case of an individual who offered bets on very few occasions. Persons who enter into forward contracts or speculate at the Stock Exchange may not make profit or gain in most of the transactions entered into by them; nonetheless, income accruing from these activities is of a recurring nature for the simple reason that such transactions do at times result in profit. The loss incurred by some of such persons must result in corresponding gain to the rest and, therefore, recurring loss and recurring profit must be the outcome of such activities. *A fortiori*, receipts from bets, irrespective of the frequency of the bets offered, are receipts of a recurring nature.

In the view that I take, point No. 1 must be decided in favour of the assessee. Before parting with point No. 1 noted above, I must observe that, from the facts available to us, the conclusion is irresistible that the assessee maintained racing stable on a systematic and commercial basis and habitually indulged in betting in horse racing. The amounts spent by him in purchasing horses and maintaining them and in making bets were entered in the account books in the regular course of business and so were the receipts made by him. The case before us is not a case of an individual who once or twice in the course of the year took his horses to the race course or offered bets on rare and isolated occasions. The loss incurred by the assessee in

betting was in the neighbourhood of a sum of Rs. 8,000 and this must have been due to habitual and systematic betting at horse racing in the city of Meerut. I now proceed to deal with point No. 2 noted above. The words "profession," "vocation" or "occupation" have not been defined in the Act. By s. 2(4)

"business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

This is also not an exhaustive definition of the words "business." The Act is, therefore, of no assistance in the determination of the question whether a particular activity or course of conduct constitutes business or the exercise of a profession, vocation or occupation, and the question must be answered by giving these words their plain and ordinary meaning. But, having regard to the provisions of s. 2 (4), it may be assumed that the word "business" has been used in the Act in a commercial and limited sense. There is however, no warrant in the Act to give the words "profession," "vocation" or "occupation" a limited meaning. The words "business," "profession" and "vocation" have been interpreted in some English decisions and though those decisions cannot, in view of the observations of their Lordships of the Privy Council in *Commissioner of Income Tax, Bengal v. Shaw Wallace & Co.* (4), at p. 590*, furnish an infallible guide, they are of assistance in interpreting the words under consideration. The word "business" has also been interpreted in two decisions under the Indian Income Tax Act. In *Commissioners of Inland Revenue v. Marine Steam Turbine Co., Ltd.* (7), it was observed by Rowlatt, J., that the words "business" in whatever sense it be understood, is undoubtedly an elastic word capable of wide extension; but it must be borne in mind that it is also a word which has two virtually distinct meanings. It may mean any particular matter or affair of serious importance. This meaning of the word may be illustrated by a few examples. When a private person goes to consult professionally his banker or his solicitor it may properly be said that he goes to see him on business. In the same way any serious matter affecting the resources of a trust, a school, a church or a charity may be spoken of as business relating to the particular institution, and a person dealing with any matter of that kind is dealing with a matter of business. To take a further example from the present case, if a director of the respondent company were to go to its premises for the purpose of doing some purely formal act, or, if a shareholder were to go to the premises for the purpose of looking into the accounts relating to these

(7) (1920) 1 K B 193; 89 L J K B 49; 121 L T 368; 35 T L R 599.

*Page of (1932) A. L. J. (Ed.)

royalties, he would no doubt be attending there on a matter of business. The word 'business,' however, is also used in another and a very different sense, as meaning an active occupation or profession continuously carried on, and it is in this sense that the word is used in the Act with which we are here concerned."

In *Commissioner of Income Tax, Bengal v. Shaw Wallace & Co.* (4), at p. 591*, their Lordships of the Privy Council observed that though the words used in s. 2 (4) are wide,

"but underlying each of them is the fundamental idea of the continuous exercise of an activity. Under s. 10 the tax is to be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him. Again, their Lordships think, the same central idea: the words italicized, are an essential constituent of that which is to produce the taxable income; it is to be the profit earned by a process of production."

In *Rogers Pyatti Shellac & Co. v. Secretary of State* (8), at p. 36, Mukerji, J, relying on certain English decisions held that

"the word 'business' is one of large and indefinite import and connotes something which occupies attention and labour of a person for the purpose of profit. The word means almost anything which is an occupation or a duty requiring attention as distinguished from sports or pleasure and is used in the sense of an occupation continuously carried on for the purpose of profits."

It would appear from these judicial pronouncements that the word "business" has been used in the Act to denote the continuous and systematic exercise of an occupation or profession with the object of making income or profit, and where the element of continuity is wanting in a particular activity that activity cannot be characterized as "business" within the meaning of the Act. "Profession" or "occupation" can amount to business only if it is continuously and systematically exercised. It follows that the words "profession" and "occupation" are words of wider import than the word "business." The question what amounts to a "profession," was considered in *Commissioners of Inland Revenue v. Maxse* (9), at p. 657 and Scrutton, L. J., observed that "it seems to me.....that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time."

(C) 52 O 1 (36); 83 Ind. Cas. 273; A I R 1925 Cal. 34; 40 O L J 110; 28 O W N 1074.

(9) (1919) 1 K B 647 (657); 88 L J K B 752; 120 L T 60; 63 S J 429; 35 L L R 348.

*Page of (1932) A L J—[Ed.]

It would appear from this observation that the word "occupation" is a word of wider import than the word "profession." In *Partridge v. Mallandaine* (10) the word "vocation" was held to be "analogous to 'calling,' a word of wide signification, meaning the way in which a man passes his life." No reported case has been cited by the learned Counsel on either side in which the word "occupation" used in s. 4 (3) (vii) may have been interpreted. But, in Murray's Dictionary the meaning given to the word "occupation" is as follow:

"The being occupied, or employed with, or engaged in something; that in which one is engaged; employment or business. . . . A particular action or course of action in which one is engaged, especially habitually or steadily."

It is obvious that the words "business," "profession," "vocation" and "occupation" have been used in s. 4 (3) (vii) in contradistinction to each other and, having regard to the scheme of taxation underlying the Act, the conclusion is irresistible that the word "profession" is of wider import than the word "business" and the word "vocation" is of wider import than the word "profession" and lastly "occupation" is a word of wider signification than the word "vocation." In other words, what may not amount to business may amount to profession and what may not amount to profession may amount to vocation and what may not amount to vocation may amount to occupation within the meaning of the Act.

Whether the maintenance of a racing stable does or does not in a particular case amount to "business" must depend on the facts and circumstances of each case. A company may be formed or a partnership may be entered into for maintaining race horses and for systematically running the same in races with the object of making money. In such a case the maintenance of race horses would, in my opinion, amount to business within the meaning of the Act. What difference does it then make if the same sort of activity with the same object is continuously carried on by an individual? The mere fact that the maintenance of race horses involves an element of sport cannot exempt it from the category of "business" if the activity is continuous and is carried on with the object of earning money. I find it impossible to lay it down as a general proposition of universal application that, in all cases where an element of sport or amusement is involved, a particular activity, howso-

(10) (1887) 18 Q B D 276; 56 L J Q B 251; 56 L T 203; 35 W R 276.

ever systematically and continuously exercised, cannot amount to business. The question in each case must be what was the dominant intention. If the dominant intention was to get income or make profits or gains the activity of the description referred to above must amount to "business."

It may be assumed that the assessee in the present case is a man in very affluent circumstances and he could afford to spend substantial amount for mere sport and pleasure, but this circumstance, in my opinion, cannot affect the answer to the question under consideration. The maintenance of race horses, though providing pleasure and sport and possibly securing to the assessee the satisfaction of possessing splendid specimen of such horses, was also calculated to bring income to the assessee and, having regard to the method adopted by the assessee in the maintenance of the racing stable and running the horses in races, it is fair to assume that the assessee pursued this activity with the object of making money. The activity, therefore, amounted to "business" within the meaning of the Act. It is to be noted in this connexion that it is not the case that only in the year under consideration the assessee maintained the horses. It has been pointed out above that it was stated at the bar that questions similar to the questions that arise in the present reference have arisen in connexion with the assessment for the subsequent years, and this shows that the horses have been maintained and run in races by the assessee year after year.

Even if the maintenance of race horses did not in the present case amount to business it did certainly amount to the exercise of "vocation" or "occupation" within the meaning of the Act. In arriving at this conclusion, I have not ignored the fact that the assessee carries on money-lending business and deals in precious stones. But a man may very well have more than one vocation or occupation. I have already pointed out that the words "vocation" and "occupation" are words of very wide import and they, in my judgment, embrace the systematic maintenance of racing stable such as we have in the present case. The question of betting by the assessee however stands on a slightly different footing. That betting is done by every individual with the object of making money is an axiomatic truth, and, as such, it must be assumed that the assessee offered bets with that intention. There is however not enough

material upon the record to show that the bets were offered by the assessee with such continuity and frequency as to amount to business, nor am I prepared to hold, on the available materials, that betting constituted profession in the present case. But, having regard to the enormous loss sustained by the assessee under this head, I am of the opinion that the assessee must have offered bets on numerous occasions and that betting, in the case of the assessee, did certainly constitute his vocation or occupation.

The decision in *Graham v. Green* (1) on which reliance was placed by the Income-tax Authorities was strongly pressed upon us by the learned Advocate-General. With all respect to the eminent Judge who decided that case I am not prepared to hold that betting, under no circumstances, can constitute vocation or occupation of a particular individual and, that the winnings from the same cannot amount to profits or gains chargeable to income-tax. The decision in *Graham's case* (1) was cited in *Cooper v. Stubbs* (11), and Warrington, L. J., made the following observations as regards the proposition laid down in that case:

"I desire to reserve for consideration, when, if ever, it comes before this Court, the question whether betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. That question, when it arises, will have to be decided on the facts of the particular case."

Similar observations were also made by Atkin, L. J. These observations show that the authority in *Graham v. Green* (1) is not beyond dispute.

For the reasons given above point No. 2 must also be decided in favour of the assessee.

To sum up, my reasons for arriving at the conclusions stated above are as follows: (1) In order to entitle an assessee to have the loss suffered by him set-off against his income the loss must be under one of the heads mentioned in s. 6. (2). S. 6 is exhaustive and embraces income from all sources whatsoever barring those classes of income which are specified in s. 4 (3) of the Act. (3) The income from betting or horse racing must therefore fall under one of the heads of income specified in s. 6 unless it comes within the purview of s. 4 (3) (vii) of the Act. (4) The burden of proving that the income from horse racing or betting comes under the exception clause viz., s. 4 (3) (vii), is on the department. (5) There are no materials upon the record to justify the

(11) (1925) 2 K. B. 753; 94 L. J. K. B. 903; 133 L. T. 592; 69 S. J. 743; 41 T. L. R. 614; 10 Tax Cas. 29.

conclusion that the income from horse racing or betting in the case of the assessee could not constitute his business, vocation or occupation, or that the income from these sources was both of a casual and of a non-recurring nature. (6) It follows that the burden that lay on the department in the present case was not discharged.

For the reasons given above I would answer the questions referred as follows :

1 (a). There was no material on which it could be held that the maintenance of the racing stable did not constitute the business of the assessee.

(b) There was no material on which it could be held that the series of betting transactions by the assessee did not constitute his business.

2 (a). The assessee was entitled to have the loss of Rs. 425 deducted from his assessable income for the year in dispute.

(b) The assessee was entitled to have the loss of Rs. 7,458 in the betting account deducted from his assessable income for the year in dispute.

Bajpai, J.—On an application made by the assessee Raizada Lala Inder Sen, head and representative of a Hindu undivided family, resident at 291 Clement Street, Meerut, under s. 66 (2), Income Tax Act (XI of 1922), the Commissioner of Income-tax, Central and United Provinces, has stated a case and referred two questions of law said to arise out of the appellate order of the Assistant Commissioner for our decision. The questions of law formulated by him are as follows :

"(1) Was there any material on which it could be found that (a) the maintenance of the racing stable, and (b) the series of betting transactions did not constitute 'business' of the assessee? (2) If so, was the assessee in the face of such a finding entitled to have the loss either (a) of Rs. 425 in the racing account, or (b) Rs. 7,458 in the betting account, or both losses, deducted from his assessable income for the year in dispute?"

The assessee is a money-lender and deals also in precious stones. For the assessment year 1933-34 he claimed a deduction of Rs. 8,064 on account of loss in what he described as the racing account. This deduction was claimed under s. 24 of the Act which provides that

"where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in s. 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year."

Section 6 of the Act says :

"Save as otherwise provided by this Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter

appearing, namely :

- (i) Salaries.
- (ii) Interest on securities.
- (iii) Property.
- (iv) Business.
- (v) Professional earnings.
- (vi) Other sources."

The assessee made profits in money-lending and in precious stones, but in the racing account he lost Rs. 7,454 on betting and Rs. 610 in running horses. It is conceded that out of this latter sum, Rs. 185 was spent in purchasing a stop-watch and that, therefore, this sum could not possibly be claimed as a deduction and the loss is thus reduced to Rs. 7,879. I have had the advantage of reading the judgments of my learned brethren Iqbal Ahmad and Braund and I am definitely of the opinion that the questions of law have not been properly formulated by the learned Commissioner. The orders of the Income-tax Officer and the Assistant Commissioner as printed on our paper book are scrupulously barren of facts and the assessee's contentions seem to have been decided more or less as questions of law. The learned Commissioner, to whom a combined application under s. 33 of the Act for review by him and under s. 66 (2) of the Act for reference to this Court was made, felt this difficulty and by his order dated May 17, 1936 called for a report from the Income-tax Officer, and the Income-tax Officer submitted his report on May 22, 1936 after examining the account books of the assessee for the year ending March 31, 1933 in the light of the observations made by the Commissioner in his order dated May 17, 1936, and some facts for the first time seem to have been ascertained by the Income-tax Officer and were stated in his report.

The Assistant Commissioner, when he passed his appellate order dated February 8, 1936, had as far as I can see, only the original order of the Income-tax Officer dated February 26, 1935 and he does not seem to have examined the account books of the assessee and anticipating the reasons, which I shall give later on, I feel inclined to say on the first question formulated by the Commissioner that there was no material, at least none has been mentioned in the appellate order of the Assistant Commissioner, on which he could find that (a) the maintenance of the racing stable and (b) the series of betting transactions did not constitute business of the assessee. It is clear that under s. 66 (2), a question of law should

arise out of the appellate order of the Assistant Commissioner and out of the materials which the Assistant Commissioner had before him when he passed his order; and I have already said before that the facts came to be investigated for the first time in some details—scanty as they are even now for deciding this particular case—when the Commissioner for his own benefit called for a report from the Income-tax Officer after the assessment was complete so far as the Income-tax Officer and the Assistant Commissioner were concerned.

I shall, however, out of deference to the wishes of my learned brethren constituting the Bench, not adopt the drastic measure of refusing to answer the questions of law or of sending back the case to the learned Commissioner because I feel that no fresh facts can probably come to light and we can only in a general manner decide the questions of law.

The facts that have been ascertained by the Income-tax Officer after an examination of the accounts in his second report may be briefly stated. In the books of the assessee there are two accounts for racing in the year in question; one is the horses account and the other is the racing account. The horses account is a very bald one. It relates to the purchase of three horses, one for Rs. 1,000, the second for Rs. 1,400 and the third for Rs. 1,800 and all of them were purchased between October 19, 1932 and February 20, 1933. The total price of the three horses comes to Rs. 4,200 which represents the assessee's investment for the year under consideration. Only the first two of the above horses ran at the various races in that year.

The racing account contains a consolidated record for bettings and stakes. The winnings on account of betting as well as stakes money received from the race clubs have been credited to it and the losses due to bettings and expenses incurred in connexion with the maintenance of horses, like bills for forage, money paid to the secretaries of the race clubs in the form of entry fee, jockey fee, servants pay, etc., have been debited to the account. The bets include bets on the assessee's own horses as well as on those belonging to others and it was not possible from the account to give separately the losses suffered due to betting on his own horses and on horses belonging to others, because no details were kept in the books. In the betting account the winnings are Rs. 3,910 and

the losses are Rs. 11,364. Thus, the net loss is Rs. 7,454. In the racing account the profits as represented by the stakes money come to Rs. 4,747 and the losses are Rs. 5,357. Thus, the net loss is Rs. 610. Out of this should be deducted a sum of Rs. 185 debited to the price of a stop-watch which obviously is inadmissible being a capital expense, and the loss is thus reduced from Rs. 610 to Rs. 425 on this head. The question that emerges out of these facts is whether the assessee is entitled to claim a deduction under s. 24 of the Act on account of the above losses. I would like to divide the racing account into two heads, one consisting of the maintenance of the racing stable and the other consisting of the betting transactions, although the two may be said to be intimately connected, for experience shows that a horse owner who maintains a racing stable can rarely escape the temptation of betting. The Income tax Officer and the Assistant Commissioner have quoted the observations of Rowlatt J., in *Graham v. Green* (1) *in extenso* and the Income-tax Officer has disallowed the set-off claimed on betting by an implicit reliance on the above English case, and as for the loss due to the maintenance of horses and running them in the various races he says that:

"It does not arise in the course of a vocation or profession. The assessee indulges in this hobby by way of pastime and it is not done in the nature of profession. The loss sustained by him or the income made in pursuance of this pastime do not attract the provisions of the Income Tax Act. The loss claimed by him on this account is therefore, disallowed."

The learned Assistant Commissioner appears to have mixed up the two accounts and observes as follows:

"I do not think the efforts of the appellant in maintaining horses and betting on them and others, however, systematically organized they may be constitute a business. A stable might be kept in an organized manner, but this by itself does not constitute a business. There is no system in betting, nor can it be called organized. A person who bets may think that he does so systematically but actually it is not the case, for there is no element of trade or business or even vocation in it. Betting is only a hobby which does not amount to business. The appellant is not a bookmaker whose efforts are organized and systematic and consequently the former cannot be said to be carrying on trade or business merely by keeping a stable and betting on horses."

After having said the above the Assistant Commissioner quotes the observations of Mr. Justice Rowlatt, in *Graham v. Green* (1). Now it is clear that the observations of Rowlatt, J., relate only to betting and

have no bearing on the question of racing establishment. With great respect to that learned Judge, I am afraid, I am not prepared to go to the extent to which he has gone and to say that it is not possible under any circumstance to bring the income from betting under the six heads given in s. 6, Income Tax Act, for, apart from the more or less well-defined first five clauses there is the sweeping sixth clause, namely 'other sources.' *Graham v. Green* (1) was considered by the Court of Appeal in *Cooper v. Stubbs* (11) and at p. 769* Warrington L. J. says :

"I desire to reserve for consideration, when, if ever, it comes before this Court, the question whether betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. That question when it arises, will have to be decided on the facts of the particular case"

and Atkin L. J. at p. 776* says :

"Like my brother Warrington I desire to reserve the question of what the position would be if these transactions had turned out, to be bets; but if the bets had been proved to be as continuous as these particular bets were, I express no opinion about it. I suppose the matter may some day arise in the Courts."

It is obvious that the English Court of Appeal in the above case was not quite happy about the decision of Rowlatt, J., in *Graham v. Green* (1), and I can conceive of a case where a person might be making his livelihood by bettings alone, or in addition to other sources of livelihood might be making an income out of bettings as well. Such a person might get into touch with the various racing establishments, might try to find out the capabilities of various horses maintained in those racing establishments and might evolve some system for betting and in any event might be known by the general public as a person who indulges constantly in bets, maintains a regular record of them and depends for his livelihood solely or mainly on betting. Like the two learned Judges Warrington, L. J. and Atkin, L. J., I would reserve the consideration of the question when a proper case arises and content myself by saying for the present that *Graham v. Green* (1) should not be considered by the Income-tax Authorities in this country as a case of universal application. The income from the maintenance of a racing establishment might in certain cases come within the head of 'business' and in certain other cases come within the head of 'other sources' and the exemption clauses s. 4 (3) (vii) might not apply.

The racing establishment consisting of the expenses incurred on moneys paid to the secretaries of the race clubs in the form of entry-fee, jockey-fee, pay of servants, travelling charges, etc., on the debit side and of the stakes money on the credit side stands on a different footing. This might be indulged as a hobby and a pastime or might be conducted on business lines which involves an element of commercial enterprise. In every case it will be a question of fact, the fact to be determined from surrounding circumstances, the surrounding circumstances being invoked in order to determine the underlying intention of the person concerned. I am aware of the danger of what I am saying. This might vest the Income-tax Authorities with undesirable powers but I am not prepared to assume that they will exercise these powers arbitrarily and it might further be possible in an extreme case to hold that the power was not judicially exercised and the question was a mixed question of fact and law. If however experience shows that there has been an abuse of such powers it will be time for the Legislature to step in to remedy the abuse, but I am convinced that we as Judges should not try to lay down any scientific test or tests. The Income Tax Act has not attempted to define 'income' and could not possibly define or describe 'other sources.' "Business" has only been described as including

"any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

What other things it includes the Income Tax Act does not say, nor have the words "profession, vocation or occupation" occurring in s. 4 (3) (vii) been defined anywhere in the Act; much less the words "casual and non-recurring nature" also occurring there. A common sense working definition or description will have to be adopted in each particular case. Their Lordships of the Privy Council in *Commissioner of Income Tax, Bengal v. Shaw Wallace & Co.*, (4), at p. 590* say :

"The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt, into 'income, profits and gains' but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall."

In the Full Bench case in *A. U. John v.*

*Pages of (1925) 2 K. B.—[Ed.]

*Page of (1932) A L J.—[Ed.]

Commissioner of Income Tax (12) to which I was a party, it was held that

"the observations of the Judicial Committee with regard to the question as to what amounts to income under the Income Tax Act in *Commissioner of Income Tax, Bengal v. Shaw Wallace & Co.* (4), referred to above, were not intended by their Lordships to be confined to the particular facts and the circumstances of the case which their Lordships were considering. Their Lordships intended to indicate that the element of periodical receipt or regularity or expected regularity of money return was an essential ingredient of 'income' under the Income Tax Act."

Applying, therefore, this definition of income to receipts from racing establishment or from betting, I am prepared to hold that it is possible to conceive of a case where receipts from either of these sources might come within the definition and the exemption contained in s. 4(3) (vi) might not apply, and in that case the assessee might be entitled to claim a set-off under s. 24 of the Act if a loss ensues there. Coming to the facts of the present case which are ever so meagre my view is that the assessee is not entitled to claim a set-off of losses either on the racing establishment account or on the betting account, and this is my general answer to the questions formulated by the learned Commissioner.

Braund, J.—This is a case stated by the Commissioner of Income-tax of the Central and United Provinces and referred to us under s. 66, Income Tax Act, 1922. The facts, so far as they are available to us, are very simple. The assessee is one Raizada Lala Inder Sen. He is the head of a joint Hindu family which carries on business in Meerut as money-lenders and dealers in precious stones. In the course of the financial year 1932-33, the assessee was minded to buy three race horses at an aggregate capital cost of Rs. 4,200. These horses he trained, or had trained for him, for racing. During the year ending March 31, 1933, the assessee ran these horses in various races as a result of which he received in stake-money a sum of Rs. 4,747 from various racing clubs in Northern India. The expenses however of the training, upkeep and running of the horses, as adjusted by the Income-tax Officer, amounted to Rs. 5,272. In the result therefore there was a loss on this account (which is called "the racing account") of Rs. 425.

The assessee however made bets during the year of assessment both on his own horses and upon horses not his own. We are given no facts relating to the volume (12) (1938) A L J 736; 176 Ind. Cas. 771; A I R 1938 All. 464; I L R (1938) All. 691; 1938 A L R 686; 11 R A 142.

or frequency of this betting, its distribution between bets made by the assessee on his own and upon other horses nor the size of the bets made, except that the nett result of these betting operations during the year of assessment was that they showed a nett loss of Rs. 7,454. The assessee appears to have entered these transactions in his books of account under two headings, namely "Horses Account" to which he debited the purchase price of the horses and "Racing Account" to which he debited his outgoings in respect of training, upkeep etc., and in which he also entered his losses and gains in respect of the bets he made.

These are the whole of the facts. To put the point in issue in its simplest terms, the assessee has claimed in respect of the year of assessment (1933-34) to be allowed a deduction of Rs. 8,061 (the aggregate of Rs. 425 and Rs. 7,454) under s. 24, Income Tax Act, upon the footing that it represents a loss of profits or gains in the year of assessment under one of the heads mentioned in s. 6 of the Act. Both the Income-tax Officer and the Assistant Commissioner of Income-tax decided against the assessee. The present case has been stated to us by the Commissioner who has expressed his own opinion to be that the assessee is entitled to the relief he seeks neither in respect of the loss of Rs. 425 incurred by him in maintaining his stable and running his horses nor in respect of the loss of Rs. 7,454 incurred by him on betting. He has taken the view that as regards both they were carried on "as a hobby and not by way of business." I think he was right. The actual question referred to us is in these terms:

"(1) Was there any material on which it could be found that (a) the maintenance of the racing stable, and (b) the series of betting transactions did not constitute 'business' of the assessee? (2) If so, was the assessee in the face of such a finding entitled to have the loss either (a) of Rs. 425 in the racing account or (b) Rs. 7,458 in the betting account, or both losses, deducted from his assessable income for the year in dispute?"

It will, perhaps, be convenient before discussing the form of, and deciding, the questions which the Commissioner has framed to refer to the relevant provisions of the Income Tax Act itself. It is obvious that to be assessable under the Act at all the "income" to be assessed must be such "income" as the Act applies to. What "income, profits and gains" are to be reached by the Act is to be found in s. 4 (1), as further 'described' in s. 6 of the

Act. And what "income" is not to be reached by the Act is to be found in s. 4 (3) which sets out various classes of 'income' to which the Act does not apply at all. It has to be noticed that by sub-s. (3) of s. 4 certain classes of "income" are declared not to be affected by the Act at all and, for myself, I find it difficult to reconcile the view of the Madras High Court expressed in *Commissioner of Income Tax, Madras v. Panchapakasa Iyer* (6) to which my learned brother has referred, either with the well-known principles for the construction of fiscal statutes or with the fact that, upon its face, the Income Tax Act is not made applicable to all income but only to those classes of income which by its own terms are not exempted. The words "profits and gains" which appear in the general charging section (s. 4 (1)) are not to be found in sub-s. (3) of s. 4. But, in my view, the word "income" as used in the sub-s. (3) of s. 4 embraces every form of receipt of the kind which but for the exemption would, or might, have been embraced by the words "income, profits or gains" in s. 4 (1). As has been pointed out by the Judicial Committee of the Privy Council in *Commissioner of Income Tax, Bengal v. Shaw Wallace & Co.* (4):

"The object of the Indian Act is to tax 'income,' a term which it does not define. It is expanded, no doubt into 'income, profits and gains,' but the expansion is more a matter of words than of substance."

It seems to me, therefore, that the words 'profits' and 'gains' in reality add nothing to the expression 'income' and that an incoming receipt of any of the classes exempted in s. 4, sub-s. (3) of the Act is one to which the Act does not, and never did apply.

The real question, therefore, which falls to be determined on this reference is whether any receipts (a) by way of stake money derived from the running of the assessee's horses in races and (b) from betting, or from either of those sources, subject of course to all proper adjustments in respect of outgoings or losses, would have been assessable to Indian income-tax under the Act if a profit had been shown on these accounts respectively. For, under s. 24 (1) it is only in such a case—that is to say, in the case of a loss of profits or gains under any 'assessable' head mentioned in the Act—that any question of a set-off of losses can arise.

The only head of sub-s. (3) of s. 4 of the Act which can possibly catch this case is head (vii), the effect of which is

that:

"(3) This Act shall not apply to the following classes of income:

* * * * *

(vii) Any receipts, not being receipts from business or the exercise of a profession, vocation or occupation, which, are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

The question whether by virtue of this clause the 'income' in dispute in this case is one to which the Act applies at all is, to my mind, the only material question involved in this reference, because, in itself, it embraces both the questions, first whether the assessee in doing what he did was exercising a "business," "profession," "vocation" or "occupation" and, secondly whether, if he was not exercising any of those things, the classes of receipts with which we are dealing, or either of them, were or was "of a casual and non-recurring nature."

Before giving what is, in my opinion, the proper answer to this question, I desire to say that I agree with what has been said as to the form of question propounded to us by the Commissioner. It is an unhappy form of question which I have met with before in cases of this kind. The question really is, as I have said, whether, on the facts as found by the Income-tax Officer, he was correct in law in holding (a) that the assessee was not carrying on a "business," "profession," "vocation" or "occupation" in the respects or either of them in reference to which he claims relief and (b), if he was not, whether any "receipts" in these respects were in law, on the facts found, "casual and non-recurring." I do not think that this criticism amounts to re-framing the questions asked by the Commissioner. It is intended to explain them as a preliminary to answering them.

Though it appears to have been assumed throughout these proceedings, both before the Income-tax Authorities and here, that the maintenance and training of the three horses ought to be treated as a separate transaction from the assessee's betting, I desire to say for myself that I am not altogether sure that, that on the facts is the right way of looking at it. I think they may just as easily, if not better, be regarded as one and the same activity. If in the result they should be held to constitute 'business,' I should myself think that they are one business and not two. And whether they are held to be an enterprise productive of receipts which are

"casual and non-recurring" or not, I should prefer to regard them in this case as one enterprise and not as two. But it makes no difference to the conclusion I have come to and I do not, therefore, propose to depart from what has been hitherto accepted as the right view.

In my judgment, neither the assessee's ownership, management and running of his three race horses nor his betting transaction can, in this case and on such facts as have been disclosed to us by him, be said to constitute his 'business,' his 'profession,' his 'vocation' or his 'occupation.' I should, for myself, be very unwilling to try to lay down any general definition of what a 'business,' 'profession,' 'vocation' or 'occupation' is, because it is a matter which, to my mind, must necessarily depend in every case upon the circumstances of the assessee, the particular things he does and the degree to which, and the object with which, he does them. A philatelist collects stamps for his own entertainment. A stamp dealer collects them for his profit. A country gentleman maintains a garden for his pleasure, while a market gardener or a florist does so for his profit. And yet in neither case would it be right to say that either the desire for, or an indifference to, profit, as the case might be, was an exhaustive test, for business and pleasure may well be combined. And still less is it possible to my mind to say that an actual profit would necessarily convert what was primarily a hobby or a pastime into a business. For I do not doubt that many stamp and curio collectors entertain a secret hope that they may one day by good chance and to their profit acquire a rare and valuable specimen. And I think they would be surprised to know, if that were to happen, that they had been carrying on a 'business.' The truth I think is in this, as in so many other cases, that no exhaustive test can be applied but that all the surrounding circumstances must be considered and common sense applied. If there is one test which is, as I think, more valuable than another, it is to try to see what is the man's own dominant object, whether it was to conduct an enterprise of a commercial character or whether it was primarily to entertain himself. If the latter was his real objective, I do not think that the circumstances that his hobby might possibly yield him a reward is conclusive of this question whether what he is doing constitutes a 'business,' 'profession,' 'vocation' or 'occupation' within the meaning of this Act.

In this case, the assessee was, as far as we can tell, a man well able to afford the pleasure both of keeping race horses and of betting. I think that in India, as in England men of means take a pride in possessing race horses and in exhibiting their horses, and themselves, on race courses. And the instinct to gamble is not the perquisite alone of a man of business. *Prima facie*, I think that, where the only facts known are that a well-to-do man owns and runs three horses and bets on them and other horses, he does so for his pleasure, even though that pleasure costs him Rs. 7,000 odd in a year. And nonetheless is this so by reason of the fact that he makes a note in his books of account what his pleasure costs him. Many men of method do that. And, indeed, one cannot dismiss from one's mind the possibility that such entries may be made for the very purpose of raising a claim such as the assessee is now making. Though I express this view, I do not desire it to be thought that, in my opinion, there are no circumstances in which a man can ever be said to be an owner of race horses, or a gambler, as a business proposition. I think that that would be going much too far. I think that it may well be that there are cases in which by the scale on which he conducts his racing or his gambling (whether on horses or in other ways), by the commercial methods adopted, by his declared intention or by the absence of any other means of livelihood, he may make it clear that his object is to make a 'business' of it. With great respect to that learned Judge, I am doubtful whether the decision of Rowlatt, J., in *Graham v. Green* (1) really faces the fact that however irrational it may be, gambling in some form is, nevertheless, for some people a means of livelihood. In *Cooper v. Stubbs* (11) at pp. 769 and 776* the English Court of Appeal, notwithstanding that *Graham v. Green* (1), was cited to them, expressly guarded themselves from deciding the question whether betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. I do not myself think that *Graham v. Green* (1) is necessarily an authority which ought to be relied upon in India on a matter arising under the Income Tax Act.

For these reasons, in my opinion, neither the assessee's activities on the race course itself nor his betting can, on the facts of

* Pages of (1925) 2 K. B.—[Ed.]

this case, so far as we know them, be held to constitute a 'business.' They certainly do not, in my opinion, constitute a 'profession' or a 'vocation,' and though in a sense they engage part of their owner's time, they equally do not constitute his 'occupation' in the sense in which, in my judgment, that expression is in its context, used in this Act.

A more difficult question however arises when we come to consider whether such profits (if made) would be of a "casual and non-recurring nature." It is to be observed that we are given no information as to the number of races run nor of the number of bets made. But I do not myself think that we ought to, or need, send this case back at this stage under s. 66 (4).

First, as to the betting, I have discarded the contention of the assessee that in this case he is proved to have been betting as a matter of 'business.' It follows, I think, that the true view is that he made a bet whenever he felt inclined to do so. He was not compelled to and, as far as we know, there was no method in his betting. I think therefore that the right way to look at this is that the assessee, whenever he felt inclined from time to time made a bet and not that he made a series of bets on a prescribed plan. He was free to stop whenever he liked. And if each bet is, as I think, an individual transaction, I can myself see nothing of a 'recurring nature' about it. It was not its nature to recur. If it did in fact recur with great frequency it might on that account become a 'business.' It may be true that, in fact, these bets did recur. But that was not the result of the 'nature' of the transaction but of the mere spasmodic volition of the assessee. They were not, to my mind, of a recurring 'nature' and the assessee has not shown us that in this case they did recur in such a way as to constitute them a 'business.' I think also, upon this line of reasoning, that they were 'casual'—'casual' in the sense that they were merely arbitrary acts dictated by the assessee's mood at the time of making them and following no set course of dealing. Nor can it be denied that whether or not any particular bet yielded a profit was a mere matter of chance. Whether the chance was a good chance or a poor chance (or, in other words whether the odds were short or long), a chance it remained and, in that sense, its proceeds were, I think, mere 'casual' receipts. I think that the word 'casual' in this section must be read as meaning the antithesis of

that which is governed by something more than mere chance, something out of which, according to the probabilities of business or to the known course of practical experience, a rational expectation of profit arises. And that does not, in my opinion, apply to a mere bet.

As to the management and running by the assessee of race horses, I think that exactly the same considerations apply. It was, in my view, a pastime, which might or might not—and probably would not yield a profit. It was in this particular case, I think, a pastime which has not been proved to have been even designed to yield a profit. The assessee has certainly not, on the facts we have, proved, in my opinion, that it was for him more than a mere amusement, notwithstanding that his losses have been noted in his books. It was, I think, a mere 'hobby' as the Commissioner has described it and, inasmuch as each race in which the assessee engaged his horse, was in itself a separate venture, I see nothing in any receipt derived from it that was not "of a casual and non-recurring nature." It should of course, be observed that it is the "receipts" which are by the Act required to be casual and non-recurring and not the occupation. I think however myself, as I have already said, that the better view of the whole matter is to regard the racing and the betting as one and not as two. And in that case, the same result follows.

In the result, I think that the questions referred to us ought to be answered thus: On the facts as found by the Income-tax Officer the maintenance, management and running in races of race horses by the assessee during the year of assessment and the betting of the assessee during that year, did not in law constitute the 'business,' 'profession,' 'vocation' or 'occupation' of the assessee nor any part of such 'business,' 'profession' 'vocation' or 'occupation,' and the receipts by the assessee from the said sources, or any of them, would not, if a profit had been derived therefrom, have in law constituted income, profits or gains of the assessee from 'other sources' within the meaning of s. 6 (vi), Income Tax Act, 1922; and, accordingly, the assessee is not entitled under s. 24 of the said Act to set-off any loss of profits or gains in the year of assessment in respect of the said maintenance, management and running of his race horses or in respect of the said betting against his income, profits or gains in that year under any other head of assessment.

By the Court.—The answers to the questions referred to this Court are as follows:

Iqbal Ahmad, J.—(1) There was no material on the record on which it could be found that (a) the maintenance of the racing stable, and (b) the series of betting transactions did not constitute business of the assessee.

(2) The assessee was entitled to have the loss (a) of Rs. 425 in the racing account, and (b) of Rs. 7,458 in the betting account deducted from his assessable income for the year in dispute.

Bajpal and Braund, JJ.—We answer both the questions referred to us together in these words:

That upon the materials before us the assessee is not entitled to claim a set-off of losses either on the racing establishment account or on the betting account.

The fee of the learned Advocate-General is assessed at a sum of Rs. 200. A copy of our judgments and of the order of the Court under the seal of the Court and the signature of the Registrar shall be sent to the Commissioner of Income-tax. In the circumstances of the present case we direct the parties to bear their own costs.

D.

Answered accordingly.

ODUH CHIEF COURT

Second Civil Appeal No. 54 of 1938

March 13, 1940

ZIA-UL HASAN, J.

SRI RAM—DEFENDANT—APPELLANT

versus

SITAL PRASAD AND ANOTHER—PLAINTIFFS
—RESPONDENTS

Hindu Law—Joint family—Partition—Separation taking place—Presumption as to remaining members—Partition—Shares—Mother's share—Succession to—Mother living jointly—Effect on succession—Stridhan.

When one member of a joint family separates, there is no presumption either that the remaining members have also separated or they continue joint; it is a question of fact in each case to be proved like any other fact by evidence. 87 Ind. Cas. 333 (1), relied on.

According to the Mitakshara Law, the mother or the grandmother is entitled to a share with sons or grandsons dividing the family estate between themselves but she cannot be recognized as owner of such share until the division is actually made as she has no pre-existing right in the estate except a right of maintenance. Where she is allotted her share in the partition yet her share is not partitioned she cannot be said to have become the owner of the share allotted to her and it remains in the joint family. 159 Ind. Cas. 1080 (2) and 46 Ind. Cas. 750 (3), relied on.

The rule that in cases governed by the Mitakshara the share allotted to a mother on partition is not her *stridhan* and that on her death it passes not to her *stridhan* heirs but to the sons or grandsons out of whose portion it was taken out, is a general rule applicable to a case in which all the members of a joint Hindu family have separated. It cannot apply to a case in which though one of the members of a family has separated the mother has continued to live jointly with the other members, for in the latter case it is obvious that the members who continued joint will form a joint Hindu family and succession to the property held by them will be governed by the rules of Hindu Law applicable to a joint family. 14 Ind. Cas. 1000 (4) and 103 Ind. Cas. 322 (5), explained.

S. C. A. against the order of the District Judge of Gonda, dated November 17, 1937.

Mr. S. N. Srivastava, for the Appellant.

Messrs. L. S. Misra and P. N. Chaudhry, for the Respondents.

Judgment.—This is a second appeal against a decree of the learned District Judge of Gonda confirming a decree of the learned Civil Judge of that place.

Mahabir, father of the appellant and of respondent No. 1 and grandfather of respondent No. 2, had three wives. By his first wife he had a son named Baleshar whose son is Kandhaiya, plaintiff-respondent No. 2, by his second wife he had a son Sital Prasad plaintiff-respondent No. 1, the third wife was Dharma who gave birth to two sons, Sri Ram the present appellant and Ram Raj. The latter died issueless.

In 1909 Baleshar son of Mahabir brought a suit for partition of the family property and in that suit Dharma also claimed a one-sixth share under the Hindu Law. Baleshar's suit was decreed for partition of his one-sixth share and that one-sixth share was on his application partitioned by the Revenue Court. Ram Raj died seventeen or eighteen years ago. Dharma died on June 6, 1936 and about three months later, Mahabir also died. On his death the suit which has given rise to this appeal was brought by Sital Prasad son of Mahabir, and Kandhaiya, son of Baleshar, for a two-thirds share of the shares left by Mahabir and Dharma.

The defence was two-fold. In the first place it was said that even after the partition in favour of Baleshar, Mahabir, his wife Dharma and his son Sri Ram, defendant, continued as members of a joint family so that on Mahabir's death the property devolved on Sri Ram by right of survivorship. In the second place it

was contended that Mahabir had made a will on February 10, 1934, in favour of Sri Ram in respect of the entire property.

The learned Civil Judge upheld the will in favour of the defendant and dismissed the plaintiffs' suit as regards Mahabir's own one-sixth share but gave the plaintiff a decree for two-fifths of Dharma's one-sixth share holding that on her death her share reverted to those from whose shares it was carved out. The defendant appealed but the learned District Judge upheld the decree of the trial Court.

The appeal has been argued before me on the first contention, namely, that in spite of the partition of Baleshar's share, Mahabir, his wife Dharma and Sri Ram his son continued joint so that the one-third share of Mahabir and Dharma came to the defendant-appellant by right of survivorship. It is now well-established that when one member of a joint family separates, there is no presumption either that the remaining members have also separated or they continue joint; it is a question of fact in each case to be proved like any other fact by evidence. In the case *Palani Ammal v. Muthuvenkatacharla Moniagar* (L. R. 52, I. A., 83) (1) it was held by their Lordships of the Judicial Committee that when one member of a joint family has separated, an agreement by the remaining members to continue undivided may be inferred from the way in which their business is carried on after the separation. Mulla in his *Principles of Hindu Law*, 8th Edition also says:—

"It is open to the non-separating members to remain joint and to enjoy as members of a joint family what remained of the joint family property after such partition. No express agreement is necessary for this purpose. The intention to remain joint may be inferred from the way in which their family business was carried on after their former co-parcener had separated from them, or it may be inferred from other conduct indicating such an intention." (*Vide para. 328*).

In the present case I think there is good evidence to show that after the partition of Baleshar's and Sital Prasad's shares, Mahabir continued joint with his son Sri Ram, defendant and his wife Dharma. In the first place the decree in the partition suit of Baleshar (Ex. 1) itself shows that Mahabir, Dharma and Ram Raj's shares were dealt with together as two-thirds share of the property. Then,

(1) 52 I A 83; 87 Ind. Cas. 333; A I R 1925 P O 49; 48 M I J 83; 6 P L T 133; 21 L W 439; (1925) M W N 330; 3 Pat. L R 126; 27 Bom. L R 735; 29 O W N 846; 23 A L J 746; L R 6 A (P O) 143; 48 M 254 (P O).

Ex. A-3 the partition proceedings of the Revenue Court also show that though Baleshar's two annas eight pies share was separated, the shares of all the other members of the family remained joint in the remaining thirteen annas four pies share. Further the *Khewat* for 1338 F. (Ex. A-6) shows that Sital Prasad and Kandhaiya's shares were separated but the ten annas eight pies share of Mahabir, Dharma and Sri Ram remained joint. The plaintiffs have nothing to show against this evidence. All that is contended is that in the partition suit of 1909 Dharma claimed a share and that a one-sixth share was allotted to her but the allotment of a share to Dharma was necessary for the purpose of determining Baleshar's share and is of no more significance. It is also natural that Mahabir should continue to live jointly with his last wife and her children.

In *Pratapmull Agarwalla alias Pratapmull Bagaria v. Dhanabati Bibi alias Dhanoo Bibi*, (1936 O. W. N. 1) (2) their Lordships of the Privy Council have held that according to the Mitakshara Law, the mother or the grandmother is entitled to a share with sons or grandsons dividing the family estate between themselves but she cannot be recognized as owner of such share until the division is actually made as she has no pre-existing right in the estate except a right of maintenance. In *Raoji Bhikaji Kondkar v. Anant Laxman Kondkar*, (I. L. R., 42 Bom. 535) (3) in which a grandson of a Hindu had sued for partition against his grandmother and an uncle, the Bombay High Court also held that until the actual partition was effected no share in the estate passed to the ownership of the widow and therefore the share assigned to her remained an integral part of the estate available for division among the heirs of her husband. In the present case we have seen that though Dharma was allotted a one-sixth share in the partition yet her share was not partitioned so that she cannot be said to have become the owner of the one-sixth share allotted to her and it remained in the joint family constituted by Mahabir, Sri Ram, defendant, and herself.

The learned Counsel for the plaintiffs—

(2) (1936) O W N 1; 159 Ind. Cas. 1080; A I R 1936 P O 20; 1936 O L R 49; 1936 A I R 82; 8 R P O 124; (1936) M W N 5; 2 B R 198; 40 O W N 193; 17 P L T 45; 62 O L J 453; 19 N L J 1; 43 L W 177; (1936) A L J 89; 70 M L J 296; 38 Bom. L R 323 (P O).
(3) 42 B 535; 46 Ind. Cas. 750; 20 Bom. L R 671; A I R 1918 Bom. 175.

respondents relies on para. 126 (2) of Mulla's Hindu Law in which reference has been made to the Privy Council case of *Debi Mangal Prasad v. Mahadeo Prasad*, (L. R. 34 All., 234) (4) in which it was held that in cases governed by the Mitakshara the share allotted to a mother on partition is not her *stridhan* and that on her death it passes, not to her *stridhan* heirs but to the sons or grandsons out of whose portion it was taken out. He also relies on the case of *Munni Lal v. Phula*, (L. R. 50 All., 22) (5) in which the case of *Debi Mangal Prasad v. Mahadeo Prasad* (4) was followed. The rule laid down by their Lordships of the Privy Council is obviously a general rule applicable to a case in which all the members of a joint Hindu family have separated. It cannot in my opinion, apply to a case in which though one of the members of a family has separated the mother has continued to live jointly with the other members, for in the latter case it is obvious that the members who continued joint will form a joint Hindu family and succession to the property held by them will be governed by the rules of Hindu Law applicable to a joint family.

I am therefore of opinion that the plaintiffs are not entitled to any share in the one-sixth share allotted to *Mst. Dharma* in the partition of 1909.

The appeal is therefore decreed, the decrees of the lower Courts modified and the plaintiffs' suit against the defendant is totally dismissed with costs in all the Courts.

D.

Appeal decreed.

(4) 34 A 234; 14 Ind. Cas 1000; 9 A L J 263; 11 M L T 217; 16 O W N 409; (1912) M W N 324; 14 Bom. L R 220; 15 O L J 344; 22 M L J 462; 39 I A 121 (P.O.).

(5) 50 A 22; 103 Ind. Cas. 322; 25 A L J 772; A I R 1927 All. 679.

RANGOON HIGH COURT

Criminal Miscellaneous Application No. 19 of 1939

July 17, 1939

MYA BU AND MOSELY, J.J.

ADVOCATE-GENERAL

versus

MAUNG OHIT MAUNG AND ANOTHER

—RESPONDENT

Contempt of Courts Act (XII of 1926), s. 2—Sub-Divisional Magistrate holding enquiry under s. 176, Criminal Procedure Code (Act V of 1898), is

Court Subordinate to High Court within meaning of Act.

The words 'Subordinate Court' in the Contempt of Courts Act were used in a wide sense as including any Court over which the High Court has superintendence for the purposes of s. 85, Govt. of Burma Act, 1935, that it is to say, all Courts subject for the time being to its appellate jurisdiction. The Sub-Divisional Magistrate when holding an inquiry under s. 176, Criminal P. O., is acting as a Court Subordinate to the High Court for the purposes of the Contempt of Courts Act.

Mr. U Thein Maung, Advocate-General, for the King.

Mr. U E Maung, for the Respondents.

Mosely, J.—The preliminary point in this case is whether the proceedings in question which were criticized in the newspaper were the proceedings of a Court subordinate to the High Court. The Contempt of Courts Act, XII of 1926 as amended by the Govt. of Burma Adaptation of Laws Order of 1937 reads as follows:

"The High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to it as it has and exercises in respect of contempts of itself:

Provided that the High Court shall not take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the I. P. O."

Section 4 (m), Criminal P. O., defines "judicial proceeding" as including any proceeding in the course of which evidence is or may be legally taken on oath. The proceedings in question were Criminal Miscellaneous Trial No. 4 of 1939 of the Eastern Sub-Divisional Magistrate, Rangoon, where an inquiry or inquest was held into the cause of death of one Aung Gyaw under s. 176 (1), Criminal P. O. This inquest was held on a report made by a Police Officer under s. 174 of the Code, and was held in addition to the investigation held by the Police Officer. Section 176 enacts that the Magistrate holding the inquiry shall have all the powers in conducting it which he would have in holding an inquiry into an offence. He shall record the evidence taken by him in any of the manners hereinafter prescribed, that is to say, either summarily or fully, as in a warrant case. It appears, as a matter of fact, that the evidence was not recorded on oath nor read over to the witnesses, but that is immaterial, as all that is required by the definition of "judicial proceeding" is that it shall be one where evidence may be legally taken on oath.

A finding was arrived at by the Magis-

trate in this enquiry that Maung Aung Gyaw's death was due to a fracture of the skull caused by an injury received during a clash between the Police and the general crowd of people on the scene, and that death was due to misadventure. For the respondent, *In the matter of Troylokhanath Biswas* (1) was quoted, where it was held that a report made by a Magistrate in an inquest held by him could not be considered part of a "judicial proceeding" as that was defined in s. 4, Criminal P. O., of 1872. The definition there is "any proceeding in which any judgment, sentence, or final order is passed." The definition has since been changed, but as was said in a subsequent case, *In re Laxminarayana Timmanna Karki* (2) that former case being confined to the question whether the report was part of a judicial proceeding cannot be considered to be an authority for the proposition that the inquiry of which the report is not part under s. 176 is not a judicial proceeding. This last case was one of 1928 and governed by the wording of the present Criminal P. O. It was said there that the Magistrate is empowered to hold an inquiry into the cause of death, and if he does so, is invested with all the powers which he would have in holding an inquiry into an offence. That would bring the proceedings within the meaning of an 'inquiry' as defined by s. 4 (1) (k), Criminal P. O., and of a 'judicial proceeding' as defined by s. 4 (1) (m). It was pointed out that cl. (3), s. 435 of the Code of 1898 expressly excluded from the revisional powers of the High Court inquiries under s. 176. By so doing the Legislature, it was said, seemed to have recognized the fact that those proceedings being judicial would fall within the scope of s. 435, unless they were expressly excluded. Clause (3), s. 435, has since been repealed by Act XVIII of 1923, s. 116, and no longer forms part of s. 435 of the Code. The learned Judge said that in his opinion there was nothing to debar the High Court from exercising its jurisdiction under ss. 435 and 439, Criminal P. O., in matters falling under s. 176. With these propositions of law we would respectfully concur. It might be added that ordinarily it would be rare for the High Court to interfere in revision with proceedings held under s. 176 of the Code, but the case dealt with in *In re Laxminarayana Timmanna Karki* (2) was an

exceptional case where the Magistrate's proceedings had unwarrantably been adopted by the Collector and District Magistrate and that interference was itself put a stop to in revision by the High Court.

There can be no doubt, and it is not now seriously contended to the contrary, that the proceedings of the Magistrate holding this inquiry under s. 176 of the Code were judicial proceedings. In our opinion, a Magistrate holding judicial proceedings in which it is necessary for him to come to a finding as to the cause of death and as to the person or persons, if anybody, responsible for that death, must be considered to be acting as a 'Court.' 'Court' is not defined in the Criminal P. O. It is defined in the Evi. Act as including all Judges and Magistrates and all persons except arbitrators legally authorized to take evidence. 'Court of justice' has been defined in the I. P. O., s. 20, as denoting a Judge or body of Judges, and the word 'Judge' itself includes, *vide* s. 12, every person empowered to give in a criminal proceeding a definitive judgment. The illustration shows that a Magistrate exercising jurisdiction in cases where he can pass sentence is a 'Judge' though not when he is merely committing to Sessions. It is clear that this definition, though sufficient for the purposes of the I. P. O., is not wide enough here. For the purposes of s. 195, Criminal P. O., (which lays down the cases where sanction of a Court is necessary for cognizance of an offence, such as perjury), it has frequently been held that the word 'Court' has a wider meaning than that defined in the I. P. O., see for example *Nando Lal Ganguli v. Khetra Mohan* (3) at p. 588; and must include a tribunal empowered to deal with a particular matter and authorized to receive evidence bearing on that matter in order to enable it to arrive at a determination.

It is evident that a Magistrate, holding an enquiry into the cause of death, who must come to a finding as to what caused that death comes within this definition. We have no doubt that the word 'Court' is used in the Contempt of Courts Act in this latter wide sense. It is not contended that if the Court of the Eastern Sub-Divisional Magistrate was a Court for the purposes of this section, it was not a Court subordinate to the High Court. It is clearly a Court inferior to the High Court for the purposes of s. 435, Criminal P. O.,

(1) 3 C 742.

(2) 30 Bom. L R 1050; 112 Ind. Cas. 567; A I R 1928 Bom. 390; 29 Cr. L J 1063.

(3) 45 C 585, (588); 44 Ind. Cas. 331; A I R 1918 Cal. 932; 27 C L J 463; 19 Cr. L J 315.

and we have no doubt that the words 'Subordinate Court' in the Contempt of Courts Act were used in a wide sense as including any Court over which the High Court has superintendence for the purposes of s. 85, Govt. of Burma Act, 1935, that it is to say, all Courts subject for the time being to its appellate jurisdiction. We would, therefore, hold that the Eastern Sub-Divisional Magistrate when holding an inquiry under s. 176, Criminal P. C., was acting as a Court subordinate to this Court for the purposes of the Contempt of Courts Act.

s.

Order accordingly.

OUDH CHIEF COURT

Civil Revision Application No. 48 of 1937

March 13, 1940

RADHA KRISHNA, J.

KASHI PRASAD AND ANOTHER—DEFENDANTS
—APPLICANTS

versus

Mst. SAJJADI BEGAM—PLAINTIFF—
OPPOSITE PARTY

Contract—Proposal and acceptance—Rent—Landlord and tenant—Landlord sending notice of enhancement of rent—Tenant protesting—Tenant continuing in possession—Liability for enhanced rent.

It is not open to a landlord to claim enhancement of rent simply by serving a notice giving expression to his wish that he wants enhanced rent for the premises. There may be contract either express or implied by conduct. Where a landlord serves a notice demanding enhancement at a certain rate upon the tenant and the tenant agrees to pay that enhancement either in express terms or by his conduct in not protesting against it and continuing to occupy the premises, he becomes liable for the enhancement, but where he lodges a protest against the enhancement, whether that protest is based upon tenable or untenable grounds, it cannot be said that there has been any implied acceptance of the proposal on behalf of the landlord and no contract has come into existence and the tenant is not liable for the enhanced rate of rent. What is material is whether there is an acceptance of the proposal by conduct express or implied or not. 145 Ind. Cas. 647 (1), relied on.

O. R. App. of the order of the Judge Small Cause Court, Lucknow, dated February 12, 1937.

Mr. M. L. Tilhari, for the Applicants.

Messrs. D. K. Seth and H. H. Zaidi, for the Opposite Party.

Order.—The plaintiffs-opposite party filed a suit for recovery of Rs. 87 as arrears of rent for a shop situated in Goldarwaza Street, Lucknow. This suit was filed on January 19, 1937. Before filing the suit two notices had been issued

by the plaintiffs against the defendants, one dated October 30, 1936 and the other dated November 22, 1936. The purport of these notices was to the effect that the defendants should accept to pay Rs. 20 as rent instead of Rs. 13 per month or they should vacate the shop on November 22, 1936 and in case the shop was not vacated the rent would be Rs. 50 per mensem. Exhibit A-6 dated December 22, 1936, shows that the defendants-applicants sent a sum of Rs. 50 to the opposite party on the allegation that four months' rent amounting to Rs. 52 was due out of which Rs. 2 had been paid before and the balance of Rs. 50 was being remitted. This money order seems to have reached the plaintiffs on December, 23, 1936, and refused on their behalf by their general agent on the ground that as the defendants had not complied with the notice dated October 30, 1936, the money order was being returned as unaccepted. It is further necessary to note that the defendants sent a written protest against enhancement of rent as well as ejectment by means of a registered letter dated December 23, 1936, (Ex. 8).

The Court below held that the defendants were defaulters as in reply to the notices for enhancement they set up tenancy for two years which was not established. It held that enhancement of rent up to Rs. 50 was unreasonable, and decreed the claim at Rs. 20 per mensem. Ultimately a decree for Rs. 57 was passed.

The defendants have come up in revision, and the learned Counsel for the applicants urges that the plaintiffs were not entitled to any enhancement and that the refusal by the plaintiffs of their money order, which reached them before they filed the suit, was wholly unjustified, and that the defendants should not be saddled with costs of the suit.

After hearing the Counsel for the parties, I am of opinion, that both the contentions of the learned Counsel for the applicants must be upheld. An agreement for payment of certain amount of rent is a matter of contract between the parties. It is not open to a landlord to claim enhancement of rent simply by serving a notice giving expression to his wish that he wants enhanced rent for the premises. There may be contract either express or implied by conduct. Where a landlord serves a notice demanding enhancement at a certain rate upon the tenant and the tenant agrees to pay that enhancement

either in express terms or by his conduct in not protesting against it and continuing to occupy the premises, he becomes liable for the enhancement, but where he lodges a protest against the enhancement, whether that protest is based upon tenable or untenable grounds, it cannot be said that there has been any implied acceptance of the proposal on behalf of the landlord and no contract has come into existence. The law on the point has been very clearly discussed in *Mohammad Noor v. Mirza Ashiq Beg* reported in I. L. R. 9 Lucknow, p. 112, (1), which fully covers the present case. The facts of the present case clearly show that when enhancement was proposed by the landlord, the defendant-tenants protested against the enhancement of rent and their ejection from the premises by means of a written letter. The Court below seems to have been of opinion that there was no value in this protest as they had not succeeded in making out the ground of protest by evidence in the present case, but, as I have expressed above, the question whether the protest is based on good ground or bad ground is immaterial. What is material is whether there is an acceptance of the proposal by conduct express or implied or not.

In disagreement with the Court below, I therefore hold that the plaintiffs opposite-party were not entitled to enhancement. A decree for Rs. 50 only will, therefore, be passed instead of Rs. 57 as passed by the lower Court. This application is allowed to that extent.

As regards costs, the conduct of the opposite-party in refusing the sum of Rs. 50, which was sent to them by money order and which was the full amount of arrears, according to the terms existing between the parties at that time, was most unjustified. If the plaintiffs had accepted that money order even under the protest, their suit would have been dismissed in its entirety. My order in respect of costs, therefore, is that the plaintiffs opposite party will bear the costs of the defendants-applicants in this Court as well as the Court of trial.

D. Application allowed.

(1) 9 Luck. 112; 145 Ind. Cas. 647; 6 R O 56; 10 O W N 1000; A I R 1933 Oudh 465.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Appeal No. 120 of 1939

October 20, 1939

DAVIS, J. C. AND LOBO, J.

ALLAHWARAYO DARYAKHAN—

APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 164—Admission of incriminating facts by accused to Magistrate under s. 164 or to Court during trial—Admissibility under ss. 18 to 21, Evidence Act (I of 1872).

Considerations which attach to the question of the admissibility of a confession made under s. 162, Criminal P. C., are different from the considerations which attach to a confession made before a Magistrate. The protective provisions of s. 162, which apply to statements by accused persons to the Police, or at least to accused persons who are at first witnesses, have their origin in the infirmities which it is believed, may affect the evidence of the Police in India as to statements made by accused persons. Such considerations are obviously not applicable to statements made to Magistrates either under s. 164 or s. 342. An admission of incriminating facts made by an accused person to a Magistrate under s. 164, or a statement made to the Court during the course of the trial is admissible in evidence for what it is worth against the person who makes it under ss. 18 to 21, Evi. Act, 1872. Ind. Cas. 6 (2), relied on.

Cr. A. against conviction and sentence passed by the Third Additional Sessions Judge, Hyderabad, dated May 10, 1939.

Syed M. Aslam, for the Appellant.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, J. C.—The appellant in this case is one Allahwarayo, son of Daryakhan, and he has been convicted by the Third Additional Sessions Judge of Hyderabad of the murder of one Bhaikhan and sentenced to transportation for life. The case of the prosecution is that Hayat, the son of the murdered man Bhaikhan, was on terms of intimacy with Ohangi, the sister of the appellant, and he at her request took her away and concealed her in the jungle. On the intervention of good men however Ohangi was restored to her relations but feeling between the two parties was bad. A few days before the offence Daryakhan, the appellant, his son, and Bachal, a cousin, waited for Hayat and his companion Sain Bakhsh as they returned from grazing goats, and Hayat only saved himself by taking refuge in a mosque. Bhaikhan, the murdered man, therefore forbade Hayat to take his goats in the jungle and took them himself. One Iso was grazing his goats near by and he was following his

FEDERAL COURT

Appeal from Patna High Court

March 5, 1940

MAURICE GWYER, C. J., SULAIMAN

AND VARADACHARIAR, JJ.

LACHMESHWAR PRASAD SHUKUL

AND OTHERS—APPLICANTS

versus

GIRDHARI LAL CHAUDHURI

AND OTHERS—RESPONDENTS

Case No. 14 of 1939

Federal Court Rules—O. X, rr. 1, 2 and 3—Appeal—Failure to deposit printing costs—Appeal not yet admitted—Non-compliance with O. X, rr. 1, 2 and 3 of Federal Court Rules, if can be excused—Privy Council Rules—Applicability to Federal Court—Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), ss. 205 (1), 214—Federal Court Rules, O. XXXVII, r. 1—Civil Procedure Code (Act V of 1908), ss. 109, 111-A, 122, O. XLV, rr. 7, 9, 17.

Rules of the Federal Court are framed to be kept and not to be broken; but they are framed for the purpose of assisting justice and not for the purpose of enabling it to be defeated. If, therefore, a strict adherence to the rules is likely to deprive a litigant of advantages which the Provincial Legislature clearly intended to give him, by the new Bihar Act of 1939 then the Court may properly exercise the dispensing power conferred by O. XXXVII, Federal Court Rules in order that substantial justice may be done. [p. 671, col. 2.]

If the justice of the case requires it, Federal Court is entitled to excuse the applicants from compliance with so much of O. X of the Federal Court Rules as requires them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within sixty days of the admission of the appeal by the High Court. [p. 672, col. 2.]

But if the litigants ask for the indulgence of the Federal Court, it is necessary for them to show the utmost good faith and to make a complete disclosure of all relevant facts. [p. 674, col. 1.]

Per Sulaiman, J.—There are several considerations which show that the provisions in the Privy Council Rules were never intended to be applicable to appeals to the Federal Court. [p. 674, col. 1.]

Rule 9 of the Privy Council Rules of February 9, 1920, has not been made applicable to Federal Court appeals and the High Court has no power to extend the time fixed by O. XLV, r. 7 of the Civil P. C.

Mr. Raghbir Singh, Advocate, Federal Court, instructed by Mr. T. K. Prasad, Agent, for the Applicants.

Mr. Janak Kishore, Advocate, Federal Court, instructed by Mr. G. Sahay, Agent, for the Respondents.

Gwyer, C. J.—This is an application under O. XXXVII of the Federal Court Rules for leave to be excused from compliance with the requirements of certain of the rules. The applicants were the defendants in the proceedings below and desire to appeal to the Federal Court from a decree obtained against them for a

substantial amount in the Court of the Subordinate Judge, Muzaffarpur, and upheld on appeal (with certain modifications) by the High Court at Patna on December 19, 1938. As in other cases which have recently been before this Court, the defendants had relied upon provisions of the Bihar Money-lenders Act, 1938, but the High Court, following an earlier decision of their own, held that those provisions were void as being repugnant to an existing Indian Law. A certificate under s. 205 (1) of the Constitution Act was granted; and, the formal decree having been drawn up on March 13, 1939, the applicants petitioned the High Court to have their appeal to this Court "admitted" under the provisions of O. XLV of the Civil P. C., which has been extended, with appropriate modifications and adaptations, to appeals to the Federal Court by the Govt. of India (Adaptation of Indian Laws) Order, 1937. O. XLV, r. 7, as adapted, requires an appellant (*inter alia*), before his appeal can be "admitted," to deposit within a specified period the amount required to defray the expense of printing the record of the suit. In the present case the sum required (Rs. 253-3-0) has not been deposited before May 27, 1939, the date on which the period expired. On September 1, the applicants filed an application for an extension of the time for making the deposit, alleging absence of means as a reason for the delay. A Full Bench of the High Court heard this application with two others of the same kind, and by a majority held that they had power to extend the time. In the other two cases an extension was granted, but in the case of the present applicants it was refused on the ground that no application had been made until long after the time for making the deposit had expired and no explanation given for the delay except a vague statement that there was difficulty in obtaining the money.

In these circumstances the applicants applied *ex parte* to this Court asking to be "excused from compliance with the Rules of the Federal Court" and for an enlargement of time so that they might take steps to get the records transmitted to the Federal Court. It appeared to us that an important question was raised by the application and we therefore directed that the application should be renewed after notice had been given to the respondents. We pointed out however that we had no power to entertain any appeal from

alienation took place where such co-parcener's cause of action has been barred. And by parity of reasoning, just as where the right of action possessed by the co-parceners existing at the time of the alienation if barred, is lost, not only by them but also by any member of the family later-born if they allowed the period of limitation to expire, so it is also lost if those persons who were in existence at the time of the alienation lost that cause of action by death before there came into existence the after-born child, for the after-born child has got no right of action in himself, no individual and separate cause of action that springs up immediately he is born, but his right to contest, if any, is derived from the right that those in existence at the time of the alienation who were not consenting had, and that right is lost to him when it is lost to them, and it is lost to them when they die, or, when they permit the period of limitation to expire."

There are similar observations in *Sita Ram Singh v. Cheddi Singh* (16), which my learned brother has cited. Moreover there is an authority of the Privy Council on the same point in *Ranodip Singh v. Parmeshwar Pershad* (14), to which my learned brother has also referred. I may quote what Stone, J., in *Visweswara Rao v. Surya Rao* (12), just mentioned, has to say in connection with this Privy Council decision (p. 684*) :

"And, finally and, so far as we are concerned, conclusively, it was decided by the Privy Council in *Ranodip Singh v. Parmeshwar Persad* (14), that where there was a Hindu father with three sons at the time of the alienation which was in 1893, and there was born to him a fourth son in 1900, and a suit was brought to recover possession of the alienated property in 1920, and the right of action of the three sons living at the time of the alienation was barred because they had waited until beyond the three years after they attained majority, the right of action of the fourth son who had brought the action within the three years was barred also, the reasons being that he had no separate cause of action the cause of action was that of his elder brothers (as being the co-parceners in existence at the time of the alienation) and that cause of action was barred. So obviously, had he had a separate cause of action it would not have been barred."

Mr. Thakore has attempted to distinguish *Ranodip Singh v. Parmeshwar Pershad* (14), and *Sita Ram Singh v. Cheddi Singh* (16), merely by saying that they were cases under Art. 126, not Art. 144. But there seems to be no principle on which it can be suggested that though an after-born son has not an after-born grandson has, a separate cause of action. It may be noted that in the passages in Mayne on which Mr. Thakore relies it is nowhere asserted that the grandson or other after-born co-parcener has a separate cause of action, and the learned commentator at the end of his discussion seems to commit himself to the proposition that a suit by the grandson, to be in time, must be brought within the

period of limitation as determined in accordance with the decision in *Ranodip Singh v. Parmeshwar Pershad* (14). That seems to mean that the question of limitation for a suit is to be decided on the footing that the right to set aside an alienation, or to recover possession of property in spite of alienation is not an individual right but a corporate right.

If the plaintiffs cannot be said to have a separate and independent cause of action, their suits cannot be in time, for time commenced to run in 1909 and 1910 when the alienees got possession. The possession of the alienees was adverse to the whole of the co-parceners : *Bhavrao v. Rakhmin* (18). Mr. Thakore says that this case is distinguishable because it was a case where certain members of a joint Hindu family, alienated by sale and mortgage specified plots of lands, out of their share, giving boundaries of the plots and covenanting for title, and what was really decided was that the purchaser entered as owner and not as a co-sharer : see *Biswanath Chakravarti v. Rabija Khatun* (19). But according to the view taken in Bombay, at any rate, a person who purchases from a co-parcener property in excess of that co-parcener's share without justifying necessity is a trespasser in respect of the excess, see *Balwantrao v. Ram Krishna* (17), and that being so his possession must be regarded as adverse to all the co-parceners. It would be a contradiction in terms to say that he is a trespasser and at the same time a co-sharer with the other co-parceners. It follows from this that time was already running when the plaintiffs were born. Section 9 comes in their way, and moreover they cannot rely on s. 6 for the reasons given by their Lordships of the Privy Council in *Ranodip Singh v. Parmeshwar Pershad* (14), at p. 72* :

"To the contention that by the cited ss. (i. e., 6 and 7) the period of limitation is extended for three years from the cessation of plaintiff No. 4's minority the answer is that by their express terms this extended period can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. The fourth plaintiff does not come within this description, for at that time he was not in existence."

Since s. 6 cannot be availed of, the plaintiffs' suits are clearly time-barred under s. 3 of the Act. I agree therefore with my learned brother that the appeals must be dismissed with costs.

D.

Appeals dismissed.

* Page of 52 I A—[Ed.]

were not challenged by their father Keshav who died in 1921. Nagesh himself died in 1920. The suits from which these appeals arise were brought by the plaintiffs in 1934 to recover a two-thirds share in the property on the footing that the sales were only valid in respect of the undivided one-third share of Nagesh himself. The suits were brought within three years of the plaintiffs attaining majority and they relied on s. 6, Lim. Act. One of the defences to the suits was that the sales were for legal necessity and therefore binding on the whole family. But the suits have been dismissed on a preliminary issue of limitation, for the purpose of which it must be assumed that there was no legal necessity. The trial Court has held that the suits were barred by Art. 126, if not by Art. 144. It is quite clear that if Art. 126 applied the suits would be barred, for in that Article it is expressly provided that time runs from when the alienee takes possession. On this point *Ranodip Singh v. Parmeshwar Persad* (14) is a clear authority, and the position is conceded. But the learned Counsel for the appellant says, rightly I think, that Art. 126 does not apply as it refers to cases of alienation by a father, not by a grandfather.

As Art. 126 does not apply, the residuary Art. 144 must apply according to which the starting point of limitation is when the possession of the defendant becomes adverse to the plaintiff. That, according to the argument for the appellants, could only take place so far as the present plaintiffs are concerned when they were born, and by reason of s. 6 the period of limitation is extended to three years from their attaining majority. Section 9, Lim. Act, does not apply, it is said, because the time did not begin to run as against the plaintiffs until they were born. In Mulla's Principles of Hindu Law, para. 270, cl. (1), p. 317, the effect of the authorities is stated to be that an alienation by a co-parcener in excess of his powers can only be set aside by a co-parcener who was in existence or already conceived at the time of the alienation. In Mayne's Hindu Law, paras. 397 to 399, this view is not accepted, though it has to be admitted that there are observations in *Lal Bahadur v. Ambika Prasad* (13) which seem to support it. However I think Mr. Thakore is right when he says that as we are dealing with an issue of limitation simpliciter, and not an issue as to the competence of the suits, we must assume that a suit by an after-born co-parcener to set

aside an alienation may be maintained, if not barred by limitation.

The question is what is the cause of action for such a suit. Does an alienation by a co-parcener in excess of his powers give rise to a single cause of action common to all the co-parceners, or do all the co-parceners, including those born after the alienation, have a separate cause of action. Mr. Thakore's argument requires us to hold that each has a separate cause of action. But I think the balance of authority is definitely against that view. In *Lachmi Narain v. Kishen Kishore* (20), which is one of the cases relied upon by Mayne, it was held that if the co-parceners in existence at the time of the alienation do not sue within the period of limitation, the right of the alienee is perfected and a co-parcener born after that date is barred. That proposition is not, I think, disputed by the learned Counsel for the appellants. *Visweswara Rao v. Surya Rao* (12), goes further. It was held there that if the co-parceners who are entitled to sue died without having brought a suit, a co-parcener who enters into the family thereafter is barred.

It is true that both these cases may be distinguished on the facts. The father and uncle of the present plaintiffs both died within 12 years of the alienation, so that the title of the alienee had not been perfected against them, and the plaintiffs were born and became co-parceners before they died and not after. All the same these rulings are quite inconsistent with the view that the co-parcener born after the alienation has a separate and independent cause of action, for, in that case, the decision must have been different. Stone, J., in *Visweswara Rao v. Surya Rao* (12), is quite explicit as to the principle (p. 687*) :

"Whether or not an after-born son can effectively join with existing sons to attack or resist an alienation, the cause of action or the right to defend is a cause or right that was in those members of the family that were alive at the time of the alienation and were not consenting. The right to attack begins to exist at the moment of the alienation and at the highest (we do not decide whether it extends so high) exists in all members of the family that exist while such right of action is intact. If that right of action is lost by those members of the family who had it when it arose, e. g., those co-parceners who were in existence and not consenting at the time of the alienation, if that right of action is lost by them by the operation of the statute of limitation, it is lost to the family and does not live on in some child who becomes a co-parcener even during the lifetime of the co-parceners that existed when the

(20) 38 A 126; 33 Ind. Cas. 913; A I R 1916 All. 356; 14 A L J 25.

* Page of 59 M—[Ed.]

was an interest in an estate which to the extent of the alienor's share therein had already been alienated. Upon Counsel's own showing, it was an interest in a co-parcenary estate. Consequently, in my opinion, they were not entitled to any special or separate interest in that co-parcenary property, nor to an exclusive possession of any part of that property. That is the essence of a right which a Hindu governed by the Mitakshara acquires by birth in co-parcenary property. As observed by their Lordships of the Privy Council in dealing with the rights of co-parceners there is community of interest and unity of possession between all the members of the family: see *Katama Natchier v. The Raja of Shivagunga* (15). It is clear to my mind therefore that if the possession of the defendants could be regarded as adverse to the co-parcenary title or interest it would equally be adverse not only to the existing co-parceners but all those who acquired subsequently by birth an interest in that title. If that were so, the cause of action would be identical and the time would commence to run from the date on which the possession of the defendants become adverse to the co-parcenary estate: see also *Sita Ram Singh v. Cheddi Singh* (16).

As to the character of the possession of the alienee there is good authority for holding that his possession is *prima facie* adverse against the interests of those members of the family whose interests are not legally affected by the transfer: see *Balwantrao v. Ramkrishna* (17), *Wasantrao v. Anandrao* (1), and *Bhavrao v. Rakhmin* (18). Although the facts in the latter case were not quite similar, for it was a case where certain members of a joint Hindu family alienated by sale and mortgage specified plots of lands out of "their share," the *ratio decidendi* was that the alienee entered as owner and not as a co-sharer and was therefore in a position to defeat the title of the co-parceners under Art. 144, see observations in *Biswanath Chakravarti v. Rabiya Khatun* (19), where that case has been distinguished. There are observations in the judgment of the Chief Justice who delivered the judgment of the Full Bench in *Bhavrao v.*

Rakhmin (18), which are relevant to the question of the purchaser's position vis-a-vis the coparceners of his vendor. The learned Chief Justice said (page 141*):

"... as he enters as owner and in right of his conveyance, his possession is adverse to them also. In the eye of the law, all the co-parceners, though for the sake of convenience they may be in separate possession of portions of the joint estate are the owners of the whole estate including the alienated portion."

If the unity of title and possession of the co-parceners is assumed the alienee's possession is against that title, and all those interested in it would be barred having regard to the character of the interest they can claim. It has been urged that the nature of the acquisition of an interest by a Hindu co-parcener upon his birth ought to enable the latter to say that the defendant must assert and prove adverse possession against him individually within the statutory period. With respect I think that argument involves a fallacy as to the very nature of the interest acquired by birth, and therefore I am of the opinion, apart from the question of expediency and the *argumentum ab inconvenienti* which has been applied by the Allahabad High Court in rejecting the claim like that of the plaintiffs, that the suits are barred under Art. 144. The inconvenience or rather the danger of upsetting titles if the claim of the plaintiffs were upheld needs no demonstration. It has been animadverted upon in the judgment of Sulaiman, J., in *Sita Ram Singh v. Cheddi Singh* (16). He said (p. 883†):

"Successive causes of action cannot arise as new members are born year after year. If the contention of the appellants were to be accepted, the result would be that in many cases such suits would never become barred by time inasmuch as new members may be born before the minority of an elder member is over."

With respect I agree with that reasoning. It would afford an additional ground for disallowing the contention of the appellants. I am of the opinion, therefore, that the suits instituted by the plaintiffs fail being barred by time, and that the three appeals must be dismissed with costs.

Broomfield, J.—Nagesh was the manager of a joint family consisting of himself and his sons Yeshwant and Keshav. He sold several of the family lands to the predecessors of the respondents in 1909 and 1910 and handed over possession. Plaintiffs are the sons of Keshav and were born in 1913 and 1914 respectively. The sales

(15) 9 M I A 539; 2 W R 31; 1 Suther. 520; 2 Sar. 25 (P O).

(16) 46 A 882; 83 Ind. Cas. 1052; A I R 1924 All. 798; 22 A L J 809.

(17) 3 Bom. L R 682.

(18) 23 B 137.

(19) 56 O 616; 117 Ind. Cas. 593; A I R 1929 Cal. 250; 33 C W N 46; Ind. Rul. (1929) Cal. 545.

*Page of 23 B.—[Ed.]

†Page of 46 A.—[Ed.]

before his birth. The principle laid down in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal* (11) seems to be that the after-born son cannot impeach the alienation individually. But if a co-parcener, who was alive at the date of the alienation, files a suit on behalf of the family to set aside the alienation partially, the after-born co-parcener can participate in the benefit of the decree as a member of the joint family. The case would be entirely different if the alienation was good when it was made by a sole surviving co-parcener and another co-parcener was born thereafter. The ratio of the decisions seems to be that there must be some co-parcener other than the alienor alive at the time of the alienation capable of impeaching the transaction before another co-parcener is born: see *Visweswara Rao v. Surya Rao* (12). There are however some observations in *Lal Bahadur v. Ambika Prasad* (13), which suggest that the right to question an alienation of the joint family property is confined to the co-parceners who were alive at the date of the alienation. That was a case where two Hindus sued to set aside a sale by their grandfather of part of the property of the joint family. The purchase price, which was adequate, was applied to discharge certain mortgages executed by the plaintiff's grandfather before the plaintiffs were born. It was held that the mortgages, which were executed before the plaintiffs were born, were incumbrances upon the plaintiffs' interest acquired upon their birth. Lord Blanesburgh in delivering the judgment of the Board observed as follows (p. 445*):

"The respondents, plaintiffs in the suit, are sons of Awadh Behari. In 1895 (when the mortgages were executed) they were still unborn. This, as will later appear, is one of the most important facts in the case. It follows from it that these two mortgage-deeds have always been binding on the respondents. The only joint family estate to an interest in which they succeeded was an estate which to the extent of these two mortgages had already been alienated."

There are other observations to the similar effect (p. 450*):

"If the respondent Adita Prasad was not born at the date of the sale deed, that deed is binding upon him, and the suit impeaching it, so far as he is concerned, cannot be maintained."

(12) 59 M 667; 163 Ind. Cas. 712; A I R 1936 Mad. 440; 70 M L J 360; (1936) M W N 163; 43 L W 349; 9 R M 48.

(13) 52 I A 443; 91 Ind. Cas. 471; A I R 1925 P O 264; 47 A 795; 2 O W N 913; (1925) M W N 852; 28 O O 371; 12 O L J 649; 23 L W 220; 30 C W N 701 (P O).

*Pages of 52 I. A.—[Ed.]

Those observations might seem to conflict with what was stated in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal* (11). But it seems to me that having regard to the question we have to decide, it is unnecessary to pursue that point any further. I shall assume, as we are asked to assume that the plaintiffs acquired an interest in the property transferred and that the suit to impeach the transaction was maintainable. The ground of our decision therefore is narrowed down to this; whether the plaintiffs upon the facts stated were within time under Art. 144 in impeaching the alienation. In my opinion, the solution to that question must largely depend upon what would be regarded as the cause of action for a grandson to set aside the unauthorized alienation. That must again depend upon the character of the interest which he acquires in the joint family property which has been alienated before he was born. If the after-born son does not acquire a fresh cause of action, his right would be clearly barred under Art. 144. In *Ranodip Singh v. Parmeshwar Pershad* (14), their Lordships of the Judicial Committee in dealing with the question of the applicability of Art. 126 to a suit instituted to set aside an alienation by a father held that as one of the youngest plaintiffs was not in existence at the date of the alienation, no new cause of action arose upon his birth, and that consequently ss. 6 and 7, Lim. Act, would not prevent a suit from being barred under Art. 126, Sch. I to the Act. There the alienation was made by the plaintiffs' father in 1893. The alienor had four sons, three of whom were born at the date of the alienation. Plaintiff No. 4 was not born until 1900, and the suit was brought within three years of his reaching majority. Sir Lawrence Jenkins in delivering the judgment of the Board observed as follows (p. 72*):

"The cause of action arose on June 3, 1893, and it is from that date that the period of limitation is to be reckoned. Plaintiff No. 4's subsequent birth on November 30, 1900, did not create a fresh cause of action or a new starting point from which limitation should be reckoned."

It seems to me that the principle deducible from that case, which dealt with a suit by a son, would be equally applicable to a suit by a grandson governed by Art. 144. The interest to which the plaintiffs succeeded

(14) 52 I A 69; 86 Ind. Cas. 249; A I R 1925 P O 33; 47 A 165; 27 O O 343; 48 M L J 29; 21 L W 236; 2 O W N 1; 23 A L J 176; 27 Bom. L R 175; 12 O L J 74; 36 P L R 113; L R 6 A (P O) 47; (1925) M W N 262; 29 C W N 666 (P O).

*Page of 52 I. A.—[Ed.]

lature has omitted all reference to a grandson in Art. 196. That omission may appear curious, for there is no assignable reason for differentiating between the rights of a son to question his father's alienation and those of a remoter descendant in regard to his ancestor's transaction. Whatever that may be, Art. 126 must be subject to the rule of strict construction, and I think therefore that Article can have no application to this case.

The question is what is the appropriate Article which is applicable to this case. It is plain that Art. 127 would not be applicable to a suit between one member of a joint Hindu family and a stranger alienee who is in possession of the property by virtue of a transfer made by another member of the joint family including a father or manager. See *Radhanath Doss v. Gisborne & Co.* (3), and *Ram Lakhi v. Durga Charan Sen* (4), at p. 682. The only other Article which may be considered is the residuary Art. 144. That Article applies to a suit for possession of immovable property or any interest therein not specially provided for, and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. Our attention has been drawn to the definition of the term "plaintiff" in s. 2, sub-s. (8), Lim. Act, which includes any person from or through whom a plaintiff derives his right to sue. The description is obviously not intended to be exhaustive. Counsel's argument is that as the plaintiffs do not claim through their parents and as they have acquired a right in the co-parcenary property in their own independent right upon their birth, the cause of action is independent and separate, that therefore the defendants' possession could not become adverse to their interest, and that their exclusion could not be known to them until they were born. Before dealing with that argument it might be necessary to state that an alienation made by a father, who has sons then living, not being one for legal necessity or for payment of an antecedent debt, if made without their consent may be set aside according to the Bombay Law by any one of the sons partially so far as it affects his interest in the property: see *Pandu Vithoji v. Goma Ramji* (5), and *Pandurang Narayan v. Bhagwandas Atma-*

ramshet (6). The question involved in the argument is this: Assuming that before the sons existing at the time of the alienation are all dead, a grandson is born, and assuming further that the alienation can be set aside by the grandson in his own right if it was not ratified before his birth, does the grandson acquire a cause of action independent of the non-alienating co-parceners alive at the date of the alienation? The point is not free from difficulty and the authorities on the subject are not quite reconcilable. For the purpose of the argument it may be conceded that the alienations in question were not valid. They were either void and not binding on the plaintiff's as contended for by the appellants or voidable as contended for by the respondents. With reference to the former view some authorities were cited such as *Lachhman Prasad v. Sarnam Singh* (7), which was a case from Allahabad, and *In the matter of Amirthalinga* (8). For the latter we were referred to the character of the alienations by a manager of the family: see *Subba Goundan v. Krishnamachari* (9), and *Principles of Hindu Law* by Sir Dinshaw Mulla, Edition 8, ss. 242-44, at pp. 271-74.

It is in my opinion, immaterial for the present purpose to define the exact nature of an alienation which is beyond the authority of the alienor. According to the trend of the authorities in this country such an alienation would not diminish the corpus of the joint family property to the extent to which it was unauthorized. If that were so, then an after-born co-parcener like the plaintiff could acquire a proportionate share in the interest which is not validity transfused. That is the view accepted in *Hanmantappa v. Dundappa* (10), and it is not inconsistent with the decision in *Ramkishore Kedarnath v. Jainarayan Ramrachhpal* (11). Even so the question is can he impeach the alienation made

(6) 44 B 341; 55 Ind. Cas. 544; A I R 1920 Bom 341; 22 Bom. L R 120

(7) 44 I A 163; 40 Ind. Cas. 284; A I R 1917 P O 41; 39 A 500; 15 A L J 581; 2 P L W 29; 21 O W N 990; 33 M L J 39; 19 Bom. L R 646; 26 O L J 97; (1917) M W N 516; 6 L W 334 (P O).

(8) A I R 1928 Mad, 986; 112 Ind. Cas. 553; (1928) M W N 602; 28 L W 634.

(9) 45 M 449; 68 Ind. Cas. 869; A I R 1922 Mad. 112; 42 M L J 372; 30 M L T 217; 15 L W 537; (1922) M W N 269.

(10) 36 Bom. L R 474; 151 Ind. Cas. 1043; A I R 1934 Bom. 234; 7 R B 100.

(11) 40 I A 213; 20 Ind. Cas. 958; 40 O 966; 10 N L R 1; (1913) M W N 661; 14 M L T 163; 17 O W N 1149; 18 O L J 237; 15 Bom. L R 867; 14 A L J 865; 25 M L J 512 (P O).

(3) 14 M I A 1; 6 Beng. L R 530; 15 W R 24; 2 Sar. 636 (P O).

(4) 11 C 680 (882).

(5) 43 B 472; 50 Ind. Cas. 765; A I R 1919 Bom. 84; 21 Bom. L R 213.

alienees raised a common defence to these actions, and they contended that the alienor was the manager of the family, that the debts were for family necessity, including the payment of an antecedent debt, and that the suits were time-barred. A preliminary issue on the question of limitation was framed and decided by the trial Judge, who upholding the defence contentions, has dismissed the three suits which raise these appeals. It may be mentioned that the decrees in two of these suits in which the property was valued at less than Rs. 5,000 were taken in appeal to the District Court of Belgaum. The learned District Judge confirmed the decrees of the trial Court agreeing with that Court that the suits were barred either under Art. 126 or Art. 144, Lim. Act. From those decrees two second appeals have been filed in this Court. From the decree in the third suit, where the valuation of the property involved for the purpose of jurisdiction exceeded Rs. 5,000, an appeal has been directly filed here. All these appeals have been heard together.

On the question of limitation Counsel's argument is of a twofold character. He says that the lower Courts were wrong in applying Art. 126, Lim. Act, for that Article does not apply in terms to a suit to set aside an alienation made by the plaintiffs' grandfather, as it postulates a suit by a Hindu son governed by the Law of the Mitakshara to set aside his father's alienation of ancestral property. It is argued that in the absence of definition of a "son" in the Lim. Act which would include a "grandson," it would be improper to apply Art. 126. The second part of the argument is that the plaintiffs as co-parceners had acquired under the Mitakshara Law an interest in all the joint family property existing at the date of their birth, and that inasmuch as the plaintiffs' father's interest was not legally alienated, it subsisted at the time when the plaintiffs were born and the latter had acquired an interest in it. The argument proceeds that upon their birth the plaintiffs had a fresh cause of action for taking possession of the property comprised of the co-parcenary estate, and that Art. 144 would apply. Counsel has relied upon certain observations in *Wasantrao v. Anandrao* (1) at p. 943 that under Mitakshara Law the son does not claim through his father, but that the son's title is from his birth wholly independent of,

(1) 6 Bom. L R 925, (943).

and equal to, that of his father. The underlying assumption is that inasmuch as the plaintiffs' right to possession of their interest arose upon their birth the defendants' prior possession could not be adverse to their interest, for adverse possession is possession which is in contravention of the right of another to such possession.

In the consideration of the question of limitation it seems to have been assumed in the Courts below that the sales were not binding on the co-parceners of the alienor, including his sons. That assumption is also involved in the question raised here on the basis of the issue framed and decided in the trial Court. Dealing with the question as to the applicability of Art. 126, I might at once say that it would be wrong in the construction of the Article to draw an analogy from the doctrine of representation in Hindu Law or the doctrine of pious obligation of a son or a grandson to discharge the father's or grandfather's debt. It may be true that in the consideration of that obligation a son would include a grandson. But the inclusion of the grandson in the terms "son" is the result of the interpretation of the texts, particularly of Brihaspati: see Colebrooke, Vol. I, Chap. 5, p. 185, cited by Sir Dinshah Mulla in the Principles of Hindu Law, Edn. 8, p. 337. Consequently, no general doctrine could be laid down that for all purposes, particularly in the interpretation of the Articles in the Lim. Act relating to Hindus the term "son" could be regarded as implying a grandson.

We were referred by Mr. Gumaste for the respondent to *Masit Ullah v. Damodar Prasad* (2), as an authority for the view that the term "son" in Art. 126 as in the compound *putra pautrad* is indicative of a class and not of an individual alone. Their Lordships in that case were dealing with the texts on Hindu Law in reference to the question as to the liability of the great-grandson under that law for the payment of the great-grandfather's debts in proportion to their relative shares in the joint family property. It is erroneous in my opinion, to draw an analogy from the interpretation of those texts and to argue that the Legislature perhaps had in mind the doctrine of representation in Hindu Law when enacting Art. 126. The Legis-

(2) 53 I A 204; 98 Ind. Cas. 1031; A I R 1926 P C 105; 48 A 518; 3 O W N 721; (1926) M W N 816; 24 L W 551; 44 C L J 321; 51 M L J 792; 28 Bom. L R 1402; 7 P L T 815; 25 A L J 1; 31 O W N 293; 38 M L T 77 (P O).

BOMBAY HIGH COURT

First Civil Appeal No. 332 of 1936

and

Second Civil Appeals Nos. 402 and 403
of 1937

September 4, 1939

BROOMFIELD AND WASSOODREW, JJ.

JIVAJI KESHAV BAPAT AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

VENKATESH KRISHNA BYADGI

AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), Arts. 126, 127, 144
—Art. 126, applicability to suit to set aside alienation made by grandfather—Art. 127 whether applies to suits between member of joint Hindu family and stranger alienee from another—Suit by Hindu to set aside alienation by grandfather made before his birth, without justifying necessity, 12 years after alienation, if barred—Hindu Law—Alienation—Father—No legal necessity—No consent of sons—Any son, if can set it aside as far as it affects his interest—Nature of co-parcenary property.

It would be wrong in the construction of the Art. 126, Lim. Act to draw an analogy from the doctrine of representation in Hindu Law or the doctrine of pious obligation of a son or a grandson to discharge the father's or grandfather's debt. Consequently, no general doctrine could be laid down that for all purposes, particularly in the interpretation of the Articles in the Lim. Act relating to Hindus the term "son" could be regarded as implying a grandson. Article 126 must be subject to the rule of strict construction, and that Article can have no application in terms to a suit to set aside an alienation made by a person's grandfather, as it postulates a suit by a Hindu son governed by the Law of Mitakshara to set aside his father's alienation of ancestral property.

Article 127 would not be applicable to a suit between one member of a joint Hindu family and a stranger alienee who is in possession of the property by virtue of a transfer made by another member of the joint family including a father or manager. *Radhanath Dass v. Gisborne & Co.* (3) and *Ram Lakhi v. Durga Charan Sen* (4), relied on. [p. 665, col. 1.]

An alienation by a co-parcener in excess of his powers gives rise to a single cause of action common to all the co-parceners, and the co-parceners, including those born after the alienation, have not a separate cause of action. The cause of action would be identical and the time would run from the date on which the possession of the alienee became adverse to the co-parcenary estate. Consequently a suit by a Hindu to set aside an alienation of the joint family property made before his birth by his grandfather without any justifying cause is barred by limitation if instituted more than 12 years after the date of the alienation. [p. 668, col. 2.]

[Case-law referred to.]

An alienation made by a father, who has sons then living, not being one for legal necessity or for payment of an antecedent debt, if made without their consent may be set aside according to the Bombay law by any one of the sons partially so far as it affects his interests in the property. 50 Ind. Cas. 765 (5) and 55 Ind. Cas. 544 (6), relied on. [p. 665, col. 2.]

Nature of co-parcenary property explained.

F. C. A. and S. C. As. from a decision of the First Class, Sub-Judge, Belgaum, in C. S. No. 145 of 1934.

Messrs. G. N. Thakor and K. G. Datar, for the Appellants.

Mr. H. B. Gumaste, for Respondent No. 2.

Wassoodew, J.—The only question, which, in these three appeals, one (No. 332 of 1936) from a decree of the First Class Subordinate Judge of Belgaum, the second and the third (Nos. 402 and 403 of 1937) from the appellate decrees passed by the District Judge of Belgaum, was dealt with in the Courts below and which arises for consideration before us, is whether a suit by a Hindu to set aside an alienation of the joint family property made before his birth by his grandfather without any justifying cause is barred by limitation, if instituted more than 12 years after the date of the alienation. The facts which raise that question can be shortly stated. The appellants-plaintiffs were members of a joint Hindu family governed by the Mitakshara Law. Their grandfather Nagesh, who was along with his sons Keshav and Yeshvant in possession of the joint family property, effected sales of distinct parcels of that property to different individuals including the respondents in these appeals between 1909 and 1910. The plaintiffs, who are the sons of Keshav, were not born at the date of the alienations. Plaintiff No. 1 was born in 1913, and plaintiff No. 2 in 1914. Their father Keshav died in 1916, and their uncle Yeshvant, who was childless, died in 1921. It may be noted that during the lifetime of Yeshvant and Keshav they did not impeach the alienations in so far as they affected their interests in the joint family property. The alienees were in peaceful possession of the property sold to them till the date of the suits from which these appeals arise and which were all filed on the same day, namely, June 5, 1934. It is common ground that these suits were well within three years of the plaintiffs attaining majority.

It was alleged by the plaintiffs that the sales were without legal necessity and there was no antecedent debt, except of a very small amount, which could have been easily paid off by the sale of a portion of the alienor's interest in the joint family property, and that therefore those sales were not binding on the interests of the alienor's sons or grandsons subsequently born. The

cising ordinary caution would not be likely to assume that the chewing tobacco sold by the respondent was manufactured by the appellants.

Their Lordships see no reason to doubt the finding of the trial Judge that the appellants had acquired a proprietary right in respect of their elephant trade mark with reference to their cigarettes and Virginia Bird's Eye tobacco. Nor are they of opinion that the appellants' right is confined only to the sale of the same kind of cigarettes and of Virginia Bird's Eye tobacco; for, in the absence of strong evinence to the contrary, such a mark would ordinarily extend to protect goods so similar in kind to the goods actually put upon the market by the trader in connexion with the trade mark that it is an almost inevitable inference that such goods would be manufactured or marketed by the trader. In other words the probability of deception in the case of goods of a closely similar kind to those actually marketed by the plaintiff would be proved in the course of establishing the trade mark. No such inference could be made in the present case as regards the respondent's goods, since the chewing tobacco he sells differs widely in appearance and in use from the goods sold by the appellants.

Some of the learned Judges in India seem to have taken the view that it was for the Court to decide as to the area of trade protected by the appellants' trade mark; that is, to answer the question whether the use of the trade mark on goods not closely similar in character to the appellants' goods would be likely to deceive. A number of well known authorities were cited which it was thought would throw light on the correct answer to this question. Their Lordships must repeat that this question is one of fact on which evidence is essential. The question differs from the question whether a particular mark or name is an imitation or a colourable imitation of a mark or name used by the plaintiff. There the Judge has before his eyes the materials for a decision, and in some cases it cannot be doubted that the Judge can himself decide on the degree of resemblance or on the materiality of alleged differences of the marks or words (*North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* (6), *Payton & Co., Ltd. v. Snelling*,

Lampard & Co., Ltd. (7), per Lord Macnaghten at p. 635). If the decision of the Court of Appeal in *London General Omnibus Co. v. Lavell* (8) or some of the dicta in that case are contrary to these decisions, it cannot be relied upon. On the other hand there are many trade mark and passing-off cases which cannot be decided by a visual comparison of the rival marks or names and must depend on the evidence of witnesses. That indeed is nearly always the case when there are factors involved other than the mere resemblance of the marks or words. In the present case a Judge may be entitled to form his own view as to the resemblance of the elephants in shape and colour or on the differences between them; but their Lordships are of opinion that a Judge cannot properly decide except upon evidence as to the classes or kinds of goods which are protected by the appellants' mark, or, to be more precise, on the question whether purchasers of chewing tobacco from the respondent in the packets and tins above described are likely to be misled into thinking that that article is manufactured or put upon the market by the appellants. This question is one which does not depend on a matter of resemblance. As already pointed out, the appellants have no monopoly in the elephant as a trade mark. The English cases may be instructive as showing the way in which such a question should be approached, but the actual decisions depending as they do on what purchasers would be likely to think in England are not a guide in India.

Their Lordships are not disposed to attach much importance to the fact that the appellants were unable to call evidence of actual deception, and they are well aware of the fact that the procuring of evidence of probability of deception is often a difficult and trouble-some task. On the other hand the appellants had to establish their case, and in the complete absence of evidence on the point to which attention has been above directed, their Lordships must come to the conclusion that they failed to do so.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

D.

Appeal dismissed.

Solicitor for the Appellants:—Mr. E. M. Oppenheim.

(7) 17 R P O 628 (635).

(8) (1901) 1 Ch. 135; 70 L J Ch. 17; 83 L T 453.

(6) (1899) A C 83; 68 L J Ch. 74; 79 L T 645.

articles, and any other matters which will assist the Court to decide whether deception is probable. Evidence of actual deception may be available and if available may be very valuable. There is no such person as an expert in human nature, and it is now well-settled that a witness cannot be called to say that it is likely that purchasers of the goods will be deceived. This can only be a matter of opinion formed after the dispute has arisen and too often without any judicial consideration of the opposing contentions. On the other hand a person who is accustomed to buy the articles in question may be called to say that he would himself be deceived, and cross-examination will often show what weight should be attached to such a statement.

It seems desirable to state the views of their Lordships on some of the topics of criticism of the views of the learned Judges which were urged on behalf of the appellants. Their Lordships think that the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. This has been settled in England since the case of *Seizo v. Provezende* (3), where there will be found some remarks by Lord Cranworth, L. C. very relevant to this matter. He also pointed out (at p. 197*) that the adoption by a rival trader of a mark which would cause his goods to bear the same name in the market, may be as much a violation of the rights of the first owner as the actual copy of his device. This same view was taken in the case of *Johnston v. Orr Ewing* (4), a case relating to the use of two elephants on tickets placed upon goods for sale in India. (See as to the effect of the differences between the tickets the remarks of Selborne, L. C. at pp. 224† *et seq.*) Further, it is not an answer to the claim of a trader who has established, as the appellants have done in the present case, the right to a trade mark (*e. g.* a device or a fancy word) to say that, apart from the device or the word, the labels or containers

(3) (1865) 1 Ch. App. 192; 12 Jur. (N.S.) 215; 14 L.T. 314; 14 W.R. 357.

(4) (1882) 7 A.C. 219; 51 L.J. Ch. 797; 46 L.T. 216; 30 W.R. 417.

*Page of (1865) 1 Ch. App.—[*Ed.*]

†Page of (1882) 7 A.C.—[*Ed.*]

of the rival trade are very different from those of the trade mark owner. It may be observed that, if it were so, such a trade mark would be of little value, for its use by several traders would soon result in its becoming common to the trade. (See *Wotherspoon v. Currie* (5), and *Johnstone v. Orr Ewing* (4).) In the present case there may well have been persons who knew of the reputation of the appellants' "elephant mark" goods, but were illiterate or did not know or did not remember the particular get-up of their goods; and again the differences of labels and get-up might have been supposed to have been made by the appellants themselves in putting a different or cheaper article upon the market. Their Lordships, however, are not to be understood as saying that the differences in get-up are immaterial; for they must inevitably form an element in considering the question of probability of deception by the use of the mark.

It is a remarkable feature of the present case that there was neither evidence of actual deception, nor any evidence from members of the public that they themselves would be deceived. It is to be observed that the important issue was, not whether the use of the elephant on smoking tobacco or on cigarettes would be likely to cause deception; but whether its use on chewing tobacco in the circumstances in which that article is sold by the respondent would be likely to cause deception, that is, to cause ordinary purchasers to purchase the chewing tobacco of the respondent in the belief that it was manufactured by or put upon the market by the appellants. The difficulty of answering this question in the affirmative in the absence of evidence as to the probability of deception is apparent from the fact that, apart from the trial Judge, who was not satisfied that there was any point of resemblance between the trade mark used by the appellants and that used by the respondent, King, J., in the High Court alone thought that the probability of deception would exist whilst Iqbal Ahmad, J., took the other view and Niamat Ullah, J., (to whom the matter was referred under cl. 27 of the Letters Patent of the High Court having regard to the difference of opinion between the two Judges in the High Court) came to the conclusion in his careful judgment that whilst some ignorant and indiscriminating persons might be deceived, persons exer-

(5) (1854) 5 H.L. 508; 42 L.J. Ch. 130; 27 L.T. 393.

peared on a red background. These goods were well known and asked for throughout India as "Elephant Mark," "Hathi Markha," "Lal Hathi" and the like.

The defendant has been manufacturing and selling chewing tobacco since 1926, that is, some three years before the action was brought. He sells in packets and in tins. The commodity in the packets is intended for use with *chunan* (lime), that in the tins for use as an addition to *pan* (betel). Certain ingredients are added to give fragrance to the article. The tobacco is grown in India. Both the packets and the tins have the picture of an elephant on them, not unlike the elephant used by the plaintiffs though there are differences, particularly in colour, which is black or red as used by the appellants and white as used by the respondent. In other respects the packets and the tins are quite unlike the containers in which the appellants' goods are put upon the market, and the respondent's labels bear the firm name "Rama & Company," while the appellants' goods bear their own name. The appellants, of course, did not contend that any persons would purchase the respondent's chewing tobacco in the belief that it was smoking tobacco manufactured by the appellants. Their contention was a very different one; they said that having regard to the reputation they had acquired in India in connection with smoking tobacco and cigarettes sold under the elephant trade mark and frequently asked for as "elephant" tobacco or "elephant" cigarettes the use of the elephant on the respondent's chewing tobacco was calculated to lead persons buying that article to believe that it was manufactured or put upon the market by the appellants.

There is no statutory law in British India relating to trade marks, and the law which is applied there on the subject is substantially the same as that applied in England before the Trade Marks Act, 1905. It is, however, plain that conditions peculiar to India must be borne in mind in applying any doctrine of English Law, and that English decisions which turn or partly turn on questions of fact—as do most cases of common law trade marks and passing-off—can only be applied with care and circumspection. The general principle, founded as it is on justice and equity, is the same in both countries. "No man," as James L. J. said in the case of *Singer Manufacturing Co. v. Loog* (1), "is entitled to represent his goods as being the goods of another man ;

(1) (1880) 18 Ch. D 395 (412.)

and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate purchaser."

It is clear that the right of property that may be acquired in such a trade mark is based on the proved association in the market of the device, name, sign, symbol or other means in question with the goods of the plaintiff, so that the use by the defendant on such goods of the trade mark will amount—whether the defendant intends it or knows it or not—to the false representation that the goods are manufactured or put on the market by the plaintiff. There can obviously be no monopoly in the use of the trade mark. A manufacturer of cigarettes under an undoubted trade mark such as an animal, or any other device, cannot legally object to the use of the identical mark on, say, hats, or soap, for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well-acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured or marketed by the cigarette manufacturer: see *Somerville v. Schembri* (2). Those would be simple cases, but some much more difficult ones can be suggested. If a manufacturer of a special kind of smoking tobacco under a trade mark seeks to restrain the use of it on cigars, or on a very different kind of smoking tobacco, or on cigarettes, or on snuff, or on chewing tobacco, or on tobacco in some form sold for use as a weed killer—all these things being made of tobacco—questions, sometimes of great difficulty, may arise. It is, however, very important to observe that each of these questions will be a question of fact to be decided on the evidence adduced. The vital element in such a case is the probability of deception. This may depend on a number of matters as well as the question of similarity of the marks or of the get-up. Witnesses can be called to prove the circumstances and the places in which the articles are sold, the classes of persons who buy them, and whether they include persons who are illiterate or ignorant or the reverse, the manner in which the public are accustomed to ask for the

(2) (1887) 12 A C 453; 56 L J P O 61; 56 L T 454.

In the matter of infringement of trade marks conditions peculiar to India must be borne in mind in applying any doctrine of English Law, and English decisions which turn or partly turn on questions of fact—as do most cases of common law trade marks and passing-off—can only be applied with care and circumspection. The general principle, founded as it is on justice and equity, is the same in both countries. No man, is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate purchaser. *Singer Manufacturing Co. v. Loog* (1), referred to.

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Held, that the appellants had acquired a proprietary right in respect of their elephant trade mark with reference to their cigarettes and Virginia Bird's Eye tobacco. Right was not confined only to the sale of the same kind of cigarettes and of Virginia Bird's Eye tobacco; for, in the absence of strong evidence to the contrary, such a mark would ordinarily extend to protect goods so similar in kind to the goods actually put upon the market by the trader in connection with the trade mark that it was an almost inevitable inference that such goods would be manufactured or marketed by the trader. In other words the probability of deception in the case of goods of a

closely similar kind to those actually marketed by the appellant would be proved in the course of establishing the trade mark. But no such inference could be made in the absence of evidence in the case as regards the respondent's goods, since the chewing tobacco he sold differed widely in appearance and in use from the goods sold by the appellant.

Held, also that much importance could not be attached to the fact that the appellants were unable to call evidence of a actual deception, due to the fact that the procuring of evidence of probability of deception is often a difficult and troublesome task. On the other hand the appellants had to establish their case, and in the complete absence of evidence on the point it must be held that they failed to do so.

It is not an answer to the claim of a trader who has established the right to a trade mark (e. g., a device or a fancy word) to say that, apart from the device or the word, the labels or containers of the rival trade are very different from those of the trade mark owner. It cannot be said that the differences in get-up are immaterial; for they must inevitably form an element in considering the question of probability of deception by the use of the mark.

[Case-law referred to.]

The test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. *Seizo v. Provezende* (3), relied on.

Messrs. F. E. Bray, K. C. and J. Mould, for the Appellants.

Viscount Maugham.—This appeal is against a decree of a Division Bench of the High Court of Judicature at Allahabad dated March 13, 1935. That Court affirmed the decree of the Additional District Judge of Cawnpore in an action brought by the appellants to restrain infringement of trade mark rights and passing-off. At the hearing before their Lordships the respondents were not represented; but the case of the appellants was placed before the Board with equal ability and fairness by their Counsel.

The appellants are manufacturers and sellers of cigarettes and of tobacco described as "Virginia Bird's Eye" smoked in pipes. These goods are marketed in a European style. Both the said cigarettes and the tobacco have from a date long before 1922 been sold in India (by the appellants and their predecessors) in packets and in tins bearing a mark the distinguishing feature of which is the representation of an elephant and the packets and tins of cigarettes have also borne the designation "Elephant Cigarettes." Upon the tobacco the representation of the elephant has appeared in red and upon the cigarettes the representation of the elephant has ap-

Parties knew that the *hundis* had not been retired and sat together discussing what was to be done because the *hundis* had not been retired. On the question of interest, Mr. Mehr Chand Mahajan claims 10 per cent. but I can see no reason why anything more than the legal rate of 6 per cent. permissible under the Negotiable Instruments Act should be allowed.

Before concluding it remains to notice an objection taken by Mr. Sikri on behalf of Rai Bahadur Ishar Das that the signature of the endorser, that is the Company did not appear on the face of the eight *hundis*. Five of these *hundis* are signed by Gwash Kaul without saying who Gwash Kaul is and the others are signed as manager and not on behalf of the Company. He refers to s. 27, Negotiable Instruments Act, and says that a general authority to transact business does not confer upon the agent the power of accepting or endorsing bills and in this connection quotes a decision of the Privy Council reported in *Sadasukh Jankidas v. Kishen Pershad* (6). In the case before their Lordships of the Privy Council, it was held that on a fair interpretation of the document the real name of the person liable under the bill was not disclosed. In the present case, it appears to me on a fair interpretation of the document that the name of the person liable is disclosed. The drawer and the drawee are the same and it is only the endorser about whose name there could be the slightest doubt. The person primarily responsible for re-payment was Muhammad Yusaf and about his identity no one could entertain the slightest doubt. So far as the endorsers are concerned, there can be no doubt in the minds of the persons now being charged with liability, namely, the proprietors of the Attock Timber Trading Company, that Gwash Kaul, who had acted in this and in numerous other similar transactions, was signing on behalf of the Company as the Manager thereof. No case has been cited at the Bar nor have I been able to discover any in the law reports where such an objection was successful on behalf of the endorsers; in other words, it is only when there was some doubt regarding the identity of the drawer that the matter was agitated before the Courts.

In the Privy Council case cited already, (6) 46 O 663; 50 Ind. Cas. 216; A I R 1918 P O 146; 46 I A 33; 29 Or. L J 340; 17 A L J 405; 25 M L T 258; 36 M L J 429; 21 Bom. L R 605; 1 U P L R (P O) 37; (1919) M W N 310; 23 O W N 937; 10 L W 143 (P O).

one Mohan Lal, when drawing a *hundi*, had described himself as the Acting Superintendent of the Private Treasury of His Highness the Nizam of Hyderabad, and their Lordships held that this was a description of the person drawing the *hundi*, and not as one purporting to charge the Nizam with the liability as his agent. As I have said already, the Privy Council case is distinguishable on the ground that the identity of Muhammad Yusaf, the drawer, is not in doubt and further that a consistent course of conduct of parties shows that Gwash Kaul had endorsed these and many other similar *hundis* as Manager, and no dispute regarding the liability of the Company had been raised so far. I would hold therefore that there is no substance in the objection taken by Mr. Sikri, as on a fair interpretation of these particular *hundis* the liability of the principal, that is the drawer, is disclosed and it is quite clear on the evidence that Gwash Kaul endorsed these *hundis* under the implied directions and with the explicit knowledge of his principals.

In these circumstances I would reverse the judgments of the learned Subordinate Judge, First Class, Lahore, in both the cases and accept both these appeals with costs throughout. I would make these costs payable to the plaintiff-appellants jointly and severally by Muhammad Yusaf respondent and by Rai Bahadur Ishar Das respondent in view of the attitude that he has taken in this litigation. Thus, I would leave the respondents other than Muhammad Yusaf and Rai Bahadur Ishar Das to bear their own costs.

Addison, J.—I concur.

s.

Appeals allowed.

PRIVY COUNCIL

Appeal from the Allahabad High Court
March 7, 1940

VISCOUNT MAUGHAM, LORD PORTER AND
SIR GEORGE RANKIN

THOMAS BEAR & SONS (INDIA) LTD.—

APPELLANTS

versus

PRAYAG NARAIN AND ANOTHER—
RESPONDENTS

Trade mark—Passing off action—English precedents, value of—Plaintiff acquiring right to certain trade mark in respect of smoking tobacco and cigarettes—Defendant using trade mark not unlike plaintiff in respect of chewing tobacco—Plaintiff, if can maintain action, in the absence of evidence as to deception—Test of comparison, value of.

ment in this case destroyed the endorser's remedy without the consent of the endorsers. It is only when these conditions are satisfied that s. 40, Negotiable Instruments Act, comes into operation. I would therefore hold that there has been no such delay which would avoid the responsibility of the endorsers on these *hundis*.

The next main line of argument based on the finding of the learned Subordinate Judge was that there had been no notice of dishonour in this case and because of this also the endorsers stood discharged. Section 98, Negotiable Instruments Act, enumerates the conditions when notice of dishonour is not necessary. Under cl. (a) of that section notice can be dispensed with by the party entitled thereto. Under cl. (c) notice is not necessary when the party charged could not suffer damages for want of notice, and under cl. (g) notice is again not necessary when the party entitled to notice with the knowledge of all the facts unconditionally promises to pay. In an earlier part of this judgment, I have indicated that both before and after maturity the Attock Trading Company knew of all the facts, first that the *hundis* were going to fall due very soon and that after maturity they had not been retired. On December 23, 1930, the Company was informed that the *hundis* were about to fall due apparently in anticipation. Such notice is not sufficient in law as the notice must be after dishonour but on April 8, 1931, Mr. Daulat Ram Bhalla, Manager of the Bank, wrote saying that the *hundi* of Karam Chand Kishan Chand and five of the *hundis* of Muhammad Yusaf had not been retired and asked for an early adjustment of the account. On February 12, 1931, the Peshawar Branch wrote to the Lahore Branch of the Bank that with reference to a letter of January 30, 1931, bills for Rs. 14,195 were lying still unpaid. In January 1931, reference was made to the fact that the drawee of the *hundis* did not turn up for payment. Copies of both letters were sent to the Attock Timber Trading Company. It was after this that the manager of the Attock Timber Trading Company wrote to the Bank at Lahore, asking the Bank to present the *hundis* to the drawers through the Notary Public. The accounts showing the debits for these *hundis* were acknowledged by the manager. On July 6, 1931 the Bank wrote to the Attock Timber Company (Ex. P-15) saying that the *hundis* including the *hundis* in suit were overdue and in spite of the repeated requests had not

been retired. Again, on July 15, 1931, another request is made to retire these *hundis* and in fact, as stated already, when efforts to get the *hundis* retired failed, a suit was brought at the request of the Company.

These facts indicate that a notice of dishonour had in fact been given and the manager of the Bank on the one side and the manager of the Company together with some of the proprietors including Rai Bahadur Ishar Das, who alone pleads want of notice, came and had discussions together regarding the non-payment of these *hundis*. It is significant that on May 25, 1931, Rai Bahadur Ishar Das wrote to the manager of the Attock Timber Trading Company, saying that if Muhammad Yusaf did not pay, the *hundis* should be sent back duly endorsed to him to enable him to recover the money if need be by suit. In the face of this it appears to me that the position taken up by Rai Bahadur Ishar Das is little short of frivolous. In terms of s. 98, it appears to me that in the circumstances disclosed above not only was notice of dishonour actually given but were in any case dispensed with by the Company, that the Company and particularly Rai Bahadur Ishar Das did not suffer any damage for want of such notice and having regard to the acknowledgments of the account there has been an unconditional promise to pay on the part of the Company, amongst other things, as evidenced by the endorsement made by the Notary Public on the *hundis*. Lala Mulk Raj Bhalla, Managing Director of the Bank, stated that a number of times Rai Bahadur Ishar Das came to him in connection with these *hundis* but never said that he was not liable to pay off these *hundis*. On the other hand, he accepted the liability of all the share-holders of these *hundis* which both he and Raja Sir Daya Kishan Kaul said would either be paid by the drawees or themselves. This statement of Lala Mulk Raj stands unchallenged and I see no reason whatsoever for not believing it fully. I would hold therefore that not only the notice of dishonour but the subsequent acknowledgments, the unqualified promises to pay and the absence of any proof of damage for want of notice would dispense with such notice even if in fact it had not been given.

Mr. Sikri urged in this connection that a mere demand was not sufficient. In my opinion, there has been something much more than a mere demand in this case.

from this that the suit was brought at the request of the partners and that the defendant now objecting was taking a personal interest in the matter. It is not without force therefore as Mr. Mehr Chand Mahajan has argued that this conduct amounts to a waiver of a right to take advantage of any alleged default in presentment of the bill for payment.

For the reasons stated above, it seems to me that under the provisions of s. 76, Negotiable Instruments Act, no presentation was necessary because: (1) the drawer and the drawee were the same person; (2) that the drawee had no place of business at Lahore and was not to be found at Lahore on the maturity of the bills (3) that the endorser had unconditionally acknowledged this debt and therefore engaged to pay it notwithstanding non-presentment (4) that not only had they promised to pay, but had waived their right, if any; and I would hold therefore that not only was presentment not legally necessary, but in so far as presentment could be made it was made through the Notary Public though made a considerable time after the maturity of the bills.

The learned Subordinate Judge has held that under s. 40 the plaintiff Bank had impaired the endorser's remedy by delay. It was argued on behalf of the defendants that there had been delay in the institution of the suit. I have shown above that the Attock Timber Trading Company had guaranteed payment in case of default and in this aspect it was not necessary to sue Muhammad Yusaf at all before maintaining a suit against the endorser. Mr. Achhru Ram argued in this connexion that no plea had been taken by the plaintiff Bank that the suit was based on any guarantee and therefore the position that the Company was a guarantor had been, by implication given up. He urged that there was merely a proposal regarding a guarantee which was not accepted. I am not impressed with this argument. If a suit was eventually brought with the knowledge and at the request of the defendants it hardly lies in the mouth of these defendants to turn round afterwards, plead that the suit was brought too late and thus take the benefit of a technical objection. It appears to me that a suit was brought by the plaintiff Bank in order to oblige their clients and even if the plaintiff Bank thereby denied to themselves a short and simple remedy in order to oblige their clients, I cannot see that

there had been any waiver of that legal position. But it must be remembered that this letter of guarantee is put forward only as one item in the chain of events showing that there was no necessity to present these *hundis* and even if it be held that it was necessary for the plaintiff specifically to plead this letter of guarantee as the basis of a suit based on such a guarantee the suit not being so based, the omission of the plaintiff to refer to this letter does not affect the suit as laid. I have already held that there was no necessity to present these *hundis* and in this aspect a further discussion of this point becomes unnecessary.

It is significant that there is little or no proof of deterioration of the financial condition of Muhammad Yusaf. The fact that Rai Bahadur Ishar Das is pressing for a suit to be brought is indicative rather of the fact that the money due on the *hundis* was recoverable from Muhammad Yusaf by suit. When he writes that Muhammad Yusaf would only pay if pressure was brought to bear upon him, again the indication is that the money was recoverable if pressure was employed. Rai Bahadur Ishar Das in his statement as a witness stated on February 17, 1935, that he knew both Karam Chand and Muhammad Yusaf personally and their financial position was quite sound in 1930 and in early 1931. He goes on to say that he has been informed that they "were not doing quite so well now," but he could not state since when their condition had deteriorated. Pandit Gwash Kaul stated on September 19, 1935, that he went to Peshawar and then said that the financial condition of Muhammad Yusaf "was becoming weak." But he says that Muhammad Yusaf told him that the *hundis* having been transferred by the Company in favour of the Bank the Company had no right to claim payment from him. This does not indicate that at that time Muhammad Yusaf was unable to pay, but merely took up the position that the *hundis* had been purchased by the Bank. Raja Sir Daya Kishan Kaul when asked about the financial condition of Muhammad Yusaf stated on September 20, 1935, that he had no personal knowledge about this matter. It seems to me therefore that it has not been proved that the delay by the Bank in suing has prejudiced the position of the Company. As I have said before, the suit was brought at the request of the proprietors of the Company and it cannot therefore be said that the holder of a negotiable instru-

was not necessary and the suit was maintainable. Section 69 enacts that a bill of exchange payable at a specified place must, in order to charge the maker or drawer, be presented for payment at that place. The words "that place" here can only mean Lahore and for this reason also it seems to me that there was no necessity to present these *hundis* at Peshawar, as Muhammad Yusaf was not discoverable at Lahore and had no place of business or residence there.

Section 76 (b) of the Act enacts that no presentment is necessary as against any party sought to be charged therewith if he has engaged to pay notwithstanding non-presentment. It seems to me that in the present case there is sufficient material on the record to hold that Rai Bahadur Ishar Das, the only defendant who is taking this objection seriously, had undertaken unconditional liability to pay in case of default. The letter of guarantee, dated October 31, 1930, signed by Gwash Kaul as manager would bind all his principals if he had authority, as in my opinion he had authority to so bind. The *hundis* were protested through Rai Bahadur Naranjan Das, Notary Public. His endorsement is to the effect that he did cause due and customary presentment to be made at Peshawar by a registered letter to Muhammad Yusaf as drawer and the Attock Timber Trading Company as endorser of the said *hundis*. "Endorsers state, if the drawer does not pay we will pay at the request of the manager." This again imports a promise to pay within the meaning of s. 76 (b) of the Act. Further, the acknowledgments of the accounts of the Bank were debts outstanding and were made by Gwash Kaul as the manager. These again import unconditional acknowledgments to pay. In *Punjab Co-operative Bank, Lahore v. Parma Nand* (5), it was held that a letter by the defendant confirming the loan made to him on a promissory note amounted to a promise to pay within the meaning of this section. A promise need not be expressed so long as it is clearly deducible from the language employed by the parties or their conduct. Under s. 76 (c), Negotiable Instruments Act, if a party after maturity of a bill and with the knowledge that the instrument had not been presented promises to pay the amount due thereon, no presentment is necessary nor is it necessary where the party concerned waives his right

(5) 17 L 287; 157 Ind. Cas. 875; 38 P L R 620; 8 R L 159.

to take advantage of any default in presentment for payment. It seems to me that both the letter of guarantee and the acknowledgment of balances by the manager are undertakings to pay notwithstanding non-presentment and are unconditional promises within the meaning of cls. (b) and (c) of this section. The matter however does not rest here.

Rai Bahadur Ishar Das and the manager of the Company with the knowledge of the fact that Muhammad Yusaf had not retired the *hundis* at maturity requested the plaintiff Bank to bring a suit against Muhammad Yusaf. For this purpose, several interviews took place and Gwash Kaul actually went to Peshawar in this connection. On December 23, 1930, the manager of the Bank wrote to the Attock Timber Trading Company mentioning one of these *hundis* as being overdue in Ex. P-11, and again in P-10 of the same date referred to four other *hundis* in suit which were about to fall due. On April 18, 1931 Gwash Kaul, manager of Attock Timber Trading Company wrote to the plaintiff Bank requesting them to ask their Peshawar branch to present the *hundis* to the drawer at Peshawar through the Notary Public on which the Bank asked the manager by letter dated April 20, (Ex. P-13) to come and discuss the matter. There is evidence that some discussion went on and on May 25, Rai Bahadur Ishar Das wrote to the manager, Attock Timber Trading Company asking him to go himself to Peshawar and bring the utmost pressure to bear upon Muhammad Yusaf to recover the amount due on the *hundis*, saying that unless this was done there was no hope of an early recovery, and finally on February 17, 1932 Pandit Gwash Kaul wrote to the plaintiff Bank (Ex. O. 13) saying that he was instructed by the partners of the Company to request the bank to kindly take legal action against the party concerned with reference to the *hundis* of Haji Muhammad Yusaf. It was after this that the *hundis* were protested through Rai Bahadur Naranjan Dass, Notary Public. Gwash Kaul made a specific request again on March 20, 1933 (Ex. O-14) that a suit may be filed against Haji Muhammad Yusaf and Messrs. Karam Ohand-Kidar Ohand and it was on this request that a suit was actually filed on April 5, 1933. It is significant that on May 31, 1933, Rai Bahadur Ishar Das wrote a letter to Gwash Kaul reminding him of the next date of hearing in the suit and hoping that he would take suitable action in the matter. It is clear

conferred this authority, are sufficient to establish the factum of this authority particularly when neither this defendant nor any other has taken the trouble to disprove the resolution cited by the production of the Directors' Minute Book. (The judgment then discussed the evidence and proceeded.) From what has been stated above, it appears to me to have been conclusively established not only by the evidence on behalf of the plaintiff but also by the evidence of some of the defendants including Lala Harkishan Lal and Raja Sir Daya Kishan Kaul and also from a consistent course of conduct that Pandit Gwash Kaul had been acting as the manager of the partnership for a long time to the knowledge of all the partners, had been dealing with all the affairs of the partnership including the endorsing of bills of exchange worth several lacs of rupees and that he was doing so with full authority, his actions never having been repudiated by any of the partners to the date of suit. It appears to me therefore that the authority of Pandit Gwash Kaul has been established and there is no substance in the objection taken on this ground by Rai Bahadur Ishar Das, defendant No. 5.

Dealing now with the question of the presentment of the *hundis* in question, the matter can be looked at from two points of view. First, whether the presentation in the circumstances of the case was at all necessary, and, secondly, if, as a matter of fact, there had been presentation. Section 64, Negotiable Instruments Act, says that promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment, the other parties thereto are not liable thereon to such holder. It is contended by Mr. Mehr Chand Mahajan that in this case, as the *hundis* were drawn on self, no presentation was necessary. As I have stated already, the *hundis* were in *shahjog* form and were drawn on Muhammad Yusaf himself payable at Lahore to some respectable person there. It has been held in *Chandra Datt v. Chander Sen Duli Chandar* (1), that where the drawer and the drawee are the same person, no presentation on due date is necessary, because the drawer cannot suffer damage for want of presentation. Under s. 76 (d) of the Act, it is enacted that no present-

ment for payment is necessary as against the drawer if the drawer could not suffer damage from the want of such presentation. To the same effect is a decision of a Division Bench of the Allahabad High Court reported in *Pachkauri Lal v. Mulchand* (2). It seems to me that on this ground presentment of the *hundis* in this case was not necessary.

There is another ground on which presentation was not necessary in this case. The presentation was to be made to Muhammad Yusaf and at the place at which the *hundi* was due, namely, at Lahore. The presentation to Muhammad Yusaf at Lahore could only take place if Muhammad Yusaf was on that date in Lahore and had a known address in Lahore then. Under s. 76 (a) no presentment is necessary if the instrument not being payable at any specified place, he cannot after due search be found and when the instrument is payable at some specified place, neither the drawee nor any other person authorized to pay attends at such place during the usual business hours. It is clear on the evidence that Muhammad Yusaf was not in Lahore on the date of the maturity of these *hundis* and therefore the question of presentation to him did not arise. In *Mahomed Ismail-Maula Bakhsh v. Abdul Majid Khan* (3), a pro-note was payable at Lyallpur which was assigned to the plaintiff who sent notice by post to the maker thereof. It was held that a city, town or village may be taken to be a specified place within the meaning of ss. 76 and 79, Negotiable Instruments Act, but that presentment of the promissory note there would only be necessary or reasonably possible if the maker has a residence or place of business there or is found to be personally present there. In *Muhammad Hayat Khan v. Khair Din* (4), a pro-note was payable at Sialkot. The promisee was a resident of Sialkot and continued to be in possession of the pro-note. On a suit by the promisee, it was contended that the same should be dismissed as the pro-note had not been duly presented to the defendant. It was held that as the promisee had the pro-note in his possession at Sialkot from the date of execution to the date of suit and was in a position to present it to the maker if he visited that place, presentment

(2) 44 A 554; 66 Ind. Cas. 503; A I R 1922 All. 279; 20 A L J 437.

(3) I L R (1937) Lah. 580; 173 Ind. Cas. 175; A I R 1937 Lah. 259; 39 P L R 938; 10 R L 403.

(4) A I R 1937 Lah. 892; 175 Ind. Cas. 692; 39 P L R 765; 11 R L 40.

(1) A I R 1934 Oudh 254; 148 Ind. Cas. 1167; 11 O W N 660; 6 R O 500 (1).

no authority to endorse the *hundis*. Regarding Issues Nos. 9 and 10 he held that there was no personal presentment of the *hundis* to Raja Sir Daya Kishan Kaul nor any notice of dishonour to him personally, and therefore defendant No. 4 was discharged. On the question of interest, that is, Issue No. 7, he held that only 6 per cent. per annum was chargeable if at all. On these findings, he dismissed the suit of the plaintiff Bank against all the defendants. By a mistake however he first ordered on January 26, 1937, that the debt could be recovered from the maker of the *hundis* Muhammad Yusaf, defendant No. 1, with costs. But later on he corrected this mistake on February 4, 1937, as obviously on his findings the suit was liable to dismissal against all the defendants. He accordingly dismissed the suit *in toto* by his amended order, dated February 4, 1937 but as the suit was being dismissed on technical grounds, he left the parties to bear their own costs.

Against this decision, the plaintiff Bank has appealed through Messrs. Mehr Chand Mahajan and Rattan Lal Chawala whom we have heard at considerable length. Defendant Raja Sir Daya Kishan Kaul has supported the judgment through Messrs. Achhru Ram and Devi Das. Rai Bahadur Ishar Das has been represented by Mr. Sikri in support of the judgment and Mr. Gwash Kaul as the manager of the Attock Timber Trading Company has appeared in person. The Punjab Co-operative Bank brought another suit for the recovery of Rs. 2,762-5-0 on the basis of three *hundis* in favour of the Attock Timber Trading Company drawn by Messrs. Karam Chand-Kishan Chand of Nowshera favouring the Attock Timber Trading Company. The defendants are the same in this case as in the first case, except that Messrs. Karam Chand-Kishan Chand as the drawers of the *hundis* in this case appear as defendant No. 1 instead of Haji Muhammad Yusaf. In this case too the suit of the plaintiff Bank based on similar allegations was dismissed against all the defendants and an appeal was made by the plaintiff Bank to the District Judge, Lahore, but this was ordered to be transferred to the High Court and to be heard as a connected appeal. This judgment will therefore dispose of both appeals, that is, Regular First Appeal No. 100 of 1937 and Regular First Appeal No. 155 of 1937.

I will first take up the question of the authority of Pandit Gwash Kaul. It is

noticeable that the only defendant who has raised this objection is Rai Bahadur Ishar Das. Pandit Gwash Kaul was examined both in Court and on interrogatories. As D. W. No. 2 in Court stated that he was the manager of the Attock Timber Trading Company and the *hundis* in question were transferred by the Attock Timber Trading Company in favour of the plaintiff Bank and that consideration money was received by the Company by adjustment which he says he got effected in the accounts in his capacity as manager. In his examination in Court as a witness he stated on May 9, 1935, that he had been endorsing *hundis* on behalf of the Company as its manager. He further said that he had authority to operate on the accounts of the company and to endorse all *hundis*. When recalled as a witness on March 11, 1936, he said that he had been signing acknowledgments as the manager of the Company for very large sums. When he was examined on interrogatories, he stated on August 17, 1936, that he had been appointed as a manager of the Company by a resolution of the Board of Directors dated February 20, 1927 in a meeting of the Board which was attended amongst others by Rai Bahadur Ishar Das, defendant No. 5, and that he was authorized to carry on the business of the Company and to operate the accounts, negotiate business and in fact do all other necessary work for the benefit of the Company. The authority to endorse negotiable instruments has not been repudiated by any of the partners up to the date of the suit.

Pandit Gwash Kaul said further that besides himself some subordinate of his used to accept *hundis* under his authority as the manager of the Company and that the number of the *hundis* which he or his subordinate under his instructions endorsed were of the value of several lacs of rupees. It seems to me that when a person has been acting as the manager of a Company for a long period and has been transacting all the business of the Company as such manager, including the acceptance and endorsing of the bills of exchange of the value of several lacs of rupees, this fact alone is sufficient to establish that he had the proper authority of the partners to act as the manager of the Company and to bind it as such. The fact that he mentions in his statement a specific resolution which invested him with authority, the further fact that the only objecting defendant was present at the meeting of the Board which

Trading Company, (2) defendant No. 4 Sir Daya Kishan Kaul and (3) defendant No. 5 Rai Bahadur Ishar Das. Defendant No. 2 admitted the factum of the endorsement on the *hundis* in question but pleaded that the Bank had not presented these for payment and had unnecessarily delayed the institution of a suit for the recovery of the money in the event of default and on this ground sought to evade liability.

Sir Daya Kishan Kaul, defendant No. 4 pleaded that he was not personally liable for the debt and denied knowledge of the execution of the *hundis* and their endorsement in favour of the plaintiff Bank. Rai Bahadur Ishar Das, defendant No. 5, pleaded that the Attock Timber Trading Company was an illegal association within the meaning of s. 4, Companies Act, and therefore could neither sue nor be sued, could not endorse the *hundis* in favour of the plaintiff Bank and therefore the plaintiff Bank was not entitled to sue on the basis of any such endorsement. He further pleaded want of authority in Pandit Gwash Kaul to accept or endorse bills of exchange so as to bind the proprietors of the Attock Timber Trading Company. He also pleaded that the *hundis* were never presented for payment, that the defendants had not been served with a proper notice of dishonour, denied that there was an agreement about the rate of interest as alleged, and lastly that extension for payment was given to the maker of the *hundis* which had impaired the rights of the other defendants and therefore they could not be made liable for any loss. On these pleadings, the following issues were framed by the learned Subordinate Judge who tried this case :

"1. Whether plaintiff made demand within reasonable time from the defendant Muhammad Yusaf for payment of the money due on the *hundis* (endorsed in plaintiff's favour) in dispute?

2. If not, what is its bearing on plaintiff's suit?

3. Whether the Attock Timber Trading Company (defendant No. 2) is an illegal association being composed of more than 20 members and being an unregistered company?

4. Was any notice of dishonour of *hundis* in dispute (by Muhammad Yusaf) given by the plaintiff Bank to the endorsers? (between plaintiff and defendant No. 5).

5. If not, what is its bearing on plaintiff's claim against defendant No. 5?

6. Whether the plaintiff Bank has got the locus to sue?

7. What rate of interest, if any are plaintiff Bank entitled to recover and from whom?

8. Whether Mr. G. Kaul had authority to endorse the *hundis* in dispute on behalf of defendant No. 2

in plaintiff's favour and is that endorsement valid?

9. Whether plaintiff presented the *hundi* in question to defendant No. 4 for payment of the debt due on it?

10. If the above issue is not proved in the positive, what is its bearing on plaintiff's claim?

11. To what relief is plaintiff entitled and against whom?"

So far as Issue No. 3 is concerned, the position of defendant No. 5 was that the Attock Timber Trading Company was a partnership in which several firms were partners and that thus the number of partners was more than twenty. As the Attock Timber Trading Company consisted of more than 20 persons and being unregistered under the Companies Act, it was an illegal association. On December 28, 1925, Messrs. Harkishan Lal, Daya Kishan Kaul, Ishar Das and Sawan Mal representing themselves as the proprietors of the Attock Timber Company, wrote to the plaintiff Bank, requesting that an account be opened in the name of the Attock Timber Trading Company. In this letter, there is no indication that the Company consists of more than 20 persons, nor is there anything to show that the plaintiff Bank was aware that the Attock Timber Trading Company had any other partners besides those mentioned in this letter. Bir Singh was stated in this letter to be the manager of this Company and authorised to operate the account proposed to be opened. The learned Subordinate Judge therefore decided this issue in favour of the plaintiff Bank and as the question was not raised before us in appeal, nothing further need be said about it.

On Issues Nos. 1 and 2, the learned Subordinate Judge held that there was no presentation to Mian Muhammad Yusaf and therefore the endorsers were discharged. He further held that the plaintiff Bank had waited too long in enforcing a remedy by suit against Muhammad Yusaf and had thereby impaired the endorsers' remedy against the makers of the *hundis* for which reason the endorsers were discharged from all liability in accordance with the provisions of s. 40, Negotiable Instruments Act. On Issues Nos. 4 and 5 he held that there was no proper notice of dishonour and for this reason also the endorsers stood discharged. On Issue No. 6 he held that if Pandit Gwash Kaul was competent to endorse the *hundis* in question, the plaintiff Bank were holders in due course and were competent to bring the suit but on Issue No. 8 he held that Pandit Gwash Kaul had

F. As. from the decree of the Sub-Judge First Class, Lahore, dated January 26, 1937.

Messrs. M. C. Mahajan and R. L. Chawla, for the Appellant.

Mr. S. M. Sikri for Lala Ishar Das Messrs. Achhru Ram and Devi Dass, for the Respondent. (Raja Daya Kishore Kaul.)

Mr. Gwash Kaul, Manager in person, for the Company.

Ram Lall, J.—The Punjab Co-operative Bank, Ltd., Lahore, brought a suit for the recovery of Rs. 17,095-8-0 on the basis of eight *hundis* against (1) Haji Muhammad Yusaf of Peshawar, (2) The Attock Timber Trading Company, Lahore, through its manager Pandit Gwash Kaul, and also against defendants Nos. 3, 4, 5, 6 and 7, viz. Lala Harkishan Lal, Sir Daya Kishan Kaul, Rai Bahadur Ishar Das, Lala Sawan Mal and Sardar Bir Singh, as the partners of the Attock Timber Trading Company, defendant No. 2. The allegation in the plaint is that Haji Muhammad Yusaf, who is a resident of Peshawar, drew five *hundis*, dated May 31, 1930, on himself for an aggregate sum of Rs. 6,120. These *hundis* were in favour of the Attock Timber Trading Company and were in *shahjog* form payable to a respectable person at Lahore. These *hundis* were sent on August 4, 1930, duly endorsed for collection to the Punjab Co-operative Bank, Ltd., Lahore, and were signed by Mr. Gwash Kaul. On the face of the *hundis*, it does not appear who Mr. Gwash Kaul is and in what capacity he is signing them. Mr. Gwash Kaul sent these *hundis*, amongst others, to the Bank duly endorsed with a covering letter, dated August 4, 1930, Ex. C-10, with a request to place the proceeds on realization to the credit of the pro-note account of the partners, signing himself as the manager of the Attock Timber Trading Company. On September 18, 1930, Muhammad Yusaf drew three more *kundis* on himself in the same form and again in favour of the Attock Timber Trading Company payable at Lahore for an aggregate sum of Rs. 7,950. These *hundis* were likewise sent duly endorsed to the Bank by Mr. Gwash Kaul who signed these three as manager of the Attock Timber Trading Company on October 31, 1930. The covering letter with which these *hundis* were sent to the Bank is Ex. C-11 and is signed by Mr. Gwash Kaul as the manager of the company, and in this letter he requests the Bank to discount the

hundis and place the proceeds to the credit of the loan account standing in the names of defendants Nos. 3 to 7. This letter goes on to say :

"If anyhow you will not be able to realize the proceeds of the *hundis* from their drawers we shall have no objection to your debiting the amount plus your charges to the above-mentioned loan account of our company."

It is apparent from the terms of this correspondence that if Mr. Gwash Kaul had authority as manager of the Attock Timber Trading Company, the Attock Timber Trading Company became the guarantors to the Bank for any loss that might accrue to the Bank by reason of the purpose of these *hundis*. On this, the plaintiff Bank proceeded to credit the proceeds of these discounted *hundis* in the pro-note account of defendants Nos. 3 to 7. A copy of this account has been exhibited as P. 3 and shows that on October 31, 1930, the proceeds of these *hundis*, namely the value of each *hundi*, minus the discount, has been credited in this account. Another account was opened on the same day in the name of Mian Muhammad Yusaf and the Attock Timber Trading Company, Lahore, in which the value of these eight *hundis* aggregating the sum of Rs. 14,070 is debited to Muhammad Yusaf and the Attock Timber Trading Company.

It was alleged further in the plaint that there was a mutual agreement between the plaintiff Bank and the defendants that after the expiry of the term of the *hundis* if the money due on them was not paid, interest would be charged at the rate of 10 percent, per annum. On this account the Bank claimed a sum of Rs. 2,950-4-0 by way of interest from the date of the expiry of the term of the *hundis* to the date of the suit. The *hundis* in question were not retired and thereafter they were protested through the notary public on April 15, 1932. The cost of this protest was stated to be Rs. 75-4-0, and adding this sum to the amount of principal and interest a suit was lodged for Rs. 17,095-8-0 by the Bank as the holders of these *hundis* in due course. Messrs. Muhammad Yusaf, Sawan Mal, Bir Singh and Harkishan Lal, though served, did not take part in the proceedings and they were proceeded against *ex parte*, except that the receiver of the estate of Lala Harkishan Lal, who was subsequently declared insolvent, joined the proceedings but did not put in any pleadings. The contesting defendants thus are: (1) defendant No. 2 the Attock Timber

Lordships' view, unlikely that a decision solemnly come to by the Governor-in-Council after full enquiry and when declared by the Act to be final, should thereafter be subject to review by the local Courts of the Province.

In coming to this conclusion their Lordships are in no way overlooking the importance of jealously scrutinizing the jurisdiction conferred on executive bodies or of giving no wider interpretation than is necessary to any limitation of the powers of the Court. But however carefully the liberty of the subject has to be guarded not only is there sound sense in making the decision of the Local Govt. final but it has also to be remembered that a right construction of the Act can only be attained if its whole scope and object together with an analysis of its wording and the circumstances in which it is enacted are taken into consideration.

From an examination of the Act alone their Lordships would have reached the conclusion that owing to the provisions of ss. 11 and 13 of the Act no resort to the Courts was left in this case under s. 8 and the other circumstances to which their Lordships have referred so far from weakening have strengthened that conclusion.

Having reached a decision opposed to both the contentions put forward on behalf of the appellant they will humbly advise His Majesty that the appeal should be dismissed with costs.

D.

Appeal dismissed.

Solicitors for the Appellant. — Messrs. Douglas Grant & Dold.

Solicitors for the Respondent. — *The Solicitors, India Office.*

LAHORE HIGH COURT

First Civil Appeals Nos. 100 and 155 of 1937

December 16, 1938

ADDISON AND RAM LALL, JJ.

PUNJAB CO-OPERATIVE

BANK LTD. LAHORE—PLAINTIFF—

APPELLANT

versus

MUHAMMAD YUSAF AND OTHERS—

DEFENDANTS NOS. 3 to 7—RESPONDENTS

Negotiable Instruments Act (XXVI of 1881), ss. 76 (b) (d), 40—Drawer and drawee same person—Necessity of presentment on due date — Drawee having no residence or place of business at place where hundi is due nor found at that place on due date— Necessity of presentment —Endorsement by notary public

held amounted to promise to pay by endorser within meaning of s. 76 (b)—Promise to pay under s. 76 (b), nature of—S. 40, applicability — Negotiable instruments—Suit on—Payment guaranteed by endorser of hundi in case of default by drawer — Holder, if must sue drawer before suing endorser—Endorsement signed by agent on behalf of endorser—Objection that signature of endorser did not appear on instrument, if can be allowed — Principal and agent — Person acting as Manager of company for long time and accepting and endorsing bills of exchange — Whether establishes that he had authority of partners to act as such and bind company.

Where the drawer and the drawee are the same person, no presentation on the due date is necessary, because the drawer cannot suffer damage for want of presentation. Where therefore a *hundi* in *shahjog* form is drawn on self payable at certain place to a respectable person, no presentment is necessary. 148 Ind. Cas. 1167 (1) and 66 Ind. Cas. 503 (2), relied on.

Under s. 76 (b), no presentment is necessary as against any party sought to be charged therewith if he has engaged to pay notwithstanding non-presentment. No presentment is also necessary where the drawee of a *hundi* has no residence or place of business or a known address at a place where the *hundi* is due and on the due date the drawee is not found personally present at such place. 173 Ind. Cas. 175 (3) and 175 Ind. Cas. 692 (4), relied on. [p. 654, cols. 1 & 2.]

An endorsement on a negotiable instrument by the notary public "endorsers state, if the drawer does not pay we will pay at the request of the manager", imports a promise to pay within the meaning of s. 76 (b).

A promise to pay need not be expressed so long as it is clearly deducible from the language employed by the parties or their conduct. Under s. 76 (c), if a party after maturity of a bill and with the knowledge that the instrument had not been presented promises to pay the amount due thereon, no presentment is necessary nor is it necessary where the party concerned waives his right to take advantage of any default in presentment for payment. 157 Ind. Cas. 875 (5), relied on. [p. 655, col. 1.]

Section 40, Negotiable Instruments Act, comes into operation, only when the holder of a negotiable instrument destroys the endorser's remedy without the consent of the endorsers.

Where the endorser of a *hundi* guarantees payment in case of default by the drawer, it is not necessary for the holder in due course to sue the drawer first before maintaining a suit against the endorsers.

When on a fair interpretation of the negotiable instrument the name of the person liable is disclosed, and it is quite clear on the evidence that the agent endorsed it under the implied directions and with the explicit knowledge of his principal an objection taken by the endorser that the signature of the endorser, does not appear on the face of the instrument as it was signed by his agent without mentioning that he is acting on behalf of his principal, cannot be upheld. It is only when there was some doubt regarding the identity of the drawer that the matter can be agitated before the Court. 50 Ind. Cas. 216 (6), distinguished.

When a person has been acting as the Manager of a Company for a long period and has been transacting all the business of the Company as such manager, including the acceptance and endorsing of the bills of exchange of the value of several lacs of rupees, this fact alone is sufficient to establish that he had the proper authority of the partners to act as the Manager of the Company and to bind it as such. [p. 653, col. 2.]

Sections 10, 11, 12 and 13 deal with the limitations of the jurisdiction of the Civil Court and are as follows:—

"10 A proprietor may apply to the Collector to have his property placed under the superintendence of the Court of Wards and the Court of Wards may on being satisfied that it is expedient to undertake the management of such property, make a declaration to this effect.

11. No declaration made by the Local Govt. under s. 8 or by the Court of Wards under s. 10 shall be questioned in any Civil Court.

12.—(1) The Court of Wards shall assume the superintendence of the property of any proprietor disqualified under cl. (b) or (d) of sub-s. (1) of s. 8 or in regard to whose property a declaration has been made under s. 10.

(2) The Court of Wards may in its discretion assume or refrain from assuming the superintendence of—

(a) the property or person and property of any proprietor disqualified under cl. (a) or (c) of sub-s. 1 of s. 8.

(b) the person of any proprietor disqualified under cl. (b) or (d) of sub-s. 1 of s. 8

(3) The Court of Wards may assume the superintendence of the person of any minor who has an immediate or reversionary interest in the property—

(a) of any proprietor disqualified under s. 8; or

(b) of any proprietor in regard to whose property a declaration has been made under s. 10.

13. If the right of the Court of Wards to assume or retain the superintendence of the person or property of any disqualified proprietor is disputed by such proprietor or, if he be a minor or of unsound mind, by some person on his behalf, the case shall be reported to the Local Govt., whose orders thereon shall be final and shall not be questioned in any Civil Court."

It will be observed that s. 11 is only concerned with action taken under sub-ss. (1) (b) or (d) of s. 8, and under s. 10, i. e., those cases in which a declaration is made, leaving the other cases in which superintendence of the property is assumed (or possibly all cases after it has been assumed or in which it is retained) to be dealt with by s. 13.

In terms s. 11 appears to prohibit the bringing of an action disputing the validity of a declaration made by the Court of Wards under those sub-clauses of s. 8. Some limitation must no doubt be put upon the generality of the provision inasmuch as good faith at any rate is required. The appellant, however, goes further and says that the Court of Wards is without jurisdiction and can be declared to be without jurisdiction by the Civil Court in all cases in which the preliminary requirements of s. 8 have not been fulfilled. So far as sub-ss. (1) (b) and (d) are concerned the primary requirement contained in those sub-clauses themselves is merely that the Governor-in-Council should declare the proprietors incapable or unfitted to manage their own property.

Under (b) it seems impossible to put any limitation on that jurisdiction. Under (d) (i) (ii) (iii) and (iv) the matter again seems to be one for the discretionary judgment of the Local Govt. It is conceivable that under (d) (ii) the jurisdiction only exists provided the proprietor has been in fact convicted of a non-bailable offence and that if this fact were non-existent the Local Govt. would be acting *ultra vires* in making a declaration, but it is difficult to imagine that in sub-ss. (i) (iii) and (iv) and indeed in that part of sub-s. (ii) which concerns unfitness by reason of vicious habits or bad character, the Local Govt. should have an absolute discretion whereas in the final part of sub-s. (ii) its jurisdiction should be limited.

In argument before their Lordships however the allegation that the action of the Local Govt. was *ultra vires* was founded not upon the wording of the sub-clauses but upon the proviso to sub-cl. (iii) and (iv) and it was said that if the Governor-in-Council showed by his decision that he interpreted the phrase "gross annual profits" wrongly in law then he could be declared to have assumed an unjustified jurisdiction.

But in such an argument the same difficulty arises as is to be found on a consideration of the sub-clauses themselves. No logical distinction between fact and law was propounded to their Lordships and indeed it is difficult to see why a wrong calculation under proviso (a) should be unchallengeable, whereas a wrong view as to the meaning of "gross annual profits" should be open to question. Nor indeed is it easy to draw a distinction between fact or law on the one part and opinion on the other since proviso (b) by which the Local Govt. are equally governed is a matter of opinion alone.

Apart from a close analysis of s. 8 itself there are other reasons for thinking the decision of the Local Govt. to be unfettered. Under s. 8 (2) careful provision is made for a hearing of the proprietor's case before a decision is made, and in the case of sub-cl. (a) and (c) s. 13 expressly provides for the method which shall be followed if the right of the Court of Wards is challenged and the decision so attained is declared to be final.

Moreover the proviso itself expressly requires the satisfaction of the Local Govt., not that of a Court and it is, in their

the Land Revenue Act from time to time in force.

Moreover though minors, certain females and lunatics—to take three of the classes mentioned in s. 8 of the Act—may require protection whether their property be in land or personalty, it is to be observed that under that section only proprietors, *i. e.*, those beneficially interested in a *mahal* are dealt with, and *mahal* primarily means a local area held under a separate engagement for the payment of land revenue.

No doubt when once a proprietor is made a ward, all his property is, under s. 16 (1) of the Act, put under the superintendence of the Court of Wards, but the original assumption of wardship is only possible in the case of proprietors or land owners paying land revenue.

In considering the way in which land revenue is regarded in India no comparison with tenures in England is of much (if any) assistance. Its, universality, its quantum, and the tendency of the Indian outlook to regard the Govt. as a sharer in all the produce of the land are matters of importance.

By s. 58 of the Land Revenue (United Prov.) Act of 1901 it is provided

"58.—(1) All land, to whatever purpose applied and wherever situated is liable to the payment of revenue to the Govt. except such land as has been wholly exempted by special grant of or contract with, the Govt. or by the provisions of any law for the time being in force.

(2) Revenue may be assessed on land, notwithstanding that revenue, by reason of its having been assigned, released, compounded for or redeemed, is not payable to the Govt."

(3) No length of occupancy of any land, nor any grant of land made by the proprietor, shall release such land from the liability to pay revenue."

But not only is the incidence of the revenue universal, it is also generally fixed at a sum varying from 40 to 45 per cent. of the total income. If in addition to this percentage the proprietor has encumbered his estate to the extent of one-third of the income, between 70 and 80 per cent. of the total receipts would be removed from his control and from 20 to 30 per cent. only remain—a small margin from which to ensure the payment of revenue and the protection of the *mahal* against foreclosure or sale under any mortgages created by the proprietor.

In their Lordships' view these considerations inevitably lead to the conclusion that Land Revenue must be deducted in calculating the gross annual profit of a property.

Even apart however from these con-

siderations the wording of s. 8 of the Court of Wards Act itself would lead their Lordships to the same conclusion.

Under proviso (a) to sub-s. (iv) of s. 8 the contrast is between the aggregate annual interest payable by the proprietor and the gross annual profits—a phraseology which would naturally point to a contrast between what the proprietor received and the interest which he owed, and would so point nonetheless though it is the profits of the property and not of the proprietor which have to be considered. Indeed to substitute the former consideration would bring into account a matter which is obviously extraneous to the considerations with which the Legislature was concerned, *viz.*, the profit derived by the proprietor from his personal estate. Moreover the words are "annual profits"—not "annual rent" or "income," and seem to refer to some profits half way between the total income of the estate and the net profits remaining after the management expenses have been paid.

If the total produce or income of the estate had been intended it would have been easy enough to say so—indeed in s. 141 of the Land Revenue Act of 1901 land revenue is said to be a first charge on the rents, profits or produce of every *mahal*, as opposed to the phrase "gross annual profits" in s. 8 of the Court of Wards Act.

Moreover if land revenue is not to be deducted before the gross annual profits are arrived at in calculating the ratio of charges to profit land revenue would appear on neither side of the account, neither as a charge nor as a deduction from profits.

Therefore even accepting the view presented by the appellant that "gross profits" has of itself no definite meaning, their Lordships, bearing in mind the circumstances above mentioned, are of opinion that in the Court of Wards Act land revenue must be deducted but no allowance for any expenses of estate management must be made in arriving at the gross annual profit of the property.

This conclusion alone would involve the dismissal of the appeal, but the preliminary question whether any action in the Courts was possible having regard to the provisions of s. 11 of the Act was fully argued and is a matter of importance on which their Lordships think their decision should also be given.

by the Local Govt. into the debts and liabilities of the appellant. After the enquiry the appellant received a letter from the Commissioner of Fyzabad, dated September 17, 1929, enclosing a statement of the loans contracted by the appellant, and a statement of the gross annual income, gross annual profits, and land revenue derived from his property. By the letter and statements the appellant was informed that his debts totalled Rs. 14,45,160-7-9 on which the annual interest at the contractual rates amounted to Rs. 1,22,110-9-0; that the gross annual income from his estates amounted to Rs. 5,71,626-10-9; that the amount payable in respect of land revenue, etc., was Rs. 2,65,117-14-4; that the gross annual profits from his estates (arrived at by deducting the amount payable as land revenue, etc., from the gross annual income) amounted to Rs. 3,06,508-12-5; and that therefore the annual interest payable at the contractual rates exceeded one-third of the gross annual profits. Further the letter charged the appellant with failure, without sufficient cause, to discharge his debts and liabilities and said that such failure was likely to lead to the dissipation of the property. Finally the appellant was informed that, under s. 8 (1) (d) (iii), (iv) provisoes (a), (b) of the 1912 Act, he was liable to be declared by the Local Govt. to be incapable of managing his property, but that, under s. 8 (2) of that Act, he could show cause against such a declaration being made.

As a result of this communication the appellant attempted to show cause why no declaration should be made but was unsuccessful and, as stated above, the declaration was made.

From the statement sent to him it is apparent that in calculating whether the annual interest at the contractual rates exceeded one-third of the annual profits of his property, the Local Govt. in order to ascertain the gross annual profits of the estate deducted the land revenue from the gross annual income. If this deduction was rightly made it was evident that the annual interest on the appellant's debts exceeded one-third of the gross annual profits—if on the other hand the land revenue should not have been deducted, the annual interest on the debts is less than one-third of the gross annual profits.

Though some question of the right of the Local Govt. to deduct certain cesses and annual charitable contributions was also

raised, it is conceded that they were not of sufficient amount to have any bearing on the question at issue, and in argument consideration of them was put aside. The sole question considered was whether land revenue was or was not rightly deducted before ascertaining what sum was to be regarded as the gross annual profits.

Altogether apart however from the question whether the construction which he put upon those words was accurate or inaccurate the respondent maintained that the appellant was prohibited from challenging the action taken by reason of the provisions of s. 11 of the Court of Wards Act. That section is as follows :—

"No declaration made by the Local Govt. under s. 8 or by the Court of Wards under s. 10 shall be questioned in any Civil Court."

A number of other questions had been raised and argued before the Courts in India but before their Lordships the respondents rested their case solely upon the two points mentioned.

(1) It may be, as stated by Jessel, M. R. and repeated by Lord Bramwell in *Last v. London Assurance Corporation* (1), that of itself the phrase "gross annual profits" has no definite meaning. It must take its colour from its surroundings. In the present case therefore it is necessary to consider those surroundings by an examination of the scheme of the Court of Wards Act, the way in which land tax is regarded in India and any provisions of the Land Revenue Act which bear upon the matter, in addition to the exact wording of s. 8 itself.

The object of disqualification under s. 8 is no doubt threefold—it will protect persons incapable of managing their own affairs—it will prevent the splitting up or as the Act itself says "the dissipation of the property" and in either event it will enable land revenue to be more easily and more certainly collected.

That the collection of land revenue is an important consideration is apparent both from the objects aimed at and from the fact that by s. 4 of the Act the Board of Revenue is made the Court of Wards for the United Provinces. Indeed in earlier schemes in respect of the disqualification of proprietors, the necessary provisions were contained in the Land Revenue Acts themselves, and even in the present Act the definition of proprietor is only reached by reference to "Mahal" and its meaning in

(1) (1885) 10 App. Cas. 438 (456); 55 L J Q B 92; 53 L T 634; 34 W R 233; 50 J P 116.

tion or fails to recollect the execution of the document, as is contemplated in s. 71, Evi. Act, other evidence would be admissible and the case would be decided on such other evidence as the plaintiff may choose to adduce. Parties will bear their own costs up to this stage; future costs do abide the result.

Latifur Rahman, J.—I agree.

s. Case remanded.

PRIVY COUNCIL

Appeal from the Allahabad High Court
March 4, 1940

VISCOUNT MAUGHAM, LORD PORTER AND
SIR GEORGE RANKIN.

Raja BHAGWAN BAKSH SINGH—
APPELLANT

versus

THE SECRETARY OF STATE—

RESPONDENT

U. P. Court of Wards Act (IV of 1912), s. 8 (d),
Proviso (a)—“Gross annual profits”—Land revenue,
if should be deducted—View of Local Government, if
can be questioned.

In considering the way in which land revenue is regarded in India no comparison with tenures in England is of much (if any) assistance. Its universality, its quantum, and the tendency of the Indian outlook to regard the Govt. as a sharer in all the produce of the land are matters of importance.

In calculating the gross annual profits of the property under s. 8 (d), Proviso (a), U. P. Court of Wards Act, 1912, land revenue must be deducted but no allowance for any expenses of estate management must be made.

However carefully the liberty of the subject has to be guarded, not only is there sound sense in making the decision of the Local Govt. final but it has also to be remembered that a right construction of the Court of Wards Act can only be attained if its whole scope and object together with an analysis of its wording and the circumstances in which it is enacted are taken into consideration. From an examination of the Act the conclusion is inevitable that owing to the provisions of ss. 11 and 13 of the Act no resort to the Court is left under s. 8 to challenge the view of the Local Govt. as to the meaning of “gross annual profits.” [p. 650, col. 1.]

Messrs. J. D. Casswell, K. C., R. K. Handoo and J. L. Roy, for the Appellant.

Messrs. J. Millard Tucker, K. C., and W. Wallach, for the Respondent.

Lord Porter—The appellant is the proprietor of the Amethi estate in the Sultanpur District of Oudh in the United Provinces of India. On March 7, 1930, he was declared by the Governor-in-Council of the United Provinces who claimed to be acting under

the powers conferred upon him by the U. P. Act, No. IV of 1912 (commonly called the United Provinces Court of Wards Act, 1912) to be incapable of managing his own property.

The appellant maintains that the declaration was *ultra vires* and on March 19, 1932, instituted a suit in the Court of the Subordinate Judge at Allahabad claiming a declaration that the declaration above mentioned was wholly illegal and of no effect against the plaintiff. His suit was dismissed on May 14, 1934, and this dismissal was confirmed by the High Court of Judicature at Allahabad on March 31, 1937. From this decision the appellant has appealed to His Majesty in Council.

The Governor's action was taken under ss. 8 and 9 of the Court of Wards Act which are as follows :

“(8)—(1) Proprietors shall be deemed to be disqualified to manage their own property when they are—

(a) minors;
(b) females declared by the Local Govt. to be incapable of managing their own property;

(c) persons adjudged by a competent Civil Court to be of unsound mind and incapable of managing their own property;

(d) persons declared by the Local Govt. to be incapable of managing or unfitted to manage their own property—

(i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property;

(ii) owing to their having been convicted of a non-bailable offence and being unfitted by vicious habits or bad character for the management of their own property;

(iii) owing to their having entered upon a course of extravagance;

(iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them;

“Provided that no such declaration shall be made under sub-cl. (iii) or (iv) unless the Local Govt. is satisfied—

(a) that the aggregate annual interest payable at the contractual rate on the debts and liability due by the proprietor exceeds one-third of the gross annual profits of the property; and

(b) that such extravagance or such failure to discharge the said debts and liabilities is likely to lead to the dissipation of the property.

“(2) No declaration under cl. (d) of sub-s. (1) shall be made until the proprietor has been furnished with a detailed statement of the grounds on which it is proposed to disqualify him and has had an opportunity of showing cause why such declaration should not be made.

“9.—(1) The Local Govt. may direct the Collector or such other person as it may appoint, to make an inquiry into the circumstances of any proprietor and the extent of his indebtedness.....”

So far as they are relevant to this appeal the facts are as follows :—

On July 13, 1929, an enquiry under s. 9 (1) of the Act of 1912 was instituted

to the processes of the Court and capable of giving evidence, to prove execution. The plaintiff did certainly take out summons on one of these attesting witnesses but the witness did not appear and nothing further is known about him. The question is, whether this is enough to let in further evidence under the provision of s. 71, Evi. Act, as has been held by the lower Appellate Court.

It is argued by Mr. Das, who appears on behalf of the appellant, that s. 71 has got no application to the present case, when there were two other attesting witnesses alive and capable of giving evidence, and the plaintiff did not make any attempt whatsoever to produce them in Court. This argument is supported by the opinion given by Field, J., in his Commentary on the Law of Evidence, and this was accepted by D. N. Mitter, J., in this Court in *Ayanati Shikdar v. Mohammad Esmail* (2). Jack, J., however took a different view in the same case and he was of opinion that if one of the attesting witnesses was actually produced and turned hostile, other evidence could be admitted under s. 71, Evi. Act, even though other attesting witnesses were available and the learned Judge relied on another decision of this Court in *Hasan Ali v. Gurudas Kapali* (1). I think that it is not necessary for me to discuss the propriety of this view, as in my opinion, the other circumstances proved in this case exclude the operation of s. 71, Evi. Act. Section 71, Evi. Act reads as follows:

"If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

This pre-supposes in my opinion that the witness is actually produced before the Court and then if he denies execution or his memory fails or if he refuses to prove or turn hostile, other evidence can be admitted to prove execution. In the case referred to above the witness was actually before the Court and afterwards turned hostile. In this case however, the witness was not before the Court at all and no question of denying or failing to recollect the execution of the document did at all arise. The plaintiff simply took out a summons as against this witness and nothing further was done later on. In a case like this where the attesting witnesses are not before the Court, s. 71, Evi. Act, has, in my opinion, got no application. In such cases it is the duty of the plain-

(2) 49 O L J 347; 122 Ind. Cas. 554; A I R 1929 Cal. 441; Ind. Rul. (1930) Cal. 250.

tiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally or physically, the plaintiff can avail himself of the provisions of s. 69, Evi. Act. I think therefore that the procedure followed by the Court of Appeal below is not right and the learned Judge should not have allowed Bir Narayan Panda to be examined as a witness in Court, although the plaintiff made no endeavour whatsoever to bring any of the attesting witnesses before the trial Judge.

Mr. Sen who appears for the respondents, sees the difficulty in his way and he attempts to get it round by saying that the case does come within the purview of the proviso to s. 68, Evi. Act. In other words, his contention is, that as the execution of the document has not been specifically denied by any one of the defendants, it is not necessary to call any attesting witness under the provision of s. 68, Evi. Act. I do not think that I can accept this contention as correct. It has been held by this Court in several cases, viz., the case in *Ebrahim Mandal v. Akshay Konar* (3) and the case in *Hari Nath Ghose v. Nepal Chandra Rai* (4), that the word 'execution' as used in the proviso to s. 68, Evi. Act, in the case of a mortgage-bond which under the law requires attestation, means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as a mortgage. This includes attestation, and as attestation was expressly denied here the plaintiff was not exonerated from the duty of complying with the provision of s. 68, Evi. Act, by calling an attesting witness. This appeal therefore must be allowed but I think that as the Court of Appeal below was labouring under some sort of misapprehension, an opportunity should be given to the plaintiff to produce one of the three attesting witnesses who are now alive and are said to be subject to the processes of the Court. I accordingly send the case back to the trial Court with a direction that the learned Munsif should give the plaintiff an opportunity of examining any of the three attesting witnesses that are capable of being produced before the Court. In case none of the attesting witnesses are produced or if the witness actually produced denies execu-

(3) 40 C W N 151; 62 O L J 25.

(4) 41 N W O 306; I L R (1937) 1 Cal. 507.

CALCUTTA HIGH COURT

Appeal No. 721 of 1937

May 5, 1939

B. K. MUKHERJEA AND LATIFUR
RAHMAN, JJ.HARE KRISHNA PANIGRAHI—
DEFENDANT NO. 1—APPELLANT

versus

JOGNESWAR PANDA, PLAINTIFF

AND OTHERS—RESPONDENTS

Evidence Act (I of 1872), ss. 71, 68, Proviso—Attesting witness not before Court—Applicability of s. 71—Summons taken out against attesting witness—His failure to appear—No further steps taken—Further evidence cannot be let in under s. 71—Word “execution”—Proviso to s. 68, meaning of, in case of mortgage bond—Express denial of attestation—Provisions of s. 68 must be complied with.

In a case where the attesting witnesses are not before the Court, s. 71, Evi. Act, has got no application. In such cases it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally or physically, the plaintiff can avail himself of the provisions of s. 68. Where the plaintiff has simply taken out summons against the attesting witness and on his failure to appear has done nothing further later on, no further evidence under s. 71 can be let in. 122 Ind. Cas. 551 (2), distinguished.

The word ‘execution’ as used in the proviso to s. 68, Evi. Act, in the case of a mortgage-bond which under the law requires attestation, means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as a mortgage. This includes attestation, and where attestation is expressly denied the mortgagee is not exonerated from the duty of complying with the provision of s. 68, by calling an attesting witness. *Ebrahim Mandal v. Akshay Konar* (3) and *Hari Nath Ghose v. Nepal Chandra Rai* (4), followed.

A. from the appellate decree of the District Judge, Midnapur, dated December 2, 1936.

Messrs. Gopendra Nath Das and Satindra Nath Chatterjee, for the Appellant.

Mr. Chandra Sekhar Sen and Lala Hemanta Kumar, for the Respondents.

B. K. Mukherjea, J.—This appeal is on behalf of defendant No. 1 and it arises out of a suit commenced by the plaintiff for enforcement of a mortgage bond. The bond is alleged to have been executed by defendant No. 1 and his brother, Naba Krishna, to secure an advance of Rs. 50 only. The brother subsequently died leaving defendant No. 1 as his sole heir. Defendants Nos. 2 to 4 are the subsequent purchasers of the mortgage property and defendant No. 5 is said to be the plaintiff's benamidar, in whose name the mortgage bond was taken. A number of defences were

taken by defendants Nos. 1 to 4 and their contentions in substance were that there was no due attestation of the mortgage bond as required by law; that there was no consideration for the same and defendant No. 5 was not the benamidar of the plaintiff. It was further alleged that the endorsement on the back of the bond was not a genuine endorsement and the suit was barred by limitation. The trial Court overruled all the other defences of the defendants except the one raised on the question of attestation. It held that the mortgage bond could not be admitted in evidence as the plaintiff did not call even one of the attesting witnesses to prove its execution, as it was incumbent upon him to do, under the provisions of s. 68, Evi. Act. In this view of the case the Munsif dismissed the plaintiff's suit. The document it may be pointed out, purports to be attested by six attesting witnesses of whom three are admittedly dead; Of the three living witnesses, one named Gaja Sant was summoned by the plaintiff but he did not depose. Another witness, named Panchanan, was summoned by the defendants but was not examined and the remaining witness was not summoned by any of the parties.

The plaintiff preferred an appeal against this decree of dismissal to the lower Appellate Court and the learned District Judge relying upon the decision of this Court in *Hasan Ali v. Gurudas Kapali* (1), came to the conclusion that the plaintiff had complied with the requirements of s. 68, Evi. Act, inasmuch as one of the attesting witnesses was actually summoned, though he did not give evidence; and it was open therefore to the plaintiff to prove execution of the document by other evidence as is provided for in s. 71, Evi. Act. A witness named Bir Narayan Panda who was examined in the trial Court was called by the Appellate Court as an additional witness and he proved the signatures of all the attesting witnesses. Relying on this witness the lower Appellate Court has decreed the plaintiff's suit and it is against this decision that the present second appeal has been preferred. The point for our determination is as to whether the view taken by the Court of Appeal below is right. Now as the mortgage bond in suit is required by law to be attested, it is necessary, under the provision of s. 68, Evi. Act, that the plaintiff should call at least one of the attesting witnesses, if he is alive and subject

(1) 49 O L J 16; 116 Ind. Cas. 726; A I R 1929 Cal. 188; 33 O W N 248; Ind. Rul. (1929) Cal. 502.

MADRAS HIGH COURTCriminal Revision Cases Nos. 813 and
814 of 1938Criminal Revision Petitions Nos.
772 and 773 of 1938

January 27, 1939

PANDRANG ROW, J.

In re V. K. SUBRAMANIA

MUDALI AND OTHERS—ACCUSED—

PETITIONERS

Madras Local Boards Act (XIV of 1920), ss. 208 (2), (3), 210, 227 (a)—Members of Panchayat Board charged with offences under ss. 208 (2) and (3) and 210 for acts done while purporting to act as members of Board—Sanction of Local Government is necessary for prosecution.

Where a member of the Panchayat Board who was appointed Temporary President for the purpose of election is charged for offences punishable under s. 208 (2) and (3) of the Mad. Local Boards Act in respect of acts or omissions alleged to have been done with reference to something intimately related to his position as a member of the Panchayat Board or as some time Temporary President of the Board, the sanction of the Govt. is absolutely necessary as a pre-requisite of taking cognizance of the alleged offence.

So also when some of the members are charged with offences under ss. 208 (2) and (3) and 210 of the Local Boards Act for acts performed by them while purporting to act in the discharge of their duties as members of the Board, they are clearly protected by the provisions of s. 227 (a) of the Act and sanction of the Local Govt. for their prosecution is necessary.

Or. R. Ps under ss. 435 and 439 of the Criminal P. O., 1898, praying the High Court to revise the orders of the Second Class Magistrate, Arkonam, dated October 11, 1938.

Messrs. V. T. Rangaswami Ayyangar and K. Ramaswami Ayyangar, for the Petitioners.

The Public Prosecutor, for the Crown.

Order.—This is a case in which the petitioner who was a member of the Panchayat Board of Kaveripakkam and who was appointed temporary President for the purpose of election was charged before the Sub-Magistrate of Arkonam for offences punishable under s. 208 (2) and (3) of the Local Boards Act in that he continued to exercise the functions of temporary President even after the election of the President and for failure to hand over one pie being the Panchayat fund to the newly elected President. It is extraordinary to find that such a complaint was entertained by the Magistrate without any sanction for the prosecution being given by the Local Govt. as required by law, even an application by the accused to the Magistrate to drop the proceedings in view of the absence of sanction of

the Govt. was dismissed. The Magistrate's view is, in my opinion, wrong as this is a case in which the sanction of the Govt. was absolutely necessary as a pre-requisite of taking cognizance of the alleged offence. The acts or omissions alleged against the petitioner in this case were with reference to something intimately related to his position as a member of the Panchayat Board or as some time temporary President of the Board. The Sub-Magistrate should not have taken cognizance of the alleged offence in the absence of Govt. sanction. The proceedings before him in Cr. O. No. 772 of 1938 are therefore quashed.

Criminal Revision Case No. 814 of 1938

This is in a way connected with Criminal Rev. Case No. 813 of 1938. In the present case no less than seven persons were charged with offences punishable under ss. 208 (2) and (3) and 210 of the Local Boards Act. The petitioners Nos. 1 to 4 who are accused Nos. 1 to 4 in the Court below are members of the Panchayat Board of Kaveripakkam and the acts which are alleged to constitute the offences are acts which were performed by them while purporting to act in the discharge of their duties as members of the Board. As the nature of the acts themselves clearly show this so far as they are concerned, they are clearly protected by the provisions of s. 227 (a) of the Madras Local Boards Act. As there was no sanction of the Local Govt. As there was no sanction of the Local Govt. for their prosecution the Magistrate should not have taken cognizance of the offences so far as they are concerned. The proceedings so far as these persons, accused Nos. 1 to 4 before the Magistrate are concerned, are quashed.

As regards the remaining petitioners i. e., accused Nos. 5 to 7 in the Court below are concerned, it has not been shown that they are entitled to any protection or that the prosecution against them requires the previous sanction of any authority. It cannot therefore be said that the Magistrate was wrong in dismissing their application to drop the proceedings so far as they were concerned, and there can be no interference so far as accused Nos. 5 to 7 in the Court below are concerned. It will be open to them to contend before the Magistrate that the abatement alleged against them is no offence at all and indeed to put forward any other defence that may be available to them.

N.S. *Order accordingly.*

hold the trial. It would appear that the administrative directions of this Court contained in para. 20, sub-para. (3), are unnecessarily rigorous and ill-adapted to present conditions, and fetter the discretion of Magistrates. The question of amendment of these directions will be considered in due course. It is owing to the existence of those directions that the Judicial Secretary at present consults this Court when an application is made to him, and inquires whether this Court has any objection to a trial being held at headquarters outside the court-house. This procedure will, no doubt, be rendered unnecessary when the necessary amendments have been made to the Burma Courts Manual.

S.

Order accordingly.

ALLAHABAD HIGH COURT
Criminal Reference No. 855 of 1939
January 23, 1940
RAGHPAL SINGH, J.
DAL CHAND—APPLICANT

*versus***EMPEROR—OPPOSITE PARTY**

*Criminal Procedure Code (Act V of 1898), s. 283
(h) — Judgment, writing of — Duty of Magistrate pointed out.*

If a Magistrate thinks that all that is necessary for him to say by way of judgment is that he sentences an accused to imprisonment or fine, then he is not doing his duty properly. Cases have to go to the higher Courts when persons are convicted and the Magistrates should understand that it is their duty to write their judgments carefully. They may be concise and they need not be elaborate, but they should show on the face of them that the cases of both parties have been carefully and properly considered. Section 263, cl. (h), Criminal P. O., enjoins that a brief statement of reasons for the order should be given by the Magistrate. It is absolutely necessary that this should be done, otherwise the general public is likely to lose faith in the administration of justice.

The Deputy Govt. Advocate, for the Crown.

Order.—This is a reference by the learned Sessions Judge of Agra, recommending that an order passed by the trial Magistrate should be set aside and the case should be re-tried according to law. The facts can briefly be stated as follows: One Dal Chand had made a report to the Police, against certain persons. The prosecution case was that that report was false and Dal Chand was prosecuted under s. 182, I. P. O., for making a false report. The case was tried by Mr. Kehar Singh, a Magistrate of the First Class in the district of Agra. It appears from the order of the learned

Sessions Judge that he recorded the evidence of several prosecution and defence witnesses but the judgment written by him was as follows: "Dal Chand is fined Rs. 25 or two months rigorous imprisonment in default."

The learned Sessions Judge is perfectly right in saying that this is no judgment at all. Under the law summary powers can be given to certain Magistrates and it is expected that such powers are given to those Magistrates only who have got sufficient experience of criminal work. There is a grave responsibility on the shoulders of the Magistrates who have to try cases summarily. They are relieved of the necessity of recording the evidence of witnesses in a certain class of cases, but they must remember that the accused as well as the complainant have a right to expect a fair and an intelligent decision from them. If a Magistrate thinks that all that is necessary for him to say by way of judgment is that he sentences an accused to imprisonment or fine, then I have no hesitation in saying that he is not doing his duty properly. It has to be remembered that cases have to go to the higher Courts when persons are convicted and the Magistrates should understand that it is their duty to write their judgments carefully. They may be concise and they need not be elaborate, but they should show on the face of them that the cases of both parties have been carefully and properly considered. Section 263, cl. (h), Criminal P. O., enjoins that a brief statement of reasons for the order should be given by the Magistrate. It is absolutely necessary that this should be done, otherwise the general public is likely to lose faith in the administration of justice. I have considered it necessary to make these observations because this is not the first case of this kind tried by this Magistrate, Mr. Kehar Singh, which has come before me. I have had more than one case already in which I found that the judgment was almost similar. I find from the record that this Magistrate has been transferred from the district of Agra. I would direct that a copy of this order should be sent to Mr. Kehar Singh, Magistrate, by the Registrar of this Court for his information and future guidance. The reference made by the learned Sessions Judge is accepted, the conviction and sentence of the accused are set aside and it is directed that there will be a fresh trial in the case as recommended by the learned Sessions Judge.

D.

Reference accepted.

self. Where he decides to hold the trial in the jail premises he must pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise, if accused persons consider that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his court-house. If, however, the District Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Local Govt. himself straightway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial shall be held elsewhere. It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside of it. If the Magistrate then wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the necessary authorities who are in control of the premises in which the Magistrate desires to hold the trial.

Mr. U Myint Thein, Govt. Advocate, for the Crown.

Mya Bu, Ag. C. J.—These proceedings—one under s. 108, Criminal P. O., and the other under s. 107, Criminal P. O.—where the trial was held in the Monywa Jail, have been called for in revision in order to lay down the procedure which should be carried out in such cases. In the present case it would appear that the trying Magistrate, the First Additional Magistrate, Monywa, made oral representations to the District Magistrate (for there is nothing in writing on the subject on the record) and the District Magistrate communicated with the Judicial Secretary of the Govt., under whose control the jail department is, and requested that the trial of the two accused in these cases be held inside the Monywa Jail. The offences were political ones, and it was anticipated that the trial could not safely or peacefully be held in the Magistrate's Court. Directions as to the venue of criminal trials are laid down in s. 352, Criminal P. O., the marginal note to which is: "Courts to be open." The section reads as follows:

"The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them: Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court."

Administrative instructions have been given by the Court as to the place of trial.

In para. 20 of the Burma Courts Manual it is laid down that ordinary criminal trials should be held at the headquarters of the trying Magistrate, though on occasions they may be held at or close to the scene of the crime, if that is convenient to the witnesses and the Magistrate happens to be on tour in the vicinity. Sub-para. (2) provides that sessions cases should only be tried at the Sessions Judge's headquarters. Sub-para. (3) is as follows:

"At headquarters cases are to be inquired into and tried at the court-house only, subject to any provision of the law for a local inquiry."

The procedure of the learned District Magistrate in the present case appears to have been correct. He did not apply to the Local Govt. that the Magistrate should hold the trial at a place other than his court-house. As has been said, that is a matter purely within the discretion of the Magistrate himself. All that was done here was that the District Magistrate, who is the proper authority, applied to the Local Govt. for permission to hold the trial inside the jail, and that, of course, can only be done with the permission of the authorities who control the jail department.

There is however, one irregularity which should be noted. The Magistrate did not pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise, if accused persons consider that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is as well to point out here that it is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his court-house. If however the District Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Local Govt. himself straightway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial shall be held elsewhere. It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside of it. If the Magistrate then wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the necessary authorities who are in control of the premises in which the Magistrate desires to

consideration before such an interpretation is put upon it."

This follows another decision of the same High Court in *Krishnan Raju v. Chintala-swami Naidu* (7). With respect, we are unable to agree that the question of the intention of the section arises at all. It is succinctly stated by Lord Atkins, delivering the judgment of the Judicial Committee of the Privy Council in *Pakala Narayana Swami v. Emperor* (8), where the interpretation of certain words in s. 162, Criminal P. C., was in question :

"But in truth when the meaning of the words is plain, it is not the duty of the Courts to busy themselves with supposed intentions."

We would add that the remedy for any supposed hardship lies in the hands of the Legislature. There are several reported decisions in support of the view we take and reference might be made to one of them, *Meharban Singh v. Bhola Singh* (3). We consider the judgment of Rachhpal Singh, J., in that case much in point. It appears to us, however, that the point covered by these decisions should not ever arise. A material delay in passing a preliminary order under sub-s. (1), s. 145, Criminal P. C., implies a lamentable failure to grasp the purpose of s. 145, Criminal P. C. It has been emphasized in a plethora of Indian High Court decisions that the section is intended to provide a speedy remedy for the prevention of breaches of peace arising out of disputes in respect of immovable property. Sub-section (1) does not contemplate any sustained inquiry before the making of the preliminary order. The condition prescribed is that the Magistrate shall be satisfied from a Police report or other information as to the necessity for taking action, the whole purpose being to prevent an immediately apprehended breach of the peace. It is in the highest degree absurd for a Magistrate to delay the passing of a preliminary order while he undertakes a prolonged inquiry extending over several hearings. The second proviso to sub-s. (4) contemplates the making of an emergent order for attaching property in dispute, but as a condition to this there must be in existence an order under sub-s. (1). Clearly, therefore, delay in the

passing of a preliminary order is calculated to frustrate the whole object of s. 145 of the Criminal P. C., including the provision relating to emergent orders.

There may be cases in which a Magistrate is not satisfied with the information first provided by the complainant and it might be expedient to allow the complainant time in which to supplement his initial case. But the purpose of the section must not be lost sight of and no prolonged inquiry is justified. Sub-section (5) affords an adequate safeguard in those cases in which the preliminary order was not justified, and the mandatory nature and scope of that sub-section is frequently overlooked. A Magistrate must cancel his preliminary order and stay further proceedings if it is shown by any party interested that no dispute likely to cause breach of the peace exists or has existed. A Magistrate is required to direct his attention and intelligence to the purpose of the section and is not justified in delaying his preliminary order in the manner in which that order was delayed in this case.

As for the delay of about eight months in passing the final order, we can only say that this is nothing short of amazing, and displays a supreme disregard of consequence. We are constrained to say that we deprecate the strange manner in which the case has been dealt with and trust that the circumstance that the opponent No. 1 is an influential Pir has in no way conduced to this. With these observations we set aside the order of the learned Magistrate under s. 145 (6) and send the proceedings to the District Magistrate of Hyderabad with directions that the case be dealt with according to law by himself or by any Magistrate to whom he may choose to send it.

S.

Order set aside.

RANGOON HIGH COURT

Criminal Revisions Nos. 714-A and 715-A
of 1939

August 25, 1939

MYA BU, AG. O. J. AND MOSELY, J.

THE KING—PROSECUTOR

versus

U KHEMEIN AND ANOTHER—ACCUSED

*Criminal Procedure Code (Act V of 1898), s. 352—
Holding of trial at place other than Court house—
Procedure to be followed.*

Whether the Magistrate should hold the trial at a place other than his Court-house is a matter purely within the discretion of the Magistrate him

(7) A I R 1927 Mad. 816; 104 Ind. Cas. 110; 28 Cr. L J 782; 8 A I Cr. R 574.

(8) (1939) Kar. 123; 180 Ind. Cas. 1; A I R 1939 P. C. 47; 18 Pat. 234; 66 I A 66; 1939 O L R 134; (1939) M W N 185; 40 Cr. L J 364; 11 R P O 166; 1939 O W N 282; 20 F L T 265; 49 L W 319; 43 O W N 473; (1939) A L J 298; 41 Bom. L R 428; 41 P L R 272; 69 C L J 273; 5 B R 449; (1939) 1 M L J 756 (P O).

constitute an allegation of an attempt by the opponents to take forcible possession. It was alleged by the applicant that when opponent No. 1 came on the land opponents Nos. 2 to 6 who were Mohammad Rahim's *haris* declared that they were now opponent No. 1's *haris*. Such a declaration by the *haris* in such circumstances clearly cannot amount to forcible ousting of the *zamindar*. The point is clear, but reference might be made to the case in *Muhammad Araf v. Satramdas Sakhimai* (5), in which Davis, J. C., dealing with a case under s. 145, Criminal P. C., said:

"We do not think however we can accept this position, and it appears to us that dealing with land which is owned by a *zamindar* and cultivated by him with his *haris* he must before division of the produce or *batai* be deemed to be in possession of the land and of the produce of the land, and that the *haris* are merely his agents for the cultivation, and that until the crop is divided between the *zamindar* and the *haris* it is really the *zamindar* who has custody of the crop and divides them."

The learned Magistrate has interpreted the facts correctly for the purpose of his order of March 7, 1938, and we cannot see any justification whatever for his volte face. With regard to the legal aspect, no difficulty should arise in giving effect to the provisions of s. 145, Criminal P. C. Sub-sections (1), (4), (5) and (6) of s. 145, Criminal P. C., are complementary. Once an order has been passed under sub-s. (1), it is obligatory for a Magistrate to make the inquiry provided for in sub-s. (4) subject only to the obligation under sub-s. (5) to terminate the proceedings in the circumstances therein contemplated. The words of sub-s. (4), "the Magistrate shall then" are mandatory. The word 'then' refers to the stage when in compliance with the order under sub-s. (1) the parties have put in their written statements and attended the Court. Sub-section (5) is emphatic that the order under sub-s. (1) shall be final subject to the one exception that the Magistrate shall cancel the order and stay all further proceedings if it is shown that no dispute likely to cause breach of the peace exists or has existed. On the completion of the inquiry under sub-s. (4) a final order under sub-s. (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-s. (6).

In this case the learned Magistrate has disregarded the aforesaid provisions. He has made an order in favour of the op-

ponents under sub-s. (6) without having ever held any inquiry under sub-s. (4); he has based that order on the conclusion that his preliminary order under sub-s. (1) was *ab initio* bad, and he has virtually cancelled the preliminary order in contravention of the express provisions of sub-s. (5). Apart from these errors, he was not justified under any circumstances in making the final order under sub-s. (6), because the effect of cancelling the preliminary order which he had passed under sub-s. (1) was to deprive himself of jurisdiction to proceed further. In the circumstances mentioned above the question of law raised in the opponent's application of May 26, 1938, which has so greatly exercised the mind of the learned Magistrate did not arise at all. Incidentally, however, we consider that the learned Magistrate's conclusion on that question was right. The first proviso to sub s. (4) reads:

"Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date."

The inquiry under sub-s. (4) is as to possession on the date of the preliminary order under sub s. (1) and the words of the proviso "within two months next before the date of such order" are precise and unambiguous. It is difficult to see how these words afford any scope for holding that in these cases where a Magistrate does not make a preliminary order within two months of the dispossession, the party complaining is still entitled to proceed under s. 145, Criminal P. C. Undoubtedly, it is unfortunate that a party should be prejudiced by delay in the making of a preliminary order under sub-s. (1) especially if that delay is in any particular case attributable to the inaptitude or want of integrity of the Magistrate, but we cannot concede that any interpretation at variance with the plain words of the section is justified. We are aware that there are certain reported cases in which a contrary view has been taken; for instance, in *Srinivasa Reddy v. Dasaratha Rama Reddy* (6), a Judge of the Madras High Court held, to quote a portion of the headnote to the report, that

"though the words of the proviso are capable of the interpretation, that the dispossession must be within two months of the preliminary order, yet the intent and object of the section must be taken into

(5) A I R 1936 Sind 143; 164 Ind. Cas. 969; (1936) Cr. Cas. 859; 37 Cr. L J 1030; 9 R S 60 (2).

(6) 52 M 66; 113 Ind. Cas. 336; A I R 1929 Mad. 198; 30 Cr. L J 144; 56 M L J 33; 28 L W 504; (1928) M W N 794.

Criminal P. C. It was the legality of the preliminary order under s. 145 (1) which was questioned and the learned Magistrate has dealt with the application on that basis.

Arguments were heard on the application on June 16, 1938 and the matter was adjourned for orders to July 10, 1938. No inquiry as contemplated by s. 145 (4) appears to have been made by the learned Magistrate and no evidence taken, although on behalf of the applicants a request to take evidence had been made on June 16, 1938. On July 10, 1938 orders were postponed to July 26, 1938, but no orders were passed on that date. On August 12, 1938 the applicant's Advocate wrote to the learned Magistrate, asking for information regarding the expected order, but no reply was sent and no orders passed. Eventually on March 18, 1939, about eight months later, the learned Magistrate passed an order, upholding the preliminary legal objection raised by opponents in their application of May 26, 1938 and stating that his order of March 7, 1938 was, to quote his own words, 'not within the purview of the proviso to sub-s. (4) of s. 145, Criminal P. C.' Having thus come to the conclusion that his preliminary order of March 7, 1938 could not stand he went on to decide that the opponents had been in possession of the disputed land up to two months next before March 7, 1938. The learned Magistrate states his findings with regard to opponents' possession in the following words:

"Accepting therefore the preliminary legal point and relying on the rulings quoted by the learned Advocate for the opponents, I have no option but to hold that the opponents were in possession of the disputed land within two months next before the date of the order passed on March 7, 1938 and that I have no jurisdiction to proceed further in the matter."

Having stated that he had no jurisdiction to proceed further in the matter he concludes by stating:

"I further order that opponents should continue to be in the possession of the disputed land until evicted therefrom by due course of law and forbid all disturbance of possession until such eviction."

On the same date he passed a formal order under s. 145 (6) to that effect. Now from a bare recital of these facts, it is manifest that the learned Magistrate had made several errors and that his conduct of the case was unsatisfactory. On March 7, 1938 the learned Magistrate made an order under s. 145 (1), Criminal P. C., on the information placed before him by that date. That order appears to us to have complied with the provisions of s. 145 (1), Criminal P. C.,

and to have been a good and proper one in the circumstances. With regard to the question of possession the order recites that it has been made to appear to the learned Magistrate, *inter alia*

"that on December 1, 1937 the other party (opponents) came to site in order to forcibly evict the complainant (applicant) from possession."

In other words the order makes it clear beyond any question that on the date of the order the learned Magistrate considered that the applicant's party were in possession of the disputed land. The notice issued to the opponents in pursuance of this order also substantiates this. It reads:

"Whereas the complainant Mahomedali Khan has filed a complaint before me, that the *mutasarrifi* (enjoyment) and possession of original Survey Nos. 140, 141, 109 now blocks Nos. 183/3A, 18/1, 26/4, 18/4, 25/1 in Deh Larh Tapo Samabad are since the year 1912, in the hands of the vendees (1) Mahomedali Khan and (2) Mahomed Rahim Nizamani whose *am-mukhtiar* is the complainant Mahomedali Khan, and whereas on December 1, 1938 you along with other persons went to the said land and tried to take possession of the aforesaid blocks from the complainant's side forcibly, whereby there is apprehension of breach of peace;

You are hereby summoned to appear in my Court at Hala, either in person or through a Pleader on March 26, 1938 at 10 A. M. and to file a written statement as regards what you have to say in the matter."

Between March 7, 1938 and March 18, 1939 no evidence of any kind was taken and no inquiry within the terms of s. 145 (4) made and no new facts came to light. The opponents had filed written statements denying the allegations of the applicant, but the learned Magistrate had declined in spite of requests by the applicant to record any evidence. On March 18, 1939 the learned Magistrate thought fit to pass an order based on an interpretation of certain facts completely at variance with his previous interpretation of the very same facts.

As already stated the learned Magistrate was justified on March 7, 1938 in passing an order under s. 145 (1) on the assumption that the applicant was in the possession, but in holding on March 18, 1939 that these identical facts amounted to an admission by the applicant of forcible dispossession on December 1, 1937, the learned Magistrate has grossly erred in the inferences he draws as well as in his appreciation of the law. We have carefully considered the facts and we can find no justification whatever for the conclusion that the applicant admitted having been dispossessed on December 1, 1937. It is true that the word 'dispossession' has been used in the original complaint, but the facts stated clearly

December 1, 1937 opponents Nos. 1 to 6 arrived on the disputed land and squatted thereon, threatening violence in the event of any attempt to evict them. Opponent No. 1 stated that he was carrying out the order of his father Pir Zialdin Shah. Opponents Nos. 2 to 6 who had been the heirs of Muhammad Rahim working on this land asserted that they were now the heirs of opponent No. 1, in respect of the same land. The wheat crop then standing had actually been cultivated by opponents Nos. 2 to 6 on behalf of Muhammad Rahim Khan. Apprehension arising that the standing crop might be removed by force by the opponents and that there might be a breach of the peace, the applicant as Muhammad Rahim's agent instituted proceedings in the Court of the Sub-Divisional Magistrate, Hala, against the six opponents and Zialdin Shah on December 23, 1937. Such was the applicant's case. The proceedings were transferred by the Sub-Divisional Magistrate, Hala, to the Court of the First Class Magistrate, Hala, for disposal. Thereafter inordinate delay occurred in dealing with the matter and the learned First Class Magistrate's order under s. 145 (6), Criminal P. O., which is now the subject of attack in this Court, seeks to attribute the delay to the applicant. We deem it expedient to set out a short account of the manner in which this case has been dealt with.

The papers were apparently not received from the Sub-Divisional Magistrate, Hala, until January 3, 1938 owing to the intervening Christmas holidays. Notice was issued on January 5, 1938 to the applicant to appear on January 17, 1938 to give a statement on oath. This notice was not served on the applicant and a hearing was then fixed for February 7, 1938, fresh notice being issued. The applicant however appeared with an Advocate on January 28, 1938 and his statement was partly recorded. Delay arose because the applicant had not produced a certain document of title and his further examination was adjourned to February 8, 1938 on which date also the document was not produced. The applicant's further statement was again adjourned to February 23, 1938. On February 23, 1938 the aforesaid document was still not forthcoming and there was a further postponement to March 5, 1938, at the instance of the applicant's Advocate. On March 5, 1938, the applicant's further statement was recorded and on March 7, 1938 a preliminary order under s. 145 (1) was passed and the wheat crop on part of

the disputed land was attached by an order under proviso 2 to s. 145 (4), Criminal P. O. It does not appear that the said document of title was produced on March 5, or at any time.

Notice was issued on March 10, 1938, to the opponents to appear on March 23, 1938 and to file their written statements. Further delay occurred in the serving of these notices and the written statements were not filed until May 9, 1938. In these statements possession by Muhammad Rahim Khan of the disputed land was denied and it was alleged that since the death of Rashidullah in 1923 Pir Zialdin Shah, his son had been in continuous possession. On April 26, 1938, that is to say, previous to the filing of the written statements the applicant had complained to the Court that certain of the opponents were endeavouring by force to cultivate the land. On this the Court had ordered that neither party was to do any cultivation until the final decision of the case. On May 26, 1938, the applicant complained in a detailed application that the opponents in disobedience to the Court's orders were cultivating the land, and they prayed that someone be put in charge of it. This request the Court refused but ordered that the *tapedar* should make a report. On the same date, that is to say, May 26, 1938, the opponents made through their Advocate the following application:

"It is submitted on behalf of the opponents that this Hon'ble Court will be pleased to dismiss the application as the order under s. 145, cl. 4 is illegal having been made more than two months from the date of the alleged dispossession, i. e., December 1, 1937. The order is dated March 7, 1938. The words 'two months before the date of such order' in the proviso to s. 145, Criminal P. O., means two months before the date of the preliminary order and not two months from the date of the complaint."

Reliance is placed on the following rulings: *Emperor v. Baijnath* 31 Cr. L. J. 678 (1), *Emperor v. Parashram* 32 Cr. L. J. 476 (2), *Meharban Singh v. Bhol Singh* 36 Cr. L. J. 102 (3), and *Puran Singh v. Ramjhari Koer* 36 Cr. L. J. 655 (4). The reference in the application to s. 145 (4), Criminal P. O., is a mistake for s. 145 (1),

(1) 31 Cr. L. J. 678; 124 Ind. Cas. 363; A. I. R. 1929 Oudh 526; (1929) Cr. Cas. 641; 5 Luck. 440; 6 O. W. N. 957; Ind. Rul. (1930) Oudh 219.

(2) 32 Cr. L. J. 476; 130 Ind. Cas. 153; A. I. R. 1931 Nag. 38; (1931) Cr. Cas. 222; 26 N. L. R. 377; Ind. Rul. (1931) Nag. 57.

(3) 36 Cr. L. J. 102; 152 Ind. Cas. 496; A. I. R. 1935 All. 35; (1935) Cr. Cas. 22; 57 A. 488; (1934) A. I. R. 1157; 7 R. A. 316.

(4) 36 Cr. L. J. 655; 155 Ind. Cas. 88; A. I. R. 1935 Pat. 224; (1935) Cr. Cas. 618; 7 R. P. 538.

SIND JUDICIAL COMMISSIONER'S COURT.

Criminal Revision Application No. 158
of 1939

August 11, 1939

LOBO, J. O. AND O'SULLIVAN, J.
MUHAMMAD ALI YAR MUHAMMAD
—APPLICANTS

versus

SHAMSUL HAQ PIR ZIALDIN SHAH AND
OTHERS—OPPOSANTS

Criminal Procedure Code (Act V of 1898), s. 145
—Words of Proviso to sub-s. (4) mean two months before date of preliminary order under sub-s. (1)—*Inquiry under sub-s. (1)—Inquiry under sub-s. (4) whether obligatory after passing order under sub-s. (1)—Order under sub-s. (6), if must follow subsequently—Land cultivated by heirs of zamindar on his behalf—Person squatting on such land—Heirs declaring to be heirs of such person in respect of same land—Whether amounts to forcible ousting of zamindar.*

An inquiry under sub-s. (4) of s. 145, Criminal P. C., is as to possession on the date of the preliminary order under sub-s. (1) and the words of the proviso "within two months next before the date of such order" are precise and unambiguous. These words afford no scope for holding that in those cases where a Magistrate does not make a preliminary order within two months of the dispossession, the party complaining is still entitled to proceed under s. 145. These words mean two months before the date of the preliminary order. 113 Ind. Cas. 336 (6) and 180 Ind. Cas. 1 (8), not followed, 152 Ind. Cas. 496 (3), relied on. [p. 639, col. 2.]

Sub-s. (1) of s. 145 does not contemplate any sustained inquiry before the making of the preliminary order. It is in the highest degree absurd for a Magistrate to delay the passing of a preliminary order while he undertakes a prolonged inquiry extending over several hearings.

Sub-ss. (1), (4), (5) and (6) of s. 145, Criminal P. C., are complementary. Once an order has been passed under sub-s. (1), it is obligatory for a Magistrate to make the inquiry provided for in sub-s. (4) subject only to the obligation under sub-s. (5) to terminate the proceedings in the circumstances therein contemplated. The words of sub-s. (4) "the Magistrate shall then....." are mandatory. The word "then" refers to the stage when in compliance with the order under sub-s. (1) the parties have put in their written statements and attended the Court. On the completion of the inquiry under sub-s. (4) a final order under sub-s. (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-s. (6). An order under sub-s. (6) cannot be made without having held any inquiry under sub-s. (4).

Where after a person has squatted on the land of zamindar cultivated by the heirs of zamindar on his behalf, the heirs declare they are heirs of that person in respect of the same land such a declaration in such circumstances cannot amount to forcible ousting of the zamindar. 164 Ind. Cas. 969 (5), relied on.

Or. R. App. to revise the order passed by the First Class Magistrate, Hala, dated March 18, 1939.

Mr. Kishanchand J. Bijlani, for the Applicant.

Mr. Dipchand Chandumal, for the Opponents

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

O'Sullivan, J.—This is an application to revise an order passed by the First Class Magistrate, Hala, in proceedings instituted under s. 145, Criminal P. C. by the applicant in his capacity as agent to a zamindar called Muhammad Rahim of Tando Allahyar taluka, Hyderabad District, against Zialdin Shah and his son Shamsal Haq, Pirs of Pir Jhando village, Hala taluka, and five others. Pir Zialdin Shah's name was dropped in the course of the proceedings and the case continued against his son Pir Shamsal Haq, opponent No. 1, and the remaining persons, opponents Nos. 2 to 6. The applicant's allegations were in brief as follows:

Pir Rashidullah, the grandfather of opponent No. 1, had sold in September 1917 certain land in Hala taluka to three persons including the aforesaid zamindar Mahomed Rahim and opponent No. 1's father. Pir Zialdin Shah had also been a party to the sale. The price of the land was payable by instalments and possession thereof was transferred to the purchasers in February 1919 when the first instalment was paid. No mutation in the Record of Rights had ever been effected by Rashidullah or his heirs in favour of the purchaser. Pir Rashidullah died in 1923, the final instalment of the purchase price being paid to his son Zialdin Shah. After Pir Rashidullah's death dispute arose between Zialdin Shah and his brothers regarding succession to their father's estate and gadi, the family being that of the well known Pirs of Jhando. Litigation ensued and did not finally terminate until a decision of the Judicial Committee of the Privy Council in 1937. The applicant says that in view of this dispute between the sons of Pir Rashidullah it was not possible to obtain mutation of the Record of Rights in favour of the purchasers.

The land to which these proceedings appertain are part of that sold in 1917 and comprise six blocks, at present numbered 25/1, 18/4, 26/4, 10/1, 18/3 and 3-A which were allotted to Mohammad Rahim in 1927 on a partition between himself and his co-purchasers. These blocks continued in the exclusive possession of Muhammad Rahim being annually cultivated by him. On

tained at the hands of the learned District Judge. In this connection reliance was placed upon a decision of the Bombay High Court and also upon a decision of this Court to which I was a party. The Bombay decision is in *Rangappa v. Narayanrao* (1). There the learned Chief Justice made this observation:

"A preliminary objection has been taken that defendant No. 1 could not appeal as between himself and defendant No. 2 (that is exactly the position in this case). The Subordinate Judge's judgment, however, shows that he dealt with the case at the hearing as if it raised not only a question between the plaintiff and defendants, but also one between the defendants, as his decree directs defendant No. 1 to pay defendant No. 2's costs. This distinguishes the case from cases of *Gadadhar Banerjee v. Mun Mohunee Dossee* (2) and *Atma Ram v. Balkishen* (3)."

The decision in *Gadadhar Banerjee v. Mun Mohunee Dossee* (2) related to a case in which the plaintiff did not appeal but there had been an appeal by the *pro forma* defendants, by making the real defendants, who had not appealed, respondents; and it was held that the *pro forma* defendants could question that portion of the decision which, as between the plaintiff and the non-appealing defendants, had not been appealed against. The learned Chief Justice of the Bombay High Court observed that the facts of the case before him distinguished it from the authority in *Gadadhar Banerjee v. Mun Mohunee Dossee* (2). So far as this Court is concerned, the matter is concluded by the decision in *Isri Prasad Singh v. Jagat Prasad Singh* (4). The head-note of that decision, which states the gist of the case correctly, runs thus:

"The plaintiff having got a decree for contribution against some of the defendants, was content with the decree and did not appeal against the other defendants who were exonerated, but an appeal was preferred by some of the defendants against whom decrees were passed praying that a decree might be passed against the other defendants as well in order that their liability might be reduced."

It was held that O. XLI, r. 33 of the Civil P. C., applied and that the appeal was competent. I repeat that so far as this Court is concerned we are bound by that decision. I therefore hold that in the circumstances of this case the appeal by defendants Nos. 1 to 4, involving as it will, if they should succeed, defendants Nos. 5 to 9, is competent.

The principal question is whether defendants Nos. 5 to 9 form a joint family

(1) 18 B 520.

(2) 7 W R 366.

(3) 5 A 266.

(4) 18 P L T 787; 172 Ind. Cas. 187; 16 Pat. 557; A I R 1937 Pat. 628; 4 B R 118; 10 R P 308.

with defendants Nos. 1 to 4. There was some discussion during the course of the argument as to whether by reason of the fact that at the time the action was brought the parties were admittedly separate, that is to say, the two sets of defendants formed two separate sets of joint family, had the effect of throwing the onus on the person who wished to contend that the separation had taken place on a specified date. In my judgment, however, although it is contended on the authority of their Lordships of the Judicial Committee in *Bhagwani Kunwar v. Mohan Singh* (5), that the onus is upon the party contending that separation had taken place on a material date, in the circumstances of this case it is unnecessary to come to any definite conclusion on that point. (After reviewing the evidence on this issue, his Lordship continued). In the circumstances the only conclusion I can arrive at is that defendants Nos. 5 to 9 having failed to establish that they were separate in the year 1924 the year in which the bond in suit was executed, judgment should have been pronounced not only against defendants Nos. 1 to 4 but also against defendants Nos. 5 to 9.

The learned Judge in the Court below found as to Rs. 2,712-8-0 that it was for antecedent debt. Therefore the defendants being sons and grandsons of the executant of the bond are liable. The same argument cannot be used as against defendants Nos. 5 to 9. They can be made liable only on the footing that that sum was for joint family necessity. The case will therefore have to go back for determination of liability of defendants Nos. 5 to 9 as regards Rs. 2,712-8-0. As regards the balance Rs. 1,787-8-0, there is a finding which is binding on both defendants Nos. 1 to 4 and defendants Nos. 5 to 9 that it was for legal necessity. The case therefore will be remitted for the determination of the question as to what extent defendants Nos. 5 to 9 are liable as regards Rs. 2,712-8-0. The decree against defendants Nos. 1 to 4 will stand.

The learned Subordinate Judge will record a finding on this question within three weeks of the receipt of the record and transmit the same to this Court.

Chatterji, J.—I agree.

D.

Order accordingly.

(5) 29 O W N 1037; 88 Ind. Cas. 385; 23 A L J 589; A I R 1925 P O 132; 49 M L J 55; (1925) M W N 421; 41 O L J 591; 22 L W 211 (P O).

themselves laid him on a cot. The Assistant Surgeon in his evidence says that he did not think that the wound on Gangayya's abdomen was anything but merely superficial and therefore he thought there would be plenty of time to attend to him in the morning. He admits however that when he saw him in the morning he realized that the patient was in a very grave and dangerous situation and he sent for the Magistrate to take his dying declaration. It seems to us that this witness must have made a very perfunctory examination of the deceased when he was brought to his house shortly after receiving the fatal injury, and we think this is a matter which should be brought to the notice of the Surgeon-General.

N.-S.

*Appeal dismissed.***PATNA HIGH COURT**

Appeal from Original Decree No. 6
of 1937

January 26, 1940 -

WORT AND CHATTERJI, JJ.

Thakur RANESHWAR PRASAD SINGH

AND OTHERS—DEFENDANTS—

APPELLANTS

versus

RAMPRATAP THAKUR AND THREE—
(PLAINTIFFS AND JAGESHWAR PRASAD
SINGH AND OTHERS—RESPONDENTS—

RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Decree against some defendants and others exonerated—No appeal by plaintiff, but defendants against whom whole decree was passed appealing with a prayer that decree might be passed against other defendants as well—Appeal held competent.

The plaintiff having got a decree against some of the defendants, was content with the decree and did not appeal against the other defendants who were exonerated, but an appeal was preferred by some of the defendants against whom decree was passed praying that a decree might be passed against the other defendants as well in order that their liability might be reduced:

Held, that O. XLI r. 33 of the Civil P. C. applied and that the appeal was competent. 172 Ind. Cas. 187 (4), followed.

A. from a decision of the Subordinate Judge of Muzaffarpur, dated November 14, 1935.

Mr. S. K. Mitter, for the Appellants.

Rai G. S. Prasad, Rai T. N. Sahai, Messrs. S. S. Prasad Sinha, S. P. Srivastava and G. C. Das, for the Respondents.

Wort, J.—This is an appeal by defendants Nos. 1 to 4 arising out of an action

on a mortgage, dated September 10, 1924. There were also joined with defendants Nos. 1 to 4 the defendants Nos. 5 to 9. The two principal questions which arose for determination in the Court below were first, whether the consideration for the mortgage was for joint family necessity; and, secondly whether defendants Nos. 1 to 4, together with defendants Nos. 5 to 9, formed members of one joint family, or, as defendants Nos. 5 to 9 alleged, they were separate from defendants Nos. 1 to 4.

Defendants Nos. 1 to 4 were the sons and grandsons of Rameshwar Prasad Singh, who executed the bond in suit. Defendant No. 5 was the brother of Rameshwar Prasad Singh and defendants Nos. 6 to 9 were his sons. We are not here concerned with defendants Nos. 10 to 22 who had been subsequently added.

The learned Judge in the Court below decided that a substantial part of the consideration for the mortgage was for antecedent debt, and, as regards Rs. 1,787-8-0, the finding was that it was chiefly for land revenue and cess and therefore was for joint family necessity. The learned Judge came to the conclusion, in support of the contention of defendants Nos. 5 to 9, that separation of their branch of the family had taken place at the time or before the time of the bond and therefore that branch of the family was not liable in respect of that money.

The only question raised in this appeal is whether the learned Judge was right in the conclusion at which he arrived on the point I have last stated. Defendants Nos. 1 to 4 are the appellants, and in substance therefore they are asking for an enlargement of the decree which has been obtained by the plaintiff, in the sense of making defendants Nos. 5 to 9 liable also. It will easily be seen why defendants Nos. 1 to 4 are dissatisfied with the decree of the learned Judge. The property which is the security for the bond of 1924 is an eight anna interest in Mauza Jarang. If the defendant-appellants' contention is right, there remains eight annas interest of that village, admittedly unaffected by the bond of 1924, in which the defendant-appellants would still have an interest.

One of the first points that was raised was whether in the circumstances the appeal by defendants Nos. 1 to 4 was competent. It being admitted that the plaintiffs had not appealed and being satisfied with the decree which they ob-

the hubbub arose on account of the stabbing of the deceased, the accused was not there. P. W. No. 11 is the watchman of a choultry and his house is next door to the choultry and about 20 yards from the scene of crime. He says that in the middle of the night he was awakened by a knocking at his door and went there and saw the accused. The accused fell down in front of his door. The accused told this witness that he had stabbed Gangayya and then had stabbed himself and at that time there was several knife wounds on the person of the accused. The witness told the accused to go and lie down at some place and not in front of his house and the accused went to the choultry nearby and lay down on the *pial* of the choultry. P. W. No. 12 is the wife of P. W. No. 11 and she gives evidence to the same effect. These two witnesses are corroborated by the Sub-Inspector of Police who says that P. W. No. 11 came to him at the Police Station and reported this incident. The Sub-Inspector is P. W. No. 13. He says that he went at once to the choultry and saw the accused lying there with wounds on his person and the knife lying near the steps of the choultry two yards away. That knife is M. O. No. 1.

The accused was committed for trial not only for the murder of Gangayya but also on a charge of attempting to commit suicide, but the learned Sessions Judge reserved the charge of the latter offence to a separate trial.

There is also evidence, which we have no reason to doubt, that the deceased himself stated that the accused was the man who stabbed him. He said so to his father P. W. No. 7 and he made a similar statement to the Magistrate who recorded his dying declaration in the morning, but learned Counsel for the appellant very rightly stresses the fact that when P. W. No. 8 got to the side of the injured man, the latter told him that he did not see the person who stabbed him. It is clear in our opinion that the deceased did not see his assailant and his statements that the accused stabbed him were based on what people round him said. But quite apart from that, there is ample evidence to bring home the offence to the accused, namely the evidence of P. Ws. Nos. 11 and 12, which, as we have said, is corroborated by the statement made by P. W. No. 11 at the Police Station at the very earliest opportunity. The evidence of these two witnesses is also corroborated by the condition of the accused when the Sub-Inspector found him lying on the *pial* of the

choultry immediately afterwards. In the Magistrate's Court, the appellant filed a written statement saying that on that night he was in a fit of madness and while he was lying asleep some unknown person inflicted the injuries on him. In the Sessions Court he said that this statement was correct and denied the truth of P. Ws. Nos. 11 and 12, but gave no reason why they should implicate him falsely.

Learned Counsel for the appellant contends that at the best the offence committed by the appellant would amount to causing grievous hurt. His argument is based on the fact that P. W. No. 2, the Assistant Surgeon, stated in answer to a Court question that the deceased might have survived if a major operation had been performed at once. The witness also stated that he did not open the abdomen as that was a major operation for which he had not the necessary expert assistance and when he was asked why he did not call in some other qualified medical man which he could have done, he said that he was afraid that even so the deceased might possibly die under the operation and he would come to be blamed. The fact remains that the appellant stabbed the deceased on a vital part of the body and that the deceased died as a direct result of that injury. It is clear also that such an injury is one which in the ordinary course will cause death. There were 26 ounces of fluid blood in the peritoneal cavity and, as we have said, there was acute inflammation of the peritoneum. That the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime. We agree with the learned Sessions Judge that the accused was guilty of murder and also that the appropriate sentence is death. We confirm the conviction and the sentence passed on the appellant and reject his appeal.

We regret to have to place it on the record that the conduct of the Assistant Surgeon in this case calls for adverse comment. He saw the injured man at his house at 12-30 in the night and made a most perfunctory examination of him, applied some bandages to the wound and told his relations to take him to the hospital. P. W. No. 7 the father of the deceased says that the doctor was angry at being disturbed from his sleep, and hit him a blow with his fist. P. W. No. 5 the uncle of the deceased says that when they got to the hospital, there was no ward attendant there and nobody to do anything for the injured man and that they

Mitter that the whole interest in the property passed to the plaintiff-appellant by reason of the rent decree and auction sale which followed it, and that being so, he contends that we cannot now give effect to s. 26N of the Bihar Tenancy Act so as to take away the interest which had become vested in the plaintiff and re-vest such interest in the contesting defendants. In my view, once we are bound to regard this transfer as a transfer made with the consent of the landlord, then it follows that the rent decree and execution sale in consequence of it cannot affect the position. As we are bound to deem the transfer to have been made with consent, then the sale in execution of the rent decree was a sale which in no way affected the contesting defendants' interest. Had the contesting defendants been parties to the rent suit or to the execution proceedings following it, different considerations might arise. However, they were not parties, and in my view the sale in execution of the rent decree cannot now be said to have affected the contesting defendants' interests in any way. In my view the facts of the present case fall precisely within the observations made by Sir George Rankin in the Privy Council case to which I have referred, and we are bound by such observations. In my judgment the contesting defendants in this case were entitled to rely upon s. 26N of the Bihar Tenancy Act and the provisions of the Amendment Act of 1938, and such gave them a good defence to this claim.

Holding as I do that these sections afford the defendant-respondents a good defence, it is unnecessary to consider the question of limitation. For the reasons which I have given, I hold that the lower Courts and Rowland, J., were right in dismissing the plaintiff's claim, and I would, therefore, dismiss this appeal with costs. It is to be observed that the defendant-respondents in this case do not claim an absolute interest in this property but only claim a title as tenants.

Fazl Ali, J.—I agree.

D.

Appeal dismissed.

MADRAS HIGH COURT

Referred Trial No. 29 and Criminal

Appeal No. 124 of 1939

April 3, 1939

BURN AND STODART, JJ.

In re MAHANTI SREERAMULU—

ACCUSED

Criminal trial—Murder—Death caused as direct result of stabbing by accused—Offence committed is murder—Fact that immediate expert medical attention would have saved deceased does not change nature of crime.

Where an accused has stabbed the deceased on a vital part of the body and the deceased has died as a direct result of that injury and the injury is one which in the ordinary course will cause death, the accused is guilty of murder. The mere fact that the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime.

Ref. T. and Cr. A. referred by the Sessions Court, Vizagapatam Division, dated February, 4, 1939.

Mr. T. R. Thyagarajan, for the Accused.

The Public Prosecutor, for the Crown.

Stodart, J.—The accused, a man of 26, has been convicted and sentenced to death for the murder of Gangayya, aged 20. The referred trial raises the question whether we should confirm the sentence of death. The appeal is by the accused praying that the conviction be set aside. It is certain that the deceased was stabbed in the abdomen in the night of August 19, when he was sleeping on the *pial* of the house in the occupation of one Atchayya. At his cries the other persons who were sleeping there and the deceased's relations came to his help. They carried him on a cot to the house of the Assistant Surgeon and from there to the local fund hospital where he died on the morning of August 21, at 8 'clock. The *post mortem* examination disclosed the fact that the stab had penetrated the abdominal cavity and had pierced the intestines and that death was due to profuse internal hæmorrhage and acute peritonitis.

P. W. No. 7 the father of the deceased who went to the scene of crime at once on hearing what had happened to his son says that at 9 that night he had seen and talked to the deceased at that place and that the accused was there at the time. He says that the accused and the deceased used to sleep on the *pial* with 7 or 8 other men. P. W. No. 8 is one of the men who used to sleep on that *pial*. He says that on the night in question the accused lay down to sleep at 10 P. M. beside him and that when

in limine. Their Lordships are of opinion that no such saving can be implied. Section 26N is not a provision to the effect that no action shall lie in certain circumstances, nor has it any reference directly to litigation. Its provision is that every person claiming an interest as a landlord shall be deemed to have given his consent to every transfer made before January 1, 1923. This is retrospective; the question is not whether general language shall be taken only in a prospective sense. The object of this section can only be to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected he shall have the right to remain on the land."

It has been argued by Mr. Mahabir Prasad on behalf of the respondents that the present case is precisely covered by the observations of Sir George Rankin to which I have made reference. In the present case the transfer was made before 1923 and since the transfer the transferees have been in possession and are indeed in possession to this very day. He has argued that as a result of s. 26N or, perhaps to be more accurate, the latest amendment to this Act, we are bound to assume that the landlord consented to this transfer and, therefore, the transferee cannot now be ejected as he has been in possession ever since the date of the transfer.

This view finds support in recent Bench decisions of this Court. In *Thakur Rai v. Issardyal Parshad* (3), it was held that s. 26 N of the Bihar Tenancy Act was retrospective and therefore the interest of a transferee of a non-transferable holding was not affected by the sale in execution of a decree for rent against the recorded tenants only. In that case there was a transfer in favour of the plaintiff of a part of a non-transferable holding in the year 1913. In 1931, the landlord filed a suit against the recorded tenants but did not make the transferee a party. He obtained a rent decree, and in execution of that decree he purchased the holding on June 17, 1932. It appears that the present plaintiff was somehow ejected, and on December 21, 1933, he brought a suit for recovery of possession. This Court held that the transfer to the plaintiff had to be regarded as a transfer made with the consent of the owner, and, therefore, a good transfer. That being so, a rent suit brought against other persons could not possibly affect his title, and his title was in no way prejudiced by a sale in execution of the rent decree. It is to be observed that in this case the transferee was actually out of possession, yet the

Court held that he had a good title by reason of the transfer and, therefore, was entitled to possession. In the case before the Court at the present moment the transferee is in possession and has been from the date of transfer.

A similar view was taken by this Court in the case of *Muhammad Shafait v. Nathali Ram* (4). In that case a landlord in execution of a money decree against some of the tenants purchased an occupancy holding which had been sold to the plaintiff before 1923, and in that capacity disposed the plaintiff who sued for possession. The suit was dismissed by the trial Court but was decreed by the lower Appellate Court and during the pendency of the appeal to the High Court the Bihar Tenancy Amendment Act, 1934, came into force. It was held that although the plaintiff had no title at the date of the suit nevertheless when the new Act came into force his title became complete and he could get a decree for possession. Here again the Court had to consider the effect of s. 26N of the Bihar Tenancy Act. When the plaintiff in that case was dispossessed, he had no title, but the moment the Bihar Tenancy (Amendment) Act of 1934 came into force the transfer to him had to be deemed as a transfer with the consent of the landlord. It had, therefore, to be regarded as a good transfer, and accordingly he was entitled to maintain his suit for possession. The effect of this section was also considered in the case of *Miss G. B. Solano v. Umeshwari Koer* (5). The facts of that case are somewhat different from the facts of the present case; but the case is important, because the learned Judges took the same view of the effect of s. 26N of the Bihar Tenancy Act as the learned Judges had taken in the earlier cases.

In my view the cases of this Court to which I have referred must be followed. Though the transfers in the present case conferred no title upon the transferees at the date of the transfers, the effect of the amendments to which I have made reference is to give the transferee a good title. We must now regard the transfers as if they were made with the consent of the landlord. If they were made with the consent of the landlord, then the interest in the occupancy holding passed to the contesting defendants. It has been argued by Dr.

(4) 18 P L T 345; 169 Ind. Cas. 1000; A I R 1937 Pat. 357; 10 R P 62; 3 B R 614.

(5) 18 P L T 700; 171 Ind. Cas. 308; A I R 1937 Pat. 506; 10 R P 196; 4 B R 12; 16 Pat. 500.

(3) 17 Pat. 333; 179 Ind. Cas. 104; A I R 1938 Pat. 559; 5 B R 176; 11 R P 327.

before Mr. Justice Rowland in second appeal, and he held that the suit was barred by limitation. He, however, was of opinion that the transferees could not claim the protection of s. 26N of the Bihar Tenancy Act as they could not pray in aid that section to revive rights which had already been extinguished. In the result he upheld the decision of the Court below though on different grounds and dismissed the appeal.

Before Mr. Justice Rowland it does not seem to have been seriously contended that the contesting defendants had a good defence under s. 26N of the Bihar Tenancy Act. The learned Judge observes :—

"In second appeal by the plaintiff it is contended that the statute has not been correctly applied by the Subordinate Judge. It cannot operate to revive in favour of defendants first party a title which had been extinguished before the amendment of the Beng. Ten. Act came into force. We have to see, it is said, what was the effect of the decree and the auction purchase at the time when they took place and if by then title once passed the statute would not divest the title so vested. This argument appears to me to have force. In fact, Mr. S. M. Mullick for the respondents had nothing to urge against it."

Before us, however, it has been strenuously argued by Mr. Mahahir Prasad on behalf of the respondents that his clients were protected by s. 26N of the Bihar Tenancy Act and that they cannot be ejected.

In my view the respondents' contention is well founded. At the time when this litigation took place the law relating to the matter was contained in s. 26N of the Bihar Tenancy Act. That section was in these terms :—

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before the first day of January 1923, and, in the case of the transfer of a portion of a holding, to have accepted the distribution of the rent of the holding as stated in the instrument of transfer, or if there is no such instrument, as settled between the transferor and the transferee."

This section has now been replaced as a result of amendments made by the Bihar Tenancy (Amendment) Act, 1938. The amended section is now s. 26B of the Bihar Tenancy Act and there is a proviso to it in these terms :—

"Provided that if the transfer was made before the first day of January, 1923, it shall be binding on the landlord, and no notice shall be necessary and no landlord's registration fee shall be payable."

The transfer in question in this case was made in the year 1912, and by reason of s. 26N of the Bihar Tenancy Act and the

proviso to the present s. 26B of the Bihar Tenancy Act, we must assume that the transfer was made with the consent of the landlord. The effect of s. 26N of the Bihar Tenancy Act has been considered by their Lordships of the Privy Council in the case of *K. C. Mukerjee v. Ramratan Koer* (1) where it was held that s. 26N of the Bihar Tenancy Act, 1885, as amended by the Bihar Tenancy Amendment Act of 1934, is expressed and intended to have retrospective action. As there was no saving clause, it is applicable to pending suits. In that case a suit was brought on June 30, 1927, against a transferee on the footing that she had taken a transfer of a non-transferable occupancy holding in the village by a deed dated September 28, 1916. The case made against her was that the transfer of the holding attracted certain principles of the law laid down in the well-known case of *Dayamayi v. Ananda Mohan Roy Chowdhury* (2) and the landlord was entitled to re-enter upon the holding as upon an abandonment by the tenant. The Subordinate Judge accepted the plaintiff's case and passed a decree ejecting the transferee. On appeal to this Court the learned Judges were of opinion that since the date of the deed in question the plaintiff or his predecessors had recognized the right of the transferee and could not now impugn the transfer. Whilst the appeal was pending before their Lordships of the Privy Council, the Bihar Tenancy (Amendment) Act of 1934 was passed which added s. 26N to the Bihar Tenancy Act. Their Lordships applied this amendment to the facts of the case and held that the landlord must be deemed to have consented to the transfer which was made before January 1, 1923, and, therefore, the transfer had to be regarded as a good transfer, and, therefore, the plaintiff had no right to eject the transferee. At p. 271^a Sir George Rankin, who delivered the judgment of the Board, made the following observations :—

"In these circumstances it appears to their Lordships that unless some saving can be implied as regards occupancy holdings which at the date of the commencement of the Act are in question in a pending suit, s. 26N must be applied to the present case and the plaintiff's appeal must fail

(1) 15 Pat. 268; 160 Ind. Cas. 105 (2); A I R 1936 P O 49; 1936 O L R 69; 1936 A L R 101; 8 R P O 142; 40 C W N 263; 17 P L T 25; (1936) M W N 35; 2 B R 225; 70 M L J 105; 62 C L J 419; 43 L W 336; 63 I A 47 (P O).

(2) 42 O 172; 27 Ind. Cas. 61; 18 C W N 971; 20 O L J 52; A I R 1915 Cal. 242.

his client he would ask that the order should be suspended in its operation till he had time to move a competent Civil Court and obtain an order therefrom. Be that however as it may, we are of opinion that the order of the learned Magistrate holding that Sayed Mahmoodshah was entitled to possession of the disputed property and that the Receiver should hand over possession of the *dargah* to him after one month from the date of the order was illegal in view of the clear provisions of s. 145, Criminal P. C., and in view of the Magistrate's own finding that at the time of the order under s. 145, cl. (1) the *dargah* was in the possession of Rahimalishah the applicant. We accordingly reverse the order of the learned Magistrate and direct that the applicant be put in possession of the *dargah* and declare him to be entitled to the possession thereof until evicted therefrom in the due course of law and forbid all disturbance of such possession until such eviction.

s.

Order reversed.

PATNA HIGH COURT.

Letters Patent Appeal No. 20 of 1938

August 2, 1939

HARRIES, C. J. AND FAZL ALI, J.
CHANDRIKA PRASAD SINGH—
APPELLANT

versus

RAM LAL SAHU alias BIMAL SAHU

AND OTHERS—RESPONDENTS

Bihar Tenancy Act (VIII of 1885) as amended in 1938—S. 26-B, Proviso—Transfer of non-transferable holding before 1923—Transferee ever since in possession—Sale in execution of decree for rent against recorded tenant—Interest of transferee, if affected.

Where a transfer of a non-transferable holding was made in 1912 and since then the transferee has been in possession, it must be assumed by reason of the proviso to s. 26-B of the Bihar Tenancy (Amendment) Act, 1938, that the transfer was made with the landlord's consent. In such a case the transferee cannot be ejected. The interest of such a transferee is not affected by the sale in execution of a decree for rent against the recorded tenant only. 160 Ind. Cas. 105 (2) (1); 179 Ind. Cas. 104 (3), 169 Ind. Cas. 1000 (4) and 171 Ind. Cas. 306 (5), relied on, 27 Ind. Cas. 61 (2), referred to.

L. P. A. from a judgment of Mr. Justice Rowland, dated November 1, 1938.

Dr. D. N. Mitter and Mr. K. Sahai, for the Appellant.

Messrs. Mahabir Prasad, Chaudhuri Mathura Prasad, Ramnandan Prasad and M. Rahman, for the Respondents.

Harries, C. J.—This is a Letters Patent

appeal from a decision of Mr. Justice Rowland confirming the decrees of the Courts below which were in favour of the defendants.

The suit out of which this appeal arises was brought by the plaintiff to recover possession of certain property bearing survey plot No. 236 in the village of Mokamah. The holding which was non-transferable originally stood in the name of the defendants second party, and they by two sale-deeds dated October 5, 1912, transferred a part of the holding to defendants Nos. 1 and 2 and the remainder to other transferees who are now represented by defendant No. 15. It appears that after these transfers the transferees entered into possession of the property and erected *golas* thereon, and from the findings it would appear that they have been in continuous possession for a matter of over twenty years. In the year 1930 the landlords instituted a suit for arrears of rent against the original tenants, the defendants second party, and on May 18, 1930, they obtained a decree. On September 22, 1931, the holding was sold in execution of this rent decree and purchased by the plaintiff-appellant who is said to be a minor son of one of the landlords. On November 18, 1931, the sale was confirmed, and on April 17, 1933, a Civil Court person went to effect delivery of possession. The latter, however, found that there were *pakka* buildings on the land and he was unable to deliver possession. On November 29, 1933, the plaintiff brought the present suit claiming a declaration of title and recovery of possession of the property after giving defendants time to remove the structures built thereon.

The suit was contested by defendants Nos. 1 and 2 and defendant No. 15. Two grounds were taken in defence. In the first place, it was alleged that the contesting defendants who were transferees or represented the transferees of the original tenants, were entitled to the protection given by s. 26N of the Bihar Tenancy Act and, therefore, they could not be ejected. Secondly, it was pleaded that the suit was barred by limitation.

The learned Munsif held that the suit was barred by limitation; but on appeal the lower Appellate Court came to the conclusion that there was no bar of limitation, but it held that the transfer to the contesting defendants by the original tenants was a good transfer and that they could not now be ejected. The matter came

brother Muhammadalishah and he was in possession of it. The applicant made no reference to Sayed Mahmoodshah, the opponent, and obviously intended to convey that he was in possession in his own right. The learned Magistrate, as appears from his order, found that at the time of the complaint under s. 145, Criminal P. O., the *dargah* was in the possession of Rahimalishah, the applicant, and that the opponent, Sayed Mahmoodshah, claimed as a descendant of Sayed Abdullah Shah to be the *sajjadahnishin* of the *dargah* and alleged that Rahimalishah was a *mujawar* appointed by him.

Now in a matter under s. 145, Criminal P. O., the procedure to be adopted and the manner in which the proceedings are to be disposed of are clearly set out in the section itself. Under cl. (1) when the Magistrate assumes jurisdiction he is to require the parties concerned to put in written statements of their respective claims 'as respects the fact of actual possession of the subject of dispute.' Under cl. (4) the Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements put in, hear the parties, receive their evidence, take such further evidence as he thinks necessary,

"and if possible decide whether any and which of the parties was at the date of the order before-mentioned in such possession of the said subject."

It is clear from these provisions of s. 145 that what the Magistrate is concerned with in proceedings relating to disputes as to immovable property under Chap. XII, Criminal P. O., is not the right to possess the subject-matter of dispute but the actual possession thereof at the date of the order under cl. (1), s. 145. The expression 'actual possession' is plain and unambiguous and has no reference to any right to possess. In *Agni Kumar Das v. Mantazaddin* (1), a Full Bench of the Calcutta High Court held that the words 'actual possession' in sub-s. (1) of s. 144, Criminal P. O., mean actual physical possession, even though wrongful, e. g., that of a recent trespasser in actual possession at the time of the proceedings under s. 145. Our attention was invited by the learned Advocate for the opponent to the case in *Nritta Gopal Singh v. Chandi Charan Singh* (2), in which a Bench of the Calcutta High Court held that the possession of an agent or servant which is permissive

cannot give a party to a proceeding a *locus standi* as against his principal or master. It was contended that in the present case the possession of the applicant was that of a servant of the opponent. The applicant had therefore no *locus standi* as against his master, the opponent in these proceedings. The decision however is not applicable in the circumstances of this case; for, whereas in the case decided by the Calcutta High Court it was admitted that Chandi Charan Singh one of the *shebaitis*, was acting with the permission of the other *shebaitis*, in the case before us the applicant repudiates all connection with the opponent. No evidence one way or the other was recorded.

Now, the learned Magistrate having found that at the time of the complaint the *dargah* was in the actual possession of Rahimalishah the applicant, he had, under cl. (6) of s. 145, to issue an order declaring Rahimalishah, to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction. And we have no doubt that the learned Magistrate would have made such an order had it not been for the fact that he appears to have been influenced and in part misled by certain statements and admissions made before him in these proceedings by the learned Advocate who appeared for the applicant. This is apparent from the order under revision. The learned Magistrate states:

"At the hearing of the matter Mr. Aslam, Counsel for party No. 2, fairly conceded that in view of the City Survey Extract produced by party No. 1 he cannot press the claim of his client in the Criminal Court."

And again:

"Mr. Aslam for party No. 2 assures me that he will move the competent Civil Court to assert his own position and hence he requests that the Receiver appointed by this Court may be directed not to hand over possession to party No. 1 before expiry of one month from to-day."

The learned Advocate for the applicant (the applicant being party No. 2 in the Magistrate's Court) informs us that Mr. Aslam's statements and admissions have been entirely misunderstood by the learned Magistrate and that all Mr. Aslam intended to convey to the learned Magistrate was that so far as the right to possess is concerned he conceded that Sayed Mahmoodshah had a *prima facie* right in view of the City Survey Extract produced by him; and that when Mr. Aslam stated that he wanted time to move a competent Civil Court what he intended to convey to the Magistrate was that if the order was going to be against

(1) 56 C 290; 113 Ind. Cas. 181; A I R 1928 Cal. 610; 30 Cr. L J 69; 32 C W N 1173; 48 C L J 193 (F B).

(2) 10 C W N 1088; 4 Cr. L J 215.

that on a claim to recover Rs. 5,250 as arrears of maintenance he got a decree for Rs. 4,800 with future interest at 6 per cent per annum and there is no indication whatever of a claim for past interest), this claim should be disallowed. He further refers to the case of *Saraswati Kuer (Bahuria) v. Sheoratan Kuer (Bahuria)* (A. I. R. 1934 Patna, 99) (6) in which it was held that

"a widow is not entitled to claim interest on the sum which she claims as maintenance under the general Hindu Law. She is, however, entitled to interest from the date of the suit until the date of payment at 6 per cent. per annum."

The lower Court had decided this question on the view that the claimant was entitled to interest by way of damages and relied on *Narendra Chandra Lahiri v. Nalini Sundari Debi* (25 Ind. Cas. 939) (1) in which the plaintiff was held entitled to get interest by way of damages because she had been wrongfully kept out of her dues by the defendant. Learned Counsel for the respondent has preferred to rely on the Interest Act of 1839, and we think that he was entitled to do so. The claim in the present case is for a certain sum payable at a certain time, that is a monthly allowance of *guzara* impliedly payable at some time in every month for that month. Section 1 (the only section in the Act) of Act No. XXXII of 1939, the Interest Act, provides as follows:

"It is hereby enacted that, upon all such debts or sums certain payable at a certain time or otherwise the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time."

In our opinion a monthly maintenance or allowance made payable under a compromise in a suit comes within the scope of this provision and it was competent to the lower Court to allow interest at the current rate up to the date of suit. The rate which has been allowed as the current rate by the lower Court is Rs. 6 per cent. per annum which, as the rate which is generally allowed for *pendente lite* and future interest, cannot be said to be in any way unreasonable.

On this view there is no force in the present appeal which accordingly fails and is dismissed with costs.

D.

(6) A I R 1934 Pat. 99.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Revision Application No. 152 of 1939

October 20, 1939

DAVIS, J. O. AND LOBO, J.
RAHIMALISHAH ALISHAH

—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145 (1)—"Actual possession" has no reference to any right to possess.

What the Magistrate is concerned with in proceedings relating to disputes as to immovable property under Chap. XII, Criminal P. C., is not the right to possess the subject-matter of dispute but the actual possession thereof at the date of the order under cl. (1), s. 145. The expression 'actual possession' is plain and unambiguous and has no reference to any right to possess. 113 Ind. Cas. 181 (1), relied on. *Nritta Gopal Singh v. Chandi Charan Singh* (2) distinguished.

Or. R. App. to revise an order of the Third Additional City Magistrate, Karachi, dated April 20, 1939.

Mr. W. B. L. Vellani, for the Applicant.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Lobo, J.—This is an application in revision against an order of the Third Additional City Magistrate, Karachi, in certain proceedings before him under s. 145, Criminal P. C., relating to a "dargah" called 'Sayed Abdullah Shah Dargah' situated near Clifton in Karachi. In compliance with an order under cl. (1) of s. 145 the applicant Rahimalishah and the opponent Sayed Mahmoodshah filed written statements. The opponent contended that he was the custodian and *sajjadahnishin* of the dargah; that as such custodian and *sajjadahnishin* it was his right to appoint *mujawars* of the dargah, that he had appointed several *mujawars* in succession, the last of these being the applicant Rahimalishah. He contended that Rahimalishah had recently openly declared himself to be the person in sole charge of the dargah and its property and income. The applicant in his written statement contended that the dargah of Sayed Abdullah Shah had been for about sixty years in the possession of one Murshid Syed Ali Shah; on his demise in 1920 his eldest spiritual son Karamalishah an elder brother of the applicant was appointed *mutawalli*; thereafter two other brothers of his, Abdulla Sain and Muhammadali Shah, were appointed *mutwallis*. He himself had been given charge of the shrine by his

limitation. Had he, as he might have done, put the claimant to proof of the amount of arrears still outstanding, the case might have presented itself in a quite different form. The evidence on the record proves that a whole series of payments were made to the claimant on account during the years 1932 and 1933. By Ex. A-7, Ex. A-6, Ex. 11 and the deposition of Dwarka Prasad proving entries in accounts it is established that the following payments were made to Brijendra Bahadur Singh, all of them on account

	Rs.
March 16, 1932,	100
May 11, 1932	200
October 9, 1932	25
November 16, 1932	300
December 20, 1932	300 and
April 30, 1933	600

The last four entries all appear as payments *alal hisab* and they all find a place under head 114 described as *peshgi* or advance account. Brijendra Bahadur Singh went into the witness box and he proved by his own statement that the *guzara* for March to November, 1931, was still in arrears. In examination-in-chief he stated that he received something towards the arrears of his maintenance in 1932 and 1933, but no question was put in cross-examination to suggest that this amount was a payment towards the arrears of March to November, 1931. The learned Special Judge, in our opinion, has rightly held that the entries in regard to these payments and the wording of the cheques contain a clear acknowledgment that at the date of that payment there were arrears outstanding, that is they did not at any rate amount to a full settlement of the account, but were merely payments towards that account. On behalf of the appellant it has been argued that such an acknowledgment as is found in these papers only amounts to an acknowledgment of the existence of a liability to the extent of the amount actually paid, cf. *Ram Prasad v. Binaek Shukul* (A. I. R. 1933, All., 453) (4) the second head-note on p. 454. We think that the acknowledgment which is found in these entries that payments are made *alal hisab* goes further than this and comes rather within the scope of such an acknowledgment as is mentioned in *Maniram Seth v. Seth Rup Chand* (I. L. R. 33 Cal., 1047) (5) in which it was held by their Lord-
(4) A I R 1933 All. 453 (2); 144 Ind. Cas. 899; 6 R A 5; (1933) A L J 430; 55 A 632.
(5) 33 O 1047; 33 I A 165; 4 O L J 94; 8 Bom. L R 501; 10 O W N 874; 16 M L J 300; 1 M L T 199; 3 A L J 525; 2 N L R 130 (P C).

ships of the Privy Council that

"an acknowledgment of liability should the balance turn out to be against the person making it, is a sufficient acknowledgment under s. 19 of the Lim. Act."

The acknowledgment found in this case is a general and unconditional acknowledgment, and it would cover any arrears existing within three years of the date at which that acknowledgment was made. The learned Government Advocate sought to rely on the words "in advance" which find a place in the cheque, Ex. A-6, dated May 11, 1932, and contended that this indicated that the *guzara* had been paid up to the end of April, 1932. On the other hand this very document bore a receipt by the claimant in which it was stated that Rs. 200 only was received towards the *guzara* arrears. In these circumstances it could not be said that acceptance of this cheque amounted to an admission that this was an advance payment towards the *guzara* of May, 1932. Learned Counsel for the respondent has referred to Chitaley's Indian Lim. Act, 1938 Edition at p. 658 where he says:

"Thus where a person admits the existence of open and unsettled accounts between himself and others, there is impliedly an admission of liability coupled with a qualification of such admission by the condition that the balance is found on investigation to be against the person making the admission. Such an admission is sufficient for the purposes of this section provided that the balance is found to be against the person making the admission."

(In the present case the balance is proved by the evidence of the claimant and its existence is not denied in the written statement). Reference has also been made to a passage on p. 666 which runs as follows:

"Thus, an acknowledgment of a debt need not specify any precise sum as due."

In our opinion the learned Special Judge has rightly held that Ex. 11 (and indeed the same might have been said about several other exhibits) serves as an acknowledgment under s. 19 of the Indian Lim. Act and thus saves limitation so far as the claim from March 1931, till November, 1931 is concerned.

The second question which has been argued before us is in regard to the decision on issue No. 1 in regard to interest. The learned Gov. Advocate for the appellant contends that in view of the fact that there has been no demand and refusal in the present case so far as appears on the record and since in the past no interest has been demanded or paid (*vide* for example Ex. 6 the decree obtained by the present respondent in a former case which shows

nothing to show whether at any time and, if so, when any final settlement of account was arrived at. On the Court of Wards taking over the estate again on May 12, 1934, Brijendra Bahadur Singh filed an application under s. 17 of the Court of Wards Act on November 29, 1934, claiming arrears of *guzara* from March 1, 1931. To this the Court of Wards after some time replied, on November 20, 1935, admitting the claim for three years' maintenance for the period ending on November 29, 1934, but stating that the claim for the period of nine months from March 1931, to October 1931, was time-barred. They also denied that the claimant was entitled to any interest on the arrears. Subsequently on an application having been made under the Encumbered Estates Act, Thakur Brijendra Bahadur Singh on March 3, 1936, filed a claim for Rs. 13,200 on account of arrears of *guzara* from March 1931 to October 1934, with interest at the rate of 12 per cent. per annum on the arrears and future interest at 3/8 per cent. per annum till the date of realization. He also made other claims which do not arise in this appeal. This claim was contested by the Deputy Commissioner in a written statement filed on November 14, 1933, in which it was stated that out of Rs. 13,200 Rs. 10,500 had been admitted to be due and had been allowed by the Court of Wards under s. 19 of the Court of Wards Act, but that against that amount a sum of Rs. 4,009-4-4 was to be set-off under the attachment of three decrees which had been obtained by the estate against the claimant. As regards the claim for Rs. 2,700, nine months' *guzara* from March to November, 1931, the effect that this amount might have been due was not denied but it was pleaded that the claim was time-barred, and it was said that the payment relied on by the claimant to bring the claim within limitation was denied, and even if proved, did not save limitation. The claimant had alleged that no question of limitation arose because a part payment had been made in April, 1933, of which an entry was to be found in the estate papers. There is no doubt that the Court of Wards was in a difficult position because although it had taken over the management of the estate in May, 1934, it was not in possession of the estate papers of the time during which the estate had been under the management and control of the *taluqdar* Thakur Jai Indra Bahadur Singh himself. Even then it seems to us that the defence put forward was not as complete

as it should have been as the estate was presumably entitled to put the claimant to proof of the fact that the amount claimed for the period from March to November 1931, was still outstanding. This the estate failed to do. It by implication admitted the amount to be outstanding and merely pleaded that the claim for that amount was barred by limitation.

The learned Special Judge on the pleadings framed six issues, of which only issues Nos. 1 and 2 are still for decision in the present appeal. They are :

- (1) Is the claimant entitled to any interest on the arrears of maintenance; if so, at what rate?
- (2) Is the claimant entitled to any maintenance from March 1931, till November 1931?

Is this claim within limitation?

The learned Special Judge took issue No. 2 first. He held that the case was governed by Art. 115 of the Indian Lim. Act. He accepted the contention that the payment of money *alal hisab* amounted to an acknowledgment and saved limitation so far as the claim from March 1931, to November, 1931, was concerned, and he accordingly decreed the claim for that period as well as for the period from December, 1931, to the date of suit which was admitted to be due. On issue No. 1 in regard to interest he held, relying on the cases of *Narendra Chandra Lahiri v. Nalini Sundari Debi* (26 Ind. Cas., 939), (1), *Parshadi Lal v. Brij Mohan Lal*, (I. L. R. 11 Lucknow, 575 at p. 582) (2) and *Bhriugu Datt v. Gaya Prasad*, (10 O. W. N. 1271) (3), that the claimant was entitled to interest by way of damages. It may be noted that in deciding this issue he stated incorrectly that the claimant had claimed interest by way of damages. The claimant had in fact merely claimed interest without alleging that he sought it as damages or otherwise.

In this appeal it is once more contended that the use of the phrase *alal hisab* does not constitute acknowledgment so as to bring the claim for the period from March, 1931, to November, 1931, within limitation. The position is certainly very peculiar and gives rise to some suspicion, but the matter has to be decided in the light of the pleadings, and the position in regard to the pleadings is that the plaintiff by implication admitted that this amount was due, but merely pleaded that it was barred by

(1) 26 Ind. Cas. 939; A I R 1915 Cal. 550.

(2) 11 Luck. 575, (582); 159 Ind. Cas. 117; 1935 O. W. N. 1217; 1935 O. L. R. 648; 8 R. O. 159; A I R 1936 Oudh 52.

(3) 101 O. W. N. 1271; 146 Ind. Cas. 751; 6 R. O. 176; A I R 1934 Oudh 57.

interest to interpret the section so as to give relief to the defendants in respect of the interest which they would otherwise be liable to pay. I am, therefore, of the opinion that the plaintiffs are entitled to have a decree for the principal sum of Rs. 12,500 and a total interest Rs. 12,500 up to April 26, 1929, when the suit was filed, plus *pendente lite* and future interest as ordered by the High Court.

S. Varadachariar, J.—I wish to add a few words with reference to the contention urged by the learned Counsel for the respondents on the application of s. 7 of the Bihar Act of 1939 to the circumstances of this case. That section limits the interest claimable up to the date of the plaint to the "amount of loan mentioned in the document." As Rs. 1,00,000 is the amount mentioned in the mortgage bond in the present case, the learned Counsel argued that the plaintiffs were entitled to claim full interest as per terms of the bond, so long as it did not exceed Rs. 1,00,000. I am unable to accede to this contention. On the plaintiffs' own showing, the liability of the appellants to the plaintiffs was only to the extent of one-sixth of the total liability and the total amount of the loan has for the purposes of this suit been found to be only Rs. 75,000. Though the respondents' contention has the merit of plausibility and ingenuity, it seems to me that on a reasonable interpretation of the section, the appellants' liability for interest up to the date of the institution of the suit must be limited to Rs. 12,500. The appeal is to this extent allowed and the case will be remitted to the High Court for a revised decree being passed on the above footing. The plaintiffs will be entitled to the costs awarded to them by the decrees of the High Court and the Trial Court. There will be no order as to the costs of this appeal.

Maurice Gwyer, C. J.—I agree.

D. *Appeal dismissed.*

ÔUDH CHIEF COURT

First Civil Appeal No. 78 of 1937

March 27, 1940

THOMAS, C. J. AND YORKER, J.

THE DEPUTY COMMISSIONER, KHERI
MANAGER COURT OF WARDS, MAHEWA
ESTATE—PETITIONER—APPELLANT

versus

Thakur BRIJENDRA BAHADUR SINGH
—CLAIMANT—RESPONDENT

Limitation Act (IX of 1908), s. 19—Acknowledg-

ment—Payment of monthly allowance alal hisab—Whether saves limitation—Interest Act (XXXII of 1839), s. 1—Suit for arrears of maintenance payable monthly—Interest, if can be awarded.

Entries of payments towards *guzara*, followed by words that they are made *alal hisab i. e.*, on account, amount to general and unconditional acknowledgment within the meaning of s. 19, Lim. Act and would cover any arrears existing within three years of the date at which that acknowledgment was made. *Maniram Seth v. Seth Rup Chand* (5), applied, 144 Ind. Cas. 899 (4), distinguished.

A monthly maintenance or allowance made payable under a compromise in a suit comes within the scope of provision of s. 1, Interest Act and it is competent to the Court to allow interest at the current rate up to the date of suit for arrears on arrears, of the maintenance.

F. O. A. against the order of the Special Judge, First Grade, Kheri, dated April 16, 1937.

Mr. H. S. Gupta, for the Appellant.

Messrs. Sita Ram and Raghunandan Prasad, for the Respondent.

Judgment.—This is a first appeal by the Deputy Commissioner, Kheri, as Manager of the Court of Wards, Mahewa Estate belonging to Thakur Jai Indra Bahadur Singh, *taluqdar*, from the judgment of the Special Judge, 1st Grade, Kheri, who has granted a simple money decree to the creditor claimant respondent of this appeal Thakur Brijendra Bahadur Singh for the full amount claimed.

This appeal has arisen out of the following circumstances:

The claimant respondent Thakur Brijendra Bahadur Singh under the guardianship of his mother had instituted a suit claiming the whole Mahewa *taluqa*. The defendant to that suit was the Deputy Commissioner as Manager of the Mahewa estate which was at that time under the Court of Wards. (It was subsequently released from the Court of Wards but again taken over by the Court of Wards on May 12, 1934). In that suit a compromise was arrived at on September 13, 1917, the important condition of which for the purposes of this case was that Brijendra Bahadur Singh was to receive a monthly *guzara* or maintenance allowance of Rs. 300. That compromise was subsequently upheld in a suit and is not now in dispute. During the period in which the estate was free the payment of the *guzara* to Brijendra Bahadur Singh was somewhat irregular, and it seems that although payments were made from time to time, these payments were always made *alal hisab*, that is on account, and there is

Mr. *Rajeshwari Prasad*, (Advocate, Federal Court), instructed by Mr. *G. Sahay*, Agent, for the Appellants.

Mr. *Raghubir Singh*, (Advocate, Federal Court) with Mr. *P. P. Varma*, (Advocate, Patna, High Court), instructed by Mr. *T. K. Prasad*, Agent, for the Respondents.

S. M. Sulaiman, J.—This is a mortgagors' appeal arising out of a suit brought to enforce a mortgage, dated January 1, 1915, executed by Dabindra Prasad Sakul, defendant No. 4, and Birendra Prasad Sakul, defendant No. 1 for Rs. 1,00,000 carrying interest at Rs. 0-8-0 per cent. per mensem compounded every second year. The present plaintiffs were by inheritance entitled to only two sixth share in the mortgage deed. The rest has gone to the defendants. The Courts below have found that there was a legal necessity for 25,000 only which represented an unpaid purchase money for properties taken by both, while Rs. 25,000 went into the pocket of Dabindra alone. The plaintiffs had discharged Dabindra Prasad and his sons from all liability and sued to enforce the mortgage against the half share of Birendra and his sons. The amount claimed in the plaint was one-sixth of Rs. 1,00,000 plus corresponding interest. The Courts below have passed a decree for Rs. 12,500 (one-sixth of Rs. 75,000) and interest at contract rate up to the date fixed for payment in the decree. The defendants' plea that s. 11 of the Bihar Money-lenders Act, 1938, should be applied was rejected by the High Court on the ground that the section had been held by a Full Bench to be void.

Section 11 of the old Act has now been replaced by s. 7 of the new Act (Act VII of 1939), the applicability of which is governed by our ruling in Case No. 9 of 1939 (*Surendra Prasad Narain Singh v. Sri Gajadhar Prasad Sahu Trust Estate**) decided to-day.

If the principal sum due from the defendants-appellants were taken to be Rs. 12,500, and if the principle of s. 7 were to apply and the plaintiffs are to be given interest up to the date of the suit, not exceeding the principal sum, then the total amount due up to April 26, 1929, when the suit was brought would be Rs. 25,000 only. According to the accounts as appended to the decree of the first suit, the amount of principal and interest calculated up to that date exceeds Rs. 28,000. It is con-

tended on behalf of the appellants that this amount should be reduced to Rs. 25,000.

The learned Advocate for the appellants, however, contends before us that as the sum of Rs. 1,00,000 is mentioned in the mortgage deed, the maximum limit for the award of interest is that figure, and therefore the amount awarded by the Courts below, being well below it, cannot be reduced. It seems difficult to accept this argument when the plaintiffs themselves have broken the integrity of the mortgage and split up the liability.

Reading s. 7 of the new Act as a whole, it is quite obvious that it deals with a suit brought by a money-lender (against the defendant who is sued) in respect of a loan advanced (to the defendant sued against) in which a decree has to be passed (against the defendant who is sued) the amount of interest allowed prior to the suit not exceeding the amount of the loan advanced (to the defendant sued against) or if the loan (due from the defendant sued against) is based on a document, the amount of the loan (due from the defendant sued against) mentioned in or evidenced by such a document. It could not have been the intention of the Legislature that if there are several executants who have borrowed various sums and the creditor sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other *pro forma* defendants who are not really being sued. The only reasonable interpretation to put on the section is to read it as referring to the claim brought against the particular defendant who is sued, and the amount which is due from him alone and is the subject-matter of the claim.

The construction sought to be put on the section on behalf of the plaintiffs would frustrate the object in view. In the present case, on the findings of the Courts below, the principal amount for which the contesting defendants were liable, is only Rs. 12,500 and no more. This is therefore the only amount, apart from interest, for which the decree can be passed against them. The mortgage-deed was wholly invalid in respect of Rs. 25,000 as against them. In my judgment, it will be in accord with the intention of the Provincial Legislature as disclosed by the various provisions in the Act for the reduction of

*Reported in 187 Ind. Cas. 612.

The trial Court in a very elaborate judgment repelled almost all the pleas set up in defence and decreed the suit for the arrears of rent for 1341 *Fasli* and for ejectment.

Both the parties appealed from the decision of the trial Court and the lower Appellate Court disagreed with the findings of the trial Court and allowed the appeal of the defendant and dismissed that of the plaintiffs. From the decision of the lower Appellate Court the plaintiffs have filed these two appeals.

The lower Appellate Court on the evidence in the case refused to give any definite finding as to whether the land was held in *muafi* right by the defendant or not, but on a consideration of that and other evidence in the case came to a definite finding of fact that the defendant had been holding before the date of the suit the land in dispute as a tenant. Whether any rent had been settled between the parties or the rent had to be determined in future is not quite clear from the judgment of the lower Appellate Court. This finding of the Court gives effect to a plea in defence set up in para. 13 of the written statement. This finding is a finding of fact and binding upon me in second appeal. The case, therefore, resolves itself into a simple question of law as to whether s. 127 of the Oudh Rent Act would cover also the case of a person who was not a trespasser before the suit was filed but was holding as a tenant although his rent was undetermined. The answer of this question is very simple and is furnished by the language of s. 127, itself. Section 127 of the Oudh Rent Act, in my opinion, cannot be resorted to for the purpose of securing the ejectment of persons whose title to the land is not clear or who while holding with the consent of the landlord are holding without any determination of rent between them and the landlord. Section 127 of the Oudh Rent Act, must on its terms apply to a person who was a rank trespasser before the filing of the suit and whom the landlord wishes to eject or from whom he wishes to realise rent. If he wishes to do any of these things, he has been given an option by law for the purpose of securing his object to treat him as a tenant for the purpose of that suit. It is not open to the landlord to have recourse to s. 127, in respect of persons, who are not treated as tenants for the purpose of a suit under s. 127, but who were admittedly tenants from before although their rent was undetermined. If the object of the landlord is to have the rent of an

admitted tenant determined, there are other provisions in the Oudh Rent Act which arise for application. In my opinion, on the finding of fact that the defendant was holding the land in suit as a tenant since before the suit, the suit was not maintainable.

The result is that both the appeals fail and are dismissed with costs.

D. Appeals dismissed.

FEDERAL COURT

Appeal from the Patna High Court

March 18, 1940

MAURICE GWYER, C. J. AND S. M. SULAIMAN
AND S. VARADACHARIAR, JJ.

BIRENDEA PRASAD SAKUL AND OTHERS
—APPELLANTS

versus

SURENDEA PRASAD SAKUL AND OTHERS
—RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7—Scope—Loan advanced on mortgage—Creditor suing one of executors for separate share having already realized balance from others—Maximum amount of interest that can be decreed.

Reading s. 7 of the Bihar Money-lenders (Regn. of Transactions) Act as a whole, it is quite obvious that it deals with a suit brought by a money-lender (against the defendant who is sued) in respect of a loan advanced (to the defendant sued against) in which a decree has to be passed (against the defendant who is sued) the amount of interest allowed prior to the suit not exceeding the amount of the loan advanced (to the defendant sued against) or if the loan (due from the defendant sued against) is based on a document, the amount of the loan (due from the defendant sued against) mentioned in or evidenced by such a document. It could not have been the intention of the Legislature that if there are several executors who have borrowed various sums and the creditor sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other *pro forma* defendants who are not really being sued. The only reasonable interpretation to put on the section is to read it as referring to the claim brought against the particular defendant who is sued, and the amount which is due from him alone and is the subject-matter of the claim. It will be in accord with the intention of the Provincial Legislature as disclosed by the various provisions in the Act for the reduction of interest to interpret the section so as to give relief to the defendants in respect of the interest which they would otherwise be liable to pay. 187 Ind. Cas. 612, referred to.

Where the total amount of loan is Rs. 75,000 but the liability of the defendant is only to the extent of one-sixth of this liability i. e., Rs. 12,500, the interest that would be allowed to the plaintiff against the defendant would not exceed Rs. 12,500.

that represent only interest. The scheme of the Bihar Money-lenders Acts emphasises the distinction between liability in respect of the principal and liability in respect of the interest and whether a party relies on the words "mentioned in" or on the words "evidenced by" at the end of s. 7 of the Act of 1939, the "amount of loan" must be determined with reference to the whole document and not by confining attention to a particular entry.

I am for the above reasons unable to accede to the respondents' contention that the sum of Rs. 11,246-9-9 shown in Ex. I (z) (a) should be taken as the starting point for the determination of the extent of the defendants' liability even under s. 7 of Bihar Act VII of 1939. The plaintiff will only be entitled to claim up to the date of the plaint the sum of Rs. 3,700 or such other sum as the parties may agree or the High Court may on the accounts find to represent the principal amount due. On this sum the plaintiffs will be entitled to simple interest at 6 per cent. per annum from the date of the plaint to the date of the decree to be passed by the High Court. From that date, the aggregate amount due for principal and interest will carry interest at 6 per cent. per annum.

The decrees of the High Court and of the trial Court are set aside except in so far as they relate to costs. The High Court will pass a revised decree in the light of the foregoing directions. The defendants will remain liable for the costs awarded against them by the decree of the trial Court and the original decree of the High Court. There will be no order as to the costs of this appeal.

Maurice Gwyer, C. J.—I concur, and only desire to add a few words. Section 7 of the Act of 1939 is no doubt extremely obscure and ill-drawn; but if the Advocate-General's contention were correct, I should find it difficult to understand why, in an Act plainly intended for the relief of debtors, money-lenders should have been presented with so simple a method of circumventing it. I should for this reason be unwilling to accept his contention, unless the language of the Act left me no alternative. In my opinion that is not so. I agree that it is impossible to regard the record of transactions which was kept by the parties in the present case as a document on which a loan can be said to have been based or which evidences a loan; and I think that the words in s. 2 of the Act, "transaction on a bond bearing interest executed

in respect of past liability," ought in any case, having regard to the manifest intent of the Act, to be strictly construed.

I agree with the order proposed to be made.

D.

Order accordingly.

ODDH CHIEF COURT

Second Rent Appeal No. 7 of 1937

March 18, 1940.

RADHA KRISHNA, J.

IBADUL GHANI KHAN AND ANOTHER

—PLAINTIFFS—APPELLANTS

versus

NASIRUDDIN KHAN—DEFENDANT

—RESPONDENT

Oudh Rent Act (XXII of 1886), s. 127—Scope and applicability—Person not trespasser before suit but holding as tenant although rent undetermined—Section does not apply.

Section 127 of the Oudh Rent Act cannot be resorted to for the purpose of securing the ejectment of persons whose title to the land is not clear or who while holding with the consent of the landlord are holding without any determination of rent between them and the landlord. Section 127 of the Oudh Rent Act does not cover the case of a person who was not a trespasser before the suit was filed but was holding as a tenant although his rent was undetermined.

S. R. A. against the order of the District Judge of Sitapur, dated October 30, 1936.

Messrs. *Haider Husain and Rauf Ahmad*, for the Appellant.

Mr. *Naziruddin*, for the Respondent.

Judgment.—This appeal has taken much longer than an appeal of this nature should have taken. This is due to the fact that the defendant, or whoever represented the defendant, did not put forward in the written statement the defendant's pleas as clearly and specifically as one would desire. Secondly it has to be noticed that the judgments in the two Courts below have proceeded upon entirely different grounds.

The suit was a simple suit for determination of rent for land held by the defendant under s. 127 of the Oudh Rent Act and consequent ejectment of the defendant.

The defence, considering all the different pleas mentioned in the written statement, amounted to saying that the defendant had not taken the land or was not retaining possession of the land without being entitled to it and it was not open to the plaintiffs to treat him as a tenant for the purposes of ejecting him or claiming determination of rent.

Ex. I (z) (a) is "the document on which the loan is based." This expression is, to say the least, not very happy but interpreting it in the light of the definition of "loan" in s. 2 (f) and of the scheme of the Act, it is not very difficult to gather the meaning intended. In attempting to include in the definition of "loan," documents executed in respect of a past liability (as distinguished from a contemporaneous advance), the Legislature used the expression "transaction on a bond...executed in respect of a past liability." Here again, the expression "transaction on a bond" is perhaps open to criticism and I am not sure if the word "bond" in this context was intended to be limited to a formal deed or to documents of the kind specified in the definition of "bond" in the Indian Stamp Act. But I am unable to believe that mere debit entries or balance entries in accounts (even though signed by the debtor) could have been intended to be comprised in the expression "transaction on a bond." It seems to me at least necessary that the document relied on should have been intended to embody the contract between the parties and should *ex facie* show a promise or undertaking to pay before it can be spoken of as a "bond." The Indian Law had clearly emphasized the distinction between a promise to pay and a mere statement or acknowledge of liability (see the antithesis in Art. 1 of the Indian Stamp Act and the way that an I. O. U. is dealt with in the illustrations to s. 4 of the Negotiable Instruments Act). The decision in *Narain Das v. Miran Bakhsh* (5), seems to me to have gone too far in holding that book entries of balances signed by the defendants would amount to a "bond" within the meaning of Art. 67 of the Indian Lim. Act. The definition of "bond" in s. 2 (3) of that Act clearly implies that the document must be one "whereby a person obliges himself to pay money to another." I am unable to concur in the view that the mention of interest being payable at a particular rate and the possible implication therefrom of a promise to pay the principal would suffice to bring the account-entry within the category of "bond" (*cf.* Observations of the Judicial Committee in *Muhammad Akbar Khan v. Attar Singh* (7), where dealing with the definition of a "promissory note" their Lordships stress

(7) 17 L 555 (568); 162 Ind. Cas. 454; 1936 O L R 301; 8 R P O 274; A I R 1936 P O 171; 2 B R 588; 44 L W 23; 40 C W N 997; (1936) M W N 660; 17 P L T 513; 38 Bom. L R 739; 63 O L J 541; (1936) A L J 986; 71 M L J 712; 63 I A 279; 38 P L R 1006; 1936 A L R 479 (P O).

the distinction between an ordinary undertaking to pay and one which has only to be inferred or implied). Reading the words "if the loan is based on a document" in s. 7 of the Bihar Act in the sense above indicated it cannot be held that the entry I (z) (a) in this case is a "document on which the loan is based," because it merely says : Rs. 11,249-9-9 is due by me up to Asin 24, 1336."

The learned Counsel for the respondents based an argument on the difference between the word employed at the end of s. 7 of the Act of 1939 and the words occurring in the corresponding provision (s. 11) of the Act of 1938; it is not easy to follow that argument. The earlier Act affixed the limit at the amount of loan mentioned in "the document on which the suit is based" while the Act of 1939 speaks of the amount of loan "mentioned in or evidenced by such document." The use of the expression "such document" is of course an improvement, as this portion of the section is introduced by the words "if the loan is based on a document." But it is not easy to state what distinction the Legislature had in mind when, in the later Act, it referred to two alternatives, by the words "mentioned in" and "evidenced by" respectively. In *Singheswar Singh v. Madni Prasad Singh* (8), the learned Judges of the High Court have endeavoured to state a possible explanation, in the light of what was mentioned to them by the Advocate-General of Bihar. I do not find it necessary to express any opinion on that statement, because, in either alternative, the amount to be taken note of is the amount of loan and the word "loan" must be understood in the light of the definition clause already referred to. It must also be borne in mind that in both the Acts this portion of the section is introduced by the same opening words "if the loan is based on a document."

Even if it were possible to regard the accounts in this case as the document on which the loan is based, it does not seem to me possible or reasonable to confine our attention, as the learned Counsel for the respondents invited us to do, to the particular entry marked Ex. I (z) (a). The account books must be taken as a whole and as the entries therein clearly show what items represent principal and what items interest, the Court must arrive at the "amount of the loan" by excluding the items

(8) A I R 1940 Pat. 65; 187 Ind. Cas. 339; 6 B R 45; 12 R P 582.

ants had been calculated on the basis that Rs. 11,249-9-9 was due on October 12, 1929; adding a claim for compound interest at 12 per cent. per annum with annual rests, the plaintiff, which was filed on August 20, 1932, claimed Rs. 15,713-4-6 with further interest.

Section 7 of Bihar Act VII of 1939 provides that in respect of interest payable up to the date of the institution of the suit, the Court shall not pass a decree for an amount

"which together with any amount already realised as interest ... is greater than the amount of loan advanced or, if the loan is based on a document, the amount of loan mentioned in or evidenced by such document."

With reference to the concluding words of the section above set out, it was urged on behalf of the respondent that, in the present case, the *chitha* entry, Ex. I (z) (a), dated October 12, 1929, which has been signed by the first defendant should be regarded as "the document on which the loan is based" and that the plaintiff was accordingly entitled to treat the sum of Rs. 11,249-9-9 there shown as "the amount of loan" within the meaning of s. 7 of the Act. If that contention were accepted, the appellant would not of course be entitled to any relief in this appeal, because the interest claimed between October 12, 1929, and the date of the institution of the suit did not exceed the amount mentioned in the document. It was in this connection urged that the *chitha* entry Ex. I (z) (a) should be held to amount to an "account stated" between the parties and as such to furnish a separate cause of action for the recovery of the money there shown as due. In support of this contention the learned Counsel for the respondents relied on the decisions of the Judicial Committee in *L. R. 1934 A. C. 332*, and in *Firm Bishen Chand v. Girdhari Lal* (3), and on certain observations of the Lahore High Court in *Narain Das v. Miran Bakhsh* (5).

The authorities cited on behalf of the respondents themselves recognise the distinction between cases in which a statement of account signed by the debtor may be intended to be only an admission of the correctness of the account or a mere acknowledgment of a debt and cases in which it may be an "account stated" in the real sense. [See also the antithesis recognized in *O. XX, r. 8*, of the English Supreme Court Rules.]

Whether a particular statement of account

(5) A I R 1925 Lah. 75; 84 Ind. Cas. 524; 5 L 406; 1 L O 337; 6 Lah. L J 595.

falls in the one category or in the other is a question to be determined with reference to the circumstances of each case. An examination of the *chithas*, Ex. I series, in the present case leads me to think that the signed entry at the end of each year followed by a corresponding entry at the commencement of the next year could only have been intended to serve as an admission by the debtors of the correctness of the account which was maintained by the creditor. Except on this hypothesis, there was little significance in going through this process every year. In this view, the last entry, Ex. I (z) (a), dated October 12, 1929, could have no greater significance than the corresponding entries in the *chithas* of the earlier years. It has not been suggested or shown that at the time when that entry was made, it was intended to be anything like a final closing of the accounts between the parties, so as to put the debtors' liability on a new basis. So far as one can see, it was merely an accident that the accounts stopped with *F. 1336*, probably because the creditor died about the end of 1929 or early in 1930 and his estate soon became the subject-matter of litigation (probate case No. 24 of 1930). The legal significance of a set of accounts closely resembling Ex. I series in the present case was considered by Jenkins, O. J., and Woodroffe, J., in *Galstaun v. Hutchison* (6) and the learned Judges held that the signed entries in the *bahi chithas* would not even amount to an acknowledgment of a "debt" within the meaning of Art. 1 of the Indian Stamp Act 1898. It is not necessary for us to go so far; but the observations of Woodroffe, J., in that case may be usefully referred to in this connection. It may also be mentioned, for what it is worth, that the Courts below relied on the signed entries in the accounts only as "acknowledgment" sufficient to save the bar of limitation [vide the discussion of issues Nos. 2 and 5]. If Ex. I (z) (a) had been regarded as an "account stated" in the true sense, no question of limitation would have arisen at all, as the suit was instituted within three years of Ex. I (z) (a) vide Art. 64 of the Indian Lim. Act.

Even if it should be assumed that Ex. I (z) (a) represents an "account stated" between the parties, that does not seem to be decisive of the question under s. 7 of Bihar Act VII of 1939. The respondents can press into service the concluding words of the section only if it can be said that

(6) 39 C 789; 15 Ind. Cas. 279; 16 C W N 945.

question was also raised as to the extent of the benefit which the defendants would be entitled to on the true construction of s. 7 of the new Act.

The objection to the right of the appellant to claim the benefit of the new Act in the proceedings before this Court was raised not only in this appeal, but in three other cases which were heard in course of January and February this year. With a view to facilitate a full argument of this objection, we agreed to defer pronouncing our judgment till all the four appeals had been heard. Some aspects of this objection have been dealt with in the judgment in case No. 13 of 1939 and in my learned brother's judgments in this case and in case No. 10. It was also urged in some of the cases that as the contention based on the new Act had not been mentioned as a ground in the proceedings taken in the High Court, even after the new Act came into force, the appellant ought not to be permitted to raise it here. This argument ignores the provision of s. 205 of the Constitution Act. The certificate was granted by the High Court when the Act of 1938 was in force and there was no necessity or occasion to raise before the High Court in subsequent proceedings the contention based on the new Act. Once the appeal is before this Court it is open to this Court to grant leave to the appellant to raise particular grounds of appeal. It must also be observed that the contention based on the new Act is not really a ground of appeal against the decision of the High Court, because the new Act was not in existence at the time of that decision. As explained in the judgment in *Shyamkant Lal v. Rambhajan Singh* (1), it is this Court that takes cognisance of the new Act, with a view to do justice between the parties, as the new Act has been made retrospective. It was suggested in one or two cases that the validity even of s. 7 of the new Act was open to challenge, but the objection was not pressed.

The contention of the learned Counsel for the respondents as to the effect of the application of s. 7 to the case was based on the nature of the dealings between the parties and of the accounts maintained by the creditor in respect of the same. The transactions between the parties, so far as they are relevant to the present case, began, in September 1911, with a purchase of immovable property by one Ishwardhari Singh, the undivided uncle of the appel-

lant, from the plaintiff's predecessor-in-title. Out of the sale price of Rs. 2,900, Rs. 1,900 was paid in cash and for the balance of Rs. 1,000 an account was opened in the plaintiff's books (Ex. I series). Two days later, there was an advance of Rs. 115; and there were a few advances during F. 1319. In F. 1320, a sum of Rs. 2,000 due under two *hundies* drawn by Ishwardhari Singh in favour of the same creditor was brought into the same account. In F. 1320 the account was signed not only by Ishwardhari Singh, but also by two of his undivided younger brothers, one of whom was the father of the second defendant. From this date, the interest payable on the account was, by agreement between the parties, increased from fourteen annas to one rupee per cent. per mensem. The accounts continued up to October 12, 1929, that is, the end of the *mahajani* year corresponding to F. 1336. Though the only subsequent advance by the creditor seems to be a sum of Rs. 5 paid in cash in F. 1334, the receipt side of the accounts shows several items of payments from time to time. The way that the account books were maintained has been described in the judgment of the High Court as well as in the judgment just delivered by my learned brother. The result of the account was that though the total amount of the loan, including the unpaid balance of the purchase money, was only about Rs. 3,700 and an amount of about Rs. 4,953 had been paid by way of interest, the acknowledgment on October 12, 1929, showed that a sum of Rs. 11,249-9-9 was then due from the defendants to the creditor [*vide* entry marked Ex. I (7) (a).] It may be mentioned in passing that it was stated before us by the learned Counsel for the respondent that in the *chitha* for F. 1336, not merely the heading but the whole of the page was in the handwriting of the first defendant. In the view that we take of the case, nothing turns upon this circumstance.

On the facts above stated, it was contended on behalf of the appellant that as the creditor had already received towards interest an amount exceeding the principal, the plaintiff was not, in view of s. 7 of the Bihar Act VII of 1939, entitled to any further sum for interest up to the date of the institution of his suit and that the amount now payable by the defendants should be calculated on the footing that a sum of only Rs. 3,700, i. e. the principal amount, was due at the date of the institution of the suit. In the plaint, the sum due from the defend-

the sum of Rs 11,249-9-9 was not the loan advanced, but was the principal sum plus interest that had accrued during the previous years, minus all payments that had been made during the past years. The last *chitha* itself separately specifies the amounts for one year. Of course the mere mention of a figure in a document is not always absolutely conclusive as it remains open to the executants to show that in reality the full consideration mentioned therein had not actually passed. Much less would the sum total noted in the *chitha* make it conclusive that the whole of it was the loan. The intention of the Provincial Legislature in enacting s. 7 read with s. 2 (f), which draw a distinction between loan and interest, appears to be to accept the amount of the loan mentioned or evidenced by a document, if the loan is based on such a document and amounts to a transaction on a bond bearing interest and duly executed. But when a statement of account, not amounting to a bond, itself shows that the whole of the amount mentioned therein is not a loan, but part of it is professedly interest, that interest cannot be accepted conclusively as a part of the loan within the meaning of s. 7.

The question then simply resolves itself into this: Can the endorsement made by the defendant at the bottom of the last *chitha* be regarded as "a transaction on a bond bearing interest executed in respect of past liability?"

It seems that such a construction would be contrary to the intention of the parties. The last *chitha* cannot, therefore, be treated as a bond within the scope of the definition of "loan" in s. 2 (f). Accordingly, the amount entered in the last *chitha* cannot be regarded as the minimum amount behind which the Court cannot go and which it must assume to be the loan. In this view the first portion of the section comes into play and the Court is debarred from granting a decree for an interest in excess of the principal amount of the loan. As interest in excess of that amount has already been paid, the plaintiffs can have a decree for the principal amount advanced and no more.

The last point urged by the appellant is that the Court should re-open the transaction under s. 8 of the new Act. In the first place this point, which was covered by s. 12 of the old Act, does not appear to have been pressed before the High Court; and without a special leave of the Federal

Court, as referred to in s. 205 (2) of the Govt. of India Act, it cannot be raised in appeal. In the second place, the point really becomes wholly unnecessary if the plaintiffs are to get a decree for the principal amount only and not for any interest.

I would accordingly allow the appeal and remit the case to the High Court with the declaration that the following decree be substituted for the one appealed from:—

"The appeal be allowed, the decree of the trial Court modified and the plaintiff's suit decreed for the principal sum (about Rs 3,700) only and his claim for past interest disallowed, with *pendente lite* interest at 6 per cent. per annum, and future interest on the consolidated amount at the same rate."

Varadachariar, J.—This is an appeal, by the first defendant, against a decree for money passed by the Courts below against the appellant and his undivided co-parceners. Amongst the contentions urged on the defendants' behalf, before the High Court at Patna, there was one based upon s. 11 of the Bihar Money-lenders Act, 1938, which limited the amount of interest which a money-lender was entitled to claim. The High Court rejected this contention, in the view that it had taken in prior cases, that s. 11 of the Bihar Act of 1938 was void, on the ground of repugnancy to existing Indian legislation. This appeal has been preferred to this Court, on a certificate, granted under s. 205 of the Constitution Act, to the effect that the case involved a substantial question of law as to the interpretation of that Act.

Before us the appellant's learned Counsel relied upon the decision of this Court in *Jagdish Jha v. Aman Khan* (4) (case No. 6 of 1939) and contended that, apart from the question of the validity of s. 11 of Bihar Act III of 1938, the debtors were in any event entitled to claim the benefit of s. 7 of the Bihar Money-lenders (Regulation of Transactions) Act, 1939 (VII of 1939), which had been passed after the decision of this case, in the High Court and had in substance reproduced the provisions of s. 11 of the Act of 1938 with retrospective effect. As the earlier case before this Court had been heard *ex parte*, the learned Counsel for the respondent desired, and was permitted, to urge certain contentions against the view taken in that case as to the right of a debtor in similar circumstances to claim the benefit of the new Act. A

(4) 185 Ind. Cas. 294; 6 B R 194; 12 R F O 16; 1940 O L R 1; A I R 1940 F O 3; 21 P L T 142; 71 C L J 55 (F O).

accounts were adjusted an acknowledgment for the amount found due (including interest) was written out and signed by the debtors and a *chitha* for the next *mahajani* year opened with its top lines only written and signed by them."

For the last *chitha* (Exs. 12. and 12 (a).) dated *Asin* 24, 1336, corresponding to October 12, 1929, which only was within three years of the suit, there were the following words: "wrote out *chitha* for 1336 *Fs.* It is correct (Sd). Surendra Narayan Singh. By my own pen." Two stamps of two annas each were affixed at this place. This particular endorsement did not contain any express promise to pay the amount nor any stipulation to pay interest. As noted by the High Court, below this writing the formal *chitha* was prepared by the plaintiff's servant in these words: '*chitha* for 1336 *F.* prepared in favour of Babu Gajdhar Prasad Sahu.....interest payable at 1 per cent. per mensem.....' Then followed the transactions for 1336 *Fs.* These included on the credit side the balance brought over from 1335 *Fs.*, as well as the interest that accrued during 1336 *Fs.* and on the debit side four small payments. Then a balance was struck up to *Asin* 24, 1336. *Fs.* amounting to Rs. 11,249-9-9. Below this, two stamps of two annas each were affixed and the following endorsement was made:

"Rupees 11,249-9-9 only is due to me up to *Asin* 24, 1336, the end of the *mahajani* year. (Sd) Surendra Narayan Singh. By my own pen."

In the account prepared by the plaintiff's Munib, the rate of interest payable had certainly been noted; but in the endorsement signed by the debtor there was no express stipulation to pay such interest, although that also must be deemed to have been implied.

The *chitha* form a series of entries in the plaintiff's account books. In order to make the last portion of s. 7 applicable against the defendant, the plaintiff's have to argue that the document referred to in the section must here mean the *chitha* on the last page of the defendant's account in the plaintiff's account book. As there were cross-entries in the plaintiff's accounts, and the payments made were entered on the debit side and deducted from the amounts on the credit side, and then a final balance struck. It is obvious that the entry at the bottom of the last *chitha* was not a mere acknowledgment of liability like the endorsement at the top, but that it was a record of an adjustment and an account stated. *Eluira Rodrigues v. God-*

nicalo Hy Polito (2). It, therefore, follows that there was, by necessary implication, a promise to pay the amount due with interest, although with the exception of the words "due by me" there were no other words which could convey an express promise to pay. *Firm Bishen Chand v. Girdhari Lal* (3).

The point, however, is clear that in the year 1929, long before the Money-lenders Act was in contemplation, the intention of the parties was simply to adjust their accounts showing the balance brought over from the previous year, the interest that had accrued during the year and the reduction on account of the payments made in that year. The amount of stamp duty paid, though not by itself conclusive, also furnishes some indication that it was not the intention of the parties to get a fresh bond executed with an express promise to pay the amount due. Under Art. 15 of Sch. I of the Stamp Act the duty payable in respect of a bond is at the rate of Rs. 2-8 per Rs. 500 or part thereof for sums exceeding Rs. 1,000. The stamps of two annas each that were affixed to the *chithas* show that the parties contemplated the recording of an acknowledgment of liability after an adjustment of accounts, or of an account stated, and not the execution of any formal bond, with an express promise to pay, which would have required a higher stamp duty.

The entries at the top and the bottom were admittedly separated by a year's interval, and the middle entries were certainly not simultaneous with the first, and need not necessarily have coincided in time with the latter. The entries made by the plaintiff's Munib in the *chitha* are in the third person and do not read like the recitals in a bond executed by the defendants. On the other hand, the endorsement at the top and the entry at the end are in the first person, which profess to have been made by the debtor himself. It is, therefore, impossible to treat the whole document as one bond. The transaction as evidenced by the last *chitha* does not really go any further than the account stated. The documents itself shows that

(2) A I R 1934 P O 144; 151 Ind. Cas. 90; 36 P L R 57; 38 O W N 813; 40 L W 12; 11 O W N 997; 7 R P O 30; 67 M L J 103; 59 O L J 494; (1934) M W N 702 (P O).

(3) A I R 1934 P O 147; 150 Ind. Cas. 6; 6 R P O 166; 40 L W 71; 11 O W N 1003; 36 Bom. L R 723; 67 M L J 110; 38 O W N 961; 59 O L J 535; (1934) M W N 786; (1934) A L J 623; 56 A 376; 1934 O L R 622; 1934 A L R 702; 61 I A 273; (1934) A C 332; 78 S J 446; 50 T L R 456 (P O).

as they refer to the amount of loan (I) mentioned in or (II) evidenced by such document. Presumably by the expression "the loan based on a document" is meant the loan which has a document for its title-deed, on which the suit may have to be brought to recover it. The words in the old s. 11, after the word 'document,' which have been deleted now, were 'on which the suit is based.' Those words were likely to suggest that for the purposes of the total amount of the loan, the document which created a fresh cause of action for the suit was conclusive. That would have included accounts stated and adjustments (which give rise to a fresh cause of action), though probably not acknowledgments. Presumably it was to remove the possibility of such a construction that the Legislature has deleted those words. The addition of the words "or evidenced by it" does not alter the position in any way for the governing words that still remain are "if the loan is based on a document.....the amount of the loan."

In the definition of 'loan' the first category viz., "an advance, whether of money or in kind, on interest" obviously excludes interest. The respondents rely on the second category of transactions mentioned in the definition. But there too the words "bearing interest" suggest the distinction between loan and interest, in spite of the fact that the words 'in respect of past liability' are wide enough to include liability for past debt, whether principal or interest. The transaction has to be on a 'bond' executed in respect of past liability. The third category of "any transaction which, in substance, is a loan" may for instance possibly include a promise to pay unpaid purchase money or promise to pay a sum of money for some other good consideration, but not a mere acknowledgment of interest due, unless it also amounts to a renewal of a bond. In consequence of s. 2 (f) the word 'document' used in s. 7 obviously means the 'bond' referred to in the definition of loan, as that is inseparably involved in the definition itself, so far as past liability for interest is concerned.

The term 'bond' has not, however, been defined either in the Act or in the General Clauses Act. Two definitions of it are to be found in Indian Acts. Section 2 (3) of the Lim. Act (Act IX of 1908) defines 'bond' as including :

"any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is

performed, or is not performed, as the case may be."

Section 2 (5) of the Indian Stamp Act (Act II of 1899) defines 'bond' as :

"(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be ; (b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another ; and (c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."

It will thus be seen that the essential common feature of these definitions is 'any instrument whereby a person obliges himself.'

In England the word 'bond' is sometimes taken in a wider sense, but there too the instrument must ordinarily bind the obligor for the payment of a sum of money to the obligee. In Mozley and Whiteley's Law Dictionary, 5th Edition, 1930, p. 42, it is stated to mean "an instrument under seal, whereby a person binds himself to do or not to do certain things." In Stroud's Judicial Dictionary, 2nd Edition, p. 204, 'bond' is stated to mean "an obligation by deed." On the other hand, in Wharton's Law Lexicon, 14th Edition, p. 137, a 'bond' is stated to mean "a written acknowledgment or binding of a debt under seal," and at p. 308, 'deed' is defined as "a formal document on paper or parchment duly signed, sealed and delivered."

The definitions in the two Indian Acts make it still clear that the instrument itself must oblige the obligor to the obligee, that is to say the language of the instrument itself must expressly create the obligation. Although the word 'bond' had not been defined in the Money-lenders Act, it is fair to infer that the word has been used in it in the sense commonly understood in this country in view of the definitions in the Indian Acts, and not in the wider sense so as to include accounts stated, adjustments or acknowledgments. It, therefore, seems to me that an instrument cannot be a 'bond' unless it contains an express obligation undertaken by the executants to pay or deliver goods. If the promise to pay is to be inferred by implication then the document may amount to acknowledgment of liability or adjustment, or even account stated, but would not be a bond:

As pointed out by the High Court (p. 33 of the paper book),

"At the close of every mahajani year when

which governed the rights of the parties on the date when the High Court decided the appeal. When the certificate was duly granted his right to appeal to the Federal Court on that point undoubtedly accrued. Thereafter under s. 205 (2) the only forum of appeal available to him was the Federal Court and his right to the Privy Council, with or without special leave, disappeared. Once the door of the Federal Court was opened to the appellant, it cannot be shut against him on the double ground that he can no longer rely on the certificate because the old law has been replaced by a new one, and he cannot rely on the new law because to avail himself of the new law he must get the certificate vacated, and then go to the Privy Council. If this Court is not prepared to consider the old section, because it has been not only repealed but replaced, by a new section then it must consider and apply the latter, unless it can dispose of the appeal on some other shorter ground. As a special case, the Federal Court has also power to grant leave for taking such a ground under s. 205 (2) of the Govt. of India Act, and can also take account of the new Act *suo motu*.

The High Court conceded, or at any rate assumed, that if the provisions of the old s. 11 had been applicable, the plaintiffs could not have got a decree for more than the principal amount because the total amount of the loan advanced had been about Rs. 3,700 only while the amount repaid by way of interest was Rs. 4,953. The plaintiff-respondent relies on the last words of s. 7, viz "no Court shall ... pass a decree for an amount of interest...which... is greater than the amount of loan advanced or, if the loan is based on a document, the amount of the loan mentioned in, or evidenced by, such document." They contend that the suit is based on *chithas* and, therefore, the Court cannot go behind the amount of the loan mentioned in and evidenced by the last *chitha*.

The Bihar Money-lenders Act contains several definitions 'Principal' is defined in s. 2 (h) as meaning in relation to a loan the amount actually lent to the debtor; whereas under s. 2 (d) 'interest' means rate of interest, including the return to be made over and above what was actually lent. Under s. (2) (f) 'loan' means

(1) an advance

(a) whether of money

(b) or in kind,

on interest made by a money-lender,

(2) including a transaction on a bond bearing interest executed in respect of past liability, and

(3) any transaction which, in substance is a loan, with two exceptions which are not relevant here.

The explanation makes it clear that a bond bearing interest executed in respect of goods taken on credit constitutes a loan but a supply of goods on credit is not a loan. Thus 'loan' is a wider word than the principal amount actually lent, as it may be an advance in cash or kind, or may be a transaction on a bond bearing interest executed in respect of past liability or may be any transaction which is substantially a loan. Interest that accrues is not an advance of money, but can become a loan if liability to pay it is undertaken in a 'bond.'

As the same word 'loan' has been used in s. 7 it should bear the meaning given to it by its definition. But the definitions in s. 2 are themselves subject to the condition "Unless there is anything repugnant in the subject or context." The term 'loan' although wider than the term 'principal' is obviously used at three places in the same s. 7, in contradistinction to 'interest' used therein. Indeed, the section itself uses both the words 'loan' and 'interest' in two different senses. When the same section talks of the amount of interest separately and aims at reducing it, it is reasonable to infer that loan would not necessarily include the interest on it. The section applies to a suit brought in respect of "a loan advanced," and the interest to be decreed is not to exceed the amount of "the loan advanced" or if "the loan" is "based on a document," the amount 'mentioned in or evidenced' by it. The words in s. 7 are not total amount of debt mentioned, but the 'amount of the loan advanced or based on a document.' Had the intention been to refer to the total amount, including principal and interest mentioned in any document' it would have been simpler to use some other word like claim or debt. Interest would be included in the loan if its amount is entered in the document on which the loan is based.

Unfortunately the expression "if the loan is based on a document" used in s. 7, is rather unhappy and liable to create an ambiguity. Ordinarily one speaks of a claim being based on a document and not a loan being based on it. The concluding words, however, make the meaning clear

of the Govt. of India Act, and can also take account of the new Act *suo moto*. The Federal Court can take cognisance of the new Act, with a view to do justice between the parties, as the new Act has been made retrospective. 182 Ind. Cas. 161 (1), relied on. [p. 619, col. 1]

Meaning, scope and interpretation of s. 7 of the new Bihar Money-lenders Act, 1939, considered.

The account books must be taken as a whole and where the entries therein clearly show what items represent principal and what items interest, the Court must arrive at the "amount of the loan" within the meaning of s. 7 of the Bihar Money-lenders Act, 1939, by excluding the items that represent only interest. The scheme of the Bihar Money-lenders Act emphasises the distinction between liability in respect of the principal and liability in respect of the interest and whether a party relies on the words "mentioned in" or on the words "evidence by" at the end of s. 7 of the Act of 1939, the "amount of loan" must be determined with reference to the whole document and not by confining attention to a particular entry. [p. 620, col. 2; p. 621, col. 1.]

Mr. M. H. Malik (Advocate, Federal Court) with Rai Inder Behari Saran, (Advocate, Patna High Court) instructed by Mr. T. K. Prasad, Agent, for the Appellant.

Mr. Baldeva Sahay (A. G. Bihar and Senior Advocate, Federal Court) with Messrs. Raghbir Singh and A. C. S. Chari (Advocate, Federal Court) instructed by Mr. G. Sahay, Agent for Respondent No. 1. The other Respondents did not enter appearance.

Sulaiman, J.—It is submitted before us on behalf of the respondents that the new Bihar Money-lenders (Regulation of Transactions) Act, (Act VII of 1939), which has received the assent of the Governor-General, cannot be impugned on the ground of any repugnancy. But it is contended that this Court cannot, or at any rate should not, apply the new Act to this appeal. The appellant had invoked s. 11 of the old Money-lenders Act, but could not possibly rely on the new Act before the High Court as the judgment was pronounced on January 3, 1939, and the certificate also granted on that date, while the new Act, which received the assent of the Governor-General on April 15, 1939 was not published in the *Gazette* till May 1, 1939. Although the certificate had been granted, the appellant made a supplementary application in the High Court for leave to appeal to the Federal Court, which had stated the grounds of objection, but this also was made before the last mentioned date. The appellant did however, rely on the new section in his petition of appeal, dated August 18, 1939, lodged in the Federal Court and therefore

complied with O. XII, r. 5, F. C. R. In the circumstances the appellant cannot now be tied down to the grounds mentioned in his supplementary application to the High Court for obtaining the leave.

As regards the new s. 13, which the appellant can invoke in the first Court even if the Federal Court were not to interfere it was pointed out in *Shyamkant Lal v. Rambhajan Singh* (1) that although this Court was not bound to take the new Act into account it had certainly power to do so. The wordings of the new s. 7 are mere imperative and prevent a Court in any appeal or revision also from passing a decree for an amount in excess of that specified. Although this Court would not itself pass a decree in this case nevertheless, it may remit the case to the High Court with a declaration as to the judgment and decree which are to be substituted for the judgment and decree appealed from; and the judgment and decree of the High Court now to be passed shall have to be in strict conformity with the provisions of the new s. 7. It is therefore, all the more necessary that this Court should not ignore the coming into force of the new provisions, which would bind the High Court when the decree comes to be passed. If this Court were to ignore the new Act altogether the appellant would have no remedy left, as the High Court would not be able to give to the appellant the relief he is entitled to under that section. Without any direction from this Court the High Court would not be able to modify its own preliminary decree, which was passed when the old Act was in force, unless s. 7 were widely interpreted so as to apply to the final decree and also avoid its being at variance with the preliminary decree.

It is argued that the High Court had granted a certificate that the case involves a question of interpretation of the Govt. of India Act; but as that Act has been repealed, no question of any such interpretation now remains for consideration; and so the appeal is no longer maintainable. But the certificate has not become void or inoperative owing to the Provincial legislation having been repealed and replaced by a new one. Nor can there be any question of getting it vacated. The appellant is still asserting the validity of the old Act,

(1) (1939) F O R 193 (216, 217); 182 Ind. Cas. 161; A I R 1939 F O 74; 1939, O L R 399; 12 R F O 1; 5 B R 756; 20 P L T 473; (1939) M W N 674; 43 Q W N F O 68; (1939) Kar. (F O) 165 (F O).

Assistant Commissioner of Income-tax and on a revision application and also on an application to refer to this Court by the Commissioner of Income-tax. It is urged that whether the Income-tax Authorities are allowed to go behind a statement made in a deed of partnership when registration is sought is a question of law, and it is contended that they are not allowed so to do. This proposition has been negatived in more than one High Court. In *In the matter of Bissessar Lal Brjlal* (1) a Full Bench of the Calcutta High Court held that the Income-tax Officer has power to call for evidence over and above the documentary evidence adduced in the partnership deed. In the High Court of Lahore it was held in *Haji Ghulam Rasul Khuda Bakhsh v. Commissioner of Income-tax, Lahore* (2) that it was open to an Income-tax Officer to find against the declarations and the provisions contained in the partnership deed and to refuse registration if he found that the deed was incorrect. It is true that this was a case of a joint Hindu family and the inquiry was authorised under s. 25-A of the Act. The principle must, in my opinion, apply equally in cases of registration under s. 26-A of the Act since it cannot be presumed that an inquiry is to be made only in cases of Hindu family concerns and that applications for registration by these alone, asserting partnership where there had formerly been joint undivided status, are the only deeds which can be open to suspicion. The latest decision is that in *Haji Noor Mohammad Haji Aleemullah v. The Commissioner of Income-tax, Central and United Provinces* (3). There it was held that Income-tax Authorities are competent to hold as Judges of fact that a partnership which purports to be evidenced by a deed produced before them is fictitious, the only proviso appears to be, according to this judgment, that there must be some evidence on which the decision as Judges of fact is reached. Undoubtedly there is evidence in the case before me, evidence which I have already described. In this Court in *Mulla Fida Ali Sultan Ali v. Commissioner of Income-tax C. P. & U. P.* (4) it is laid down that if the Income-tax Authorities find that a deed of partnership is sham and not intended to be acted upon, and there is evidence on which they

(1) 57 C 1336, 128 Ind. Cas. 327; 34 C W N 363; A I R 1930 Cal. 449; Ind. Rul. (1931) Cal. 87 (F. B.).

(2) I L R (1938) Lah. 113; 181 Ind. Cas. 332; A I R 1938 Lah. 105; 11 R L 812.

(3) 10 I T C 426.

(4) 5 I T Rep. 615.

could arrive at such a finding, the High Court will not weigh the evidence with a view to decide whether the finding is correct or otherwise. This appears to me to conclude the matter, and if it is urged that the decision of a Bench of the Court of the Judicial Commissioner in *Commissioner of Income-tax v. Kikabhai* (5) takes a different view (the case was merely given in reference before me and its applicability was not shown), then it must be held to have been overruled by the Divisional Bench of this Court in *Mulla Fida Ali Sultan Ali v. Commissioner of Income-tax C. P. & U. P.* (4) already cited.

The applicants have had to make an unrefundable deposit of Rs. 100 and pray that in the event of ill success, no costs should be awarded against him. The learned Counsel for the Commissioner of Income-tax does not press for costs, and in the circumstances, although I consider that some costs would be justified, I make no order. The application is accordingly dismissed.

s. Application dismissed.

(5) A I R 1930 Nag. 6; 121 Ind. Cas. 38; Ind. Rul. (1930) Nag. 70.

FEDERAL COURT

Appeal from the Patna High Court

March 18, 1940

MAURICE GWYER, C. J.,

SULAIMAN AND VARADACHARIAR, JJ.
SURENDRA PRASAD NARAIN SINGH—

APPELLANT

versus

Sri GAJADHAR PRASAD SAHU

TRUST ESTATE AND OTHERS—

RESPONDENTS

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7 — Certificate under old Act—New Act coming into force — Appeal if can be entertained by Federal Court — Scope and interpretation of s. 7—Entries in account books showing what items represent principal and what interest—"Amount of the loan", how arrived.

Once the door of the Federal Court is opened to the appellant, it cannot be shut against him on the double ground that he can no longer rely on the certificate because the old Bihar Money-lenders law under which the certificate was granted to question the validity of a section of the old Act has been replaced by a new one, and he cannot rely on the new law because to avail himself of the new law he must get the certificate vacated and then go to the Privy Council. If Federal Court is not prepared to consider the old section, because it has been not only repealed but replaced, by a new section then it must consider and apply the latter, unless it can dispose of the appeal on some other shorter ground. As a special case, the Federal Court has also power to grant leave for taking such a ground under s. 205 (2)

The Income-tax Authorities are entitled to go behind a deed of partnership which the persons produce and to find that the deed is bogus and to refuse to register them as a firm for the purposes of the Income Tax Act. If the Income-tax Authorities find that a deed of partnership is sham and not intended to be acted upon, and there is evidence on which they could arrive at such a finding, the High Court will not weigh the evidence with a view to decide whether the finding is correct or otherwise. 128 Ind. Cas. 327 (1), 181 Ind. Cas. 332 (2), *Haji Noor Mohammad Haji Aleemullah v. Commissioner of Income-tax, Central and United Provinces* (3) and *Mulla Fida Ali Sultan Ali v. Commissioner of Income-tax Central and United Provinces* (4), relied on. 121 Ind. Cas. 38 (5), held **Overruled** by *Mulla Fida Ali Sultan Ali v. Commissioner of Income-tax, Central and United Provinces* (4).

There is no prohibition in law against a child being introduced to share in the profits of the firm, and s. 48 of the Income Tax Act shows that in a firm which has been registered such a minor is equally entitled to the benefits accruing to a firm from registration.

Misc. O. Case for asking the Commissioner of Income-tax, C. P. to refer the case of the applicants for the opinion of the High Court of Judicature preferred under s. 66 (3) of the Income Tax Act.

Mr. K. B. Tare, for the Applicants.

R. B. D. N. Choudhary, for the Opposite Party.

Order.—This is an application by a firm said to consist of three persons, Hafiz Abdul Gafoor, Abdul Latif and Mohammad Ibrahim, under s. 66 (3) of the Income Tax Act, asking for a direction that the Commissioner of Income-tax should refer certain questions for the opinion of the High Court. There are 13 questions suggested in all, but it is admitted that the whole position comes to the simple question whether, when certain persons have made an application in accordance with s. 20-A of the Income Tax Act, the Income-tax Authorities are entitled to go behind a deed of partnership which the persons produce and to find that the deed is bogus and to refuse to register them as a firm for the purposes of the Income Tax Act. Although the present application is made in the name of the firm showing three partners, the case has been treated by the Income-tax Authorities, and indeed by the firm itself, as consisting of four partners; one of the partners, Abdul Razak, has been omitted from those participating in this application.

The facts, briefly, are that since 1934 there had been a registered firm consisting of Abdul Gafoor and Mohammad Yasin, each having an eight-anna share in the partnership. On June 17, 1937 Mohammad

Yasin died and on July 9, 1937 a new partnership was drawn up, showing as partners Abdul Gafoor, his son Abdul Razak, Abdul Latif the brother of Mohammad Yasin, and Mohammad Ibrahim, the minor son of Mohammad Yasin, aged 9, each partner having been declared to have a four-anna share in the business. The Income-tax Officer considered the application for registration, which was presented to him on the basis of this partnership deed as suspicious and asked for the firm's books. These disclosed that when the old partnership which had been in existence for some three years had been dissolved owing to the death of Mohammad Yasin there had been no settlement of the old accounts or a determination of the share of the deceased partner which would go to his heirs under Muhammadan Law, that no account had been made of the total capital of the firm or indeed of the capital contributed by the two partners under the former deed or of the four partners under the present deed. Neither had there been any individual account between the earlier partners or between the present ones. It was also considered suspicious that one of the new partners should be a boy who was still at school and who was admitted to an equal share of the profits of the partnership on the ground that he knew some English and would be able to deal with the English correspondence, and that Abdul Latif should be shown as a four-anna owner when he had previously worked for the firm without remuneration, and that a child should be brought in on equal terms with the others in matters of profit.

Now, there is no prohibition in law against a child being introduced to share in the profits of the firm, and s. 48 of the Income Tax Act shows that in a firm which has been registered such a minor is equally entitled to the benefits accruing to a firm from registration, that is to say, the benefits of individual assessment, or rather the benefits accruing under s. 48 of the Act. The facts which I have set out and which indeed are not disputed do, in my opinion, constitute evidence on which the Income-tax Authorities were entitled to come to a conclusion that the deed of partnership newly entered into was a sham transaction drawn up for the purpose of attempting to obtain an undue benefit in the matter of assessment. That the deed is a sham transaction has been found by the Income-tax Officer, on appeal by the

few previous years has with some of his supporters trespassed upon the land this year after the Chettyar had leased it to some other person. Witnesses also make general statements such as that the applicant has a reckless disregard for the safety of others' property, that he is a promoter of agrarian trouble and that he is a man who wields influence over the members of his association and that therefore his being at large without security would be hazardous to the cultivators and land owners. These statements fall far short of making out a case under either cl. (e) or cl. (f).

Clause (e) speaks of habitual commission or attempt to commit or abetment of the commission of offences involving a breach of the peace. The evidence does not disclose either the commission or attempt to commit or abetment of the commission of any offence involving a breach of the peace except the alleged trespass which might not even be criminal. But the alleged trespass even if it were criminal and consequently amounted to an offence, the evidence does not disclose that the applicant either habitually committed, attempted to commit or abetted the commission of such an offence, for the evidence merely discloses only one offence while the word "habitually" implies frequent practice or use. It implies a tendency or a capacity resulting from the frequent repetition of the same acts: see *Bhubaneshwar Kuer v. Emperor* (1). Moreover, the words "offences involving a breach of the peace" mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace: see *Arun Samanta v. Emperor* (2). It is not suggested that the alleged trespass actually gave rise to any breach of the peace or public tranquillity. For these reasons, I am firmly of the opinion, that the evidence for the prosecution has failed to establish a case under s. 110, cl. (e).

With reference to cl. (f), the general statements that the applicant had a reckless disregard for the safety of others' property and that he was a promoter of agrarian trouble and that he is a dangerous and desperate character wielding influence over the members of his association whose being without security was hazardous to the community, have not been supported by any particular act or conduct on his

part other than that of his inciting the members of his association to demand a certain higher rate of wages. On the other hand, many of the prosecution witnesses admitted that the applicant was not a criminal. From this I take it that they never knew that the applicant had committed any crime or any criminal offence. The allegation that the applicant used to promote agrarian troubles appears to have been based simply and solely upon the applicant's activities in inciting the agricultural labourers to demand higher wages which are not the sort of activities for which a person can be held to be so desperate and dangerous that his being at large without security would be hazardous to the community. His movement may not be popular among a certain section of the public who may even consider him to be an objectionable member of the community, but he is merely for that reason not necessarily a person so desperate and dangerous as to render his being at large without security hazardous to the community. In the absence of evidence of the applicant's conduct showing that he has become so desperate and dangerous as to render his being at large without security hazardous to the community the finding that the applicant was of the category mentioned in cl. (f) of s. 110 cannot be maintained. The order made against the applicant is therefore not in accordance with law. For these reasons I set it aside. The bond which the applicant has executed will be cancelled.

s.

Order set aside.

NAGPUR HIGH COURT

Miscellaneous Civil Case No. 116
of 1938

September 14, 1939

GRILLE, J.

Hafiz ABDUL GHAFOR AND OTHERS—
APPLICANTS

versus

COMMISSIONER OF INCOME-TAX,
CENTRAL PROVINCES AND UNITED
PROVINCES, LUCKNOW

—OPPOSITE PARTY

Income Tax Act (XI of 1922), ss. 66 (3), 26-A, 48—Application under s. 26-A for registration of firm—Income-tax Authorities, if can go behind deed of partnership, find it to be bogus and refuse registration—Finding that deed is sham based on evidence—High Court, if can weigh evidence to decide whether finding is correct—Child, whether can be partner in firm and share profits thereof.

(1) 6 Pat. 1; 100 Ind. Cas. 967; A I R 1927 Pat. 126; 28 Cr. L.J. 359; 8 P. L. T. 335.

(2) 30 C 366.

as a percentage of the annual value of holdings containing dwelling houses within the limits of the Municipality. Thus, a holding containing no dwelling houses was exempt. There were other exemptions also; e. g., the proviso to s. 322 directed that no such fees shall be levied in respect of any shop or place of business which did not contain any privy or cesspool. The result was that the holdings in schs. B and C to the plaint in the present suit were exempt, in the one case because they were shops containing no privies or cesspools and in the other case because the holding was a Thakurbari containing no dwelling house. In the new Act the fee and the exemptions have been swept away. Instead, the Corporation is empowered under s. 123 (1) (d) to levy a consolidated conservancy, latrine and drainage rate known as the conservancy rate. This rate is levied on a percentage basis on the annual value of all holdings within the Municipality.

There is thus no precise correspondence between the old fee and the new rate: the name is different and the incidence is different; and it is therefore not possible to apply to them the language of the proviso to s. 2 of the new Act. Where the old and the new imposts correspond, the proviso obviously applies, but it is not possible to apply it in cases where there is no correspondence. We cannot say that an assessment of one kind under the old Act must, by virtue of the proviso, be deemed to be an assessment of a rather different and more comprehensive kind under the new Act. Indeed, so far as the holdings in schs. B and C are concerned, there was nothing of any kind under the old Act to correspond to the new conservancy rate: they were formerly wholly exempt from the latrine fee. It follows therefore that we have here a case where property is for the first time sought to be assessed to the conservancy rate and since this has been done without a valid valuation list, the resulting assessment is *ultra vires*. It is unnecessary to examine the effect of the omission to give notice as required by s. 147. The appeal must therefore be dismissed with costs.

B. K. Mukherjea, J.—I agree.

Appeal dismissed.

RANGOON HIGH COURT

Criminal Revision Application No. 459-B
of 1939

November 15, 1939

MYA BU, J.

MAUNG PO AUNG—APPLICANT

versus

THE KING—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 110 (e)—“Habitually,” meaning of—“Offences involving breach of the peace,” meaning of.

The word “habitually” in s. 110 (e), Criminal P. O., implies frequent practice or use. It implies a tendency or a capacity resulting from the frequent repetition of the same acts. 100 Ind. Cas. 967 (1), relied on.

The words “offences involving a breach of the peace” in s. 110 (e), Criminal P. O., mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. *Arun Samanta v. Emperor* (2), relied on.

Or. R. App. for review of the order of the Sub-Divisional Magistrate, Myaungmya, dated August 14, 1939.

Mr. Aye Maung (2), for the Applicant.

Mr. Myint Thein, Govt. Advocate, for the Crown.

Order.—The applicant Maung Po Aung applies to have the order passed against him, by the Sub-Divisional Magistrate of Myaungmya under s. 110 (e) and (f), Criminal P. O., which has been confirmed on appeal by the District Magistrate of Myaungmya revised. After a brief reference to the evidence of witnesses for the prosecution and for the defence, the learned Sub-Divisional Magistrate declared that—

“there is abundant evidence to show that the respondent falls within the classes from whom security can be demanded.”

But I find it impossible to see that even accepting all that the witnesses for the prosecution say that the applicant has been proved to be a person who “either habitually commits or abets the commission of the offences involving a breach of the peace” or “is so desperate and dangerous as to render his being at large without security hazardous to the community.” The evidence for the prosecution in the main is to the effect that the applicant was the president of the Cultivators’ Asi-ayon of Aleygyaw village in Myaungmya District and as such he used to incite the members of his Asi-ayon (which means an association) not to do field work such as ploughing or transplanting at wages below certain rates and that the applicant who worked a certain piece of land belonging to a Onettyar as the latter’s tenant for a

ment related back to the date of the suit as originally filed. On this view it was within the six months' limit and therefore not time-barred.

On the merits the question which arises in this appeal is whether the impugned assessment is *ultra vires*. To decide this question it is necessary to consider in some detail the various provisions relating to assessment under the new Act. The conservancy rate is a consolidated conservancy, latrine and drainage rate on the annual value of holdings levied under s. 123 (1) (d) of the new Act. Briefly the procedure for assessment is in five stages: (1) The decision to impose the rate. This is a matter for the Commissioners at a meeting under s. 123 (1). (2) The preparation of the valuation list. In this list are entered all the holdings in the Municipality together with the annual value of each. The work is to be done by the assessor of the Municipality as provided in s. 133. (3) The determination of the percentage on the valuation at which the rate is to be levied. This is to be done by the Commissioners at a meeting under s. 135. (4) The preparation of an assessment list by applying the percentage fixed to the annual value of each holding. This is to be done by the Commissioners under s. 136. (5) Publication and review. This is to be done as provided in ss. 147 and 149. Such in brief outline is the scheme of assessment under the new Act. Now it is certain that if the Municipal Corporation were making an assessment for the first time in respect of any rate based upon the annual value of holdings, it would have to go through all the five stages mentioned above. It is also certain that in the present case all those stages were not gone through. To mention only two omissions, there was no valuation list prepared nor were the notices required under s. 147 given. As regards the first of these two omissions, it has been argued that there was a valuation list prepared in 1923-24 under the old Act and that this list, being saved by the proviso to s. 2 of the new Act, made the preparation of a fresh list unnecessary. This argument requires a little examination. At the outset it may be observed that the new Act makes a careful distinction between valuation and assessment. Thus, the assessment list mentioned in s. 136 of the new Act is a distinct document from the valuation list mentioned in s. 133. Again, s. 137 (2) refers separately to valuation and assessment in laying down the period for

which each is valid. So, too, does s. 148 (1) in making provision for review applications. So, too ss. 150 and 151 for their respective purposes. There was a similar distinction under the old Act and indeed the two things are different, although the process of assessment necessarily involves an antecedent valuation. Now, the proviso to s. 2 of the new Act though comprehensively drawn and though purporting to save almost everything done under the old Act omits to mention valuation. The proviso runs thus:

"Provided that all Municipalities constituted limits defined, regulations, measurements and divisions made, licenses and notices issued, taxes, tolls, rates, and fees imposed or assessed, budgets passed, assessments made, plans approved, permissions or sanctions granted under the Ben. Municipal Act, 1884, shall so far as they are in force at the commencement of this Act, be deemed to have been respectively constituted, defined, issued, imposed, assessed, passed, made, approved or granted under this Act, and shall (unless previously altered, modified, cancelled, suspended, surrendered, or withdrawn, as the case may be, under this Act) remain in force for the period (if any) for which they were so constituted, defined, issued, imposed, assessed, passed, made, approved or granted."

This may be contrasted with s. 2 of the old Act, which after repealing various previous enactments were on to provide

"that assessments, valuations, measurements, divisions, and appointments made, powers conferred and notifications published under any such enactment, and all other rules (if any) now in force and relating to the matters hereinafter dealt with, shall (so far as they are consistent with this Act) be deemed to have been respectively made, conferred and published hereunder."

It will be noticed that whereas there was a specific saving of valuations in the proviso in the old Act there is no such saving in the proviso in the new Act. Therefore, even if we assume that there was a valid valuation list under the old Act in force immediately before the commencement of the new Act it will not count as a valuation list made under the new Act. It is however contended on behalf of the Municipal Corporation that even if the valuation cannot be held to survive the proviso to s. 2 of the new Act operates to keep alive the assessment itself. To see whether this contention is sound we have to examine the scheme of taxation under the new Act and compare it with that under the old Act. Under the old Act there was no such thing as a conservancy rate, but a Municipal Corporation was empowered to levy a fee for the cleansing of latrines under s. 26 (f). Section 321 of the old Act provided that the fees so levied should be fixed with reference to, but not necessarily

accrual would be June 2, 1933. In either case, the suit would have become barred by limitation several months before the date on which it was actually brought, if the appellant's contention is accepted. In my opinion, the appellant's contention cannot be accepted. It is true that the Chairman of the Municipal Commissioners is a different person from the Municipal Commissioners considered as a Corporation. But there can be no doubt that from its very inception the present suit was intended to be against the Corporation rather than the Chairman. This is clear from the nature of the allegations made in the plaint and from the nature of the relief prayed for. The plaint challenges the validity of various resolutions and proceedings of the Municipal Commissioners and ask for a declaration that the assessment purporting to have been made by them is *ultra vires* and illegal. Consequently relief in the shape of an injunction is also prayed for, but even if this be regarded as being against the Chairman it is obvious that the main relief sought was against the Corporation. From the very beginning therefore the main claim was against the Corporation; memories of the old Act were doubtless responsible for the naming of the Chairman as the defendant. This was therefore a case where a misdescription was corrected and not a case where a new party was impleaded by the amendment. Such was the view taken by Jack, J., and it is a view supported by the decisions in *Gopiram Behariram v. E. I. Ry. & O. & R. Ry.* (1), *Anukul Chandra v. Dacca District Board* (2), *Jogendranath Banerji v. Tollygunj Municipality* (3), *Municipal Commissioners of Pabna Town v. Anukul Chandra Maitra* (4), *Saraspur Manufacturing Co. Ltd. v. B. B. & C. I. Ry.* (5), *Nanak Chand v. E. I. Ry.* (6) and *Mannu Kasundhan v. Crooke* (7). Against that view we have been referred only to two cases, *B. N. Ry. v. Behari Lal* (8) and *E. I. Ry. Co. v. Ram*

Lakhan Ram (9). But both these cases are distinguishable, because in both the relief sought was some kind of personal relief against the defendant originally impleaded, so that it could not be said that the plaintiff really intended to sue the Railway Company and merely misdescribed the party. Indeed in the Patna case *Das, J.*, himself put the ground for his decision thus:

"But in my opinion, there is all the difference in the world between misdescribing a party intended to be sued and suing a wrong party. It was strongly contended before us that the plaintiff intended to sue the Railway Company and, in substance, sued the Railway Company. But the plaint speaks for itself and it is quite impossible for us to have recourse to extrinsic evidence. A personal decree was sought against the Agent, East Indian Railway, and there is no suggestion in the plaint that it was sought to bind the Railway Company by any decree that the plaintiff might obtain against the defendant."

In the case before us the plaint makes it perfectly plain that the plaintiff sought to bind the Corporation by the decree which he prayed for. We are not aware of any case exactly in point decided by the Privy Council, but the decision in *Gaekwar Baroda State Railway v. Mafiz Habib-ul-Huq* (10), is of some assistance. In that case it appears to have been held that the suit was in reality one against the Gaekwar of Baroda in spite of the name actually mentioned in the plaint. It may be observed that under s. 87, Civil P. O., a Sovereign Prince or a Ruling Chief (such as the Gaekwar of Baroda) can only be sued in the name of his State; the suit in question was not in terms against the State of Baroda, but against the Gaekwar Baroda State Railway through the Manager and Engineer-in-Chief. Nevertheless, it was held that the suit was really one against the Gaekwar of Baroda himself, and as such incompetent without a certificate under s. 86 of the Code. It is clear therefore that the name is not always the true criterion for determining the party really sued. We have to consider the nature of the allegations in the plaint and the nature of the relief sought. There can be no doubt that in the case before us the suit was from its very inception a suit against the Municipal Corporation. Therefore the effect of the amendment was not to substitute or add a new party or to convert the suit into a new suit. In these circumstances it must be held that the amendment—

(9) 3 Pat. 230; 78 Ind. Cas. 312; A I R 1925 Pat. 37; 6 P L T 415.

(10) 65 I A 182; 174 Ind. Cas. 551; A I R 1938 P O 165; I L R (1938) All. 601; 32 S L R 531; 10 R P O 262; 1938 O W N 521; 1938 A L R 352; (1938) O L R 218; (1938) A L J 488; 42 O W N 705; 47 L W 753; (1938) M W N 481; 4 B R 524; (1938) 2 M L J 11; 40 Bom. L R 811; 19 P L T 669.

(1) 30 O W N 209; 94 Ind. Cas. 762; A I R 1926 Cal. 612.

(2) 32 O W N 396; 113 Ind. Cas. 24; A I R 1928 Cal. 485.

(3) 42 O W N 768; 181 Ind. Cas. 762; A I R 1939 Cal. 178; 68 O L J 267; 11 R O 852.

(4) 43 O W N 194; 180 Ind. Cas. 673; A I R 1939 Cal. 79; 11 R O 719.

(5) 47 B 785; 73 Ind. Cas. 1027; A I R 1923 Bom. 452; 25 Bom. L R 513.

(6) 6 L 252; 89 Ind. Cas. 279; A I R 1925 Lah. 441; 26 P L R 437.

(7) 2 A 296.

(8) 29 O W N 614; 50 Ind. Cas. 426; A I R 1925 Cal. 716; 25 O 783.

ed against the Chairman of the Municipal Commissioners instead of against the Municipal Commissioners themselves as required by s. 15, Ben. Municipal Act a subsequent amendment impleading the Municipal Commissioners themselves is merely a correction of misdescription under O. I, r. 10, Civil P. O., and not an addition of a new party within the meaning of s. 22, Lim. Act. The amendment relates back to the date of the suit as originally filed and time cannot be reckoned as from the date of the amendment.

[Case-law discussed.]

Bengal Municipal Act, 1932, makes a careful distinction between valuation and assessment. Thus, the assessment list mentioned in s. 136 of the Act is a distinct document from the valuation list mentioned in s. 133. Although the process of assessment necessarily involves an antecedent valuation, yet the two things are different.

There is no precise correspondence between the fee under the old Ben. Municipal Act and conservancy rate under the new Act. The name and the incidence are different; and it is, therefore, not possible to apply to them the language of the proviso to s. 2 of the new Act. Where the old and the new imposts correspond, the proviso obviously applies, but it is not possible to apply it in cases where there is no correspondence. A valuation list prepared under the old Act is not a valid valuation list made under the new Act.

Where property is for the first time sought to be assessed to the conservancy rate without a valid valuation list, under s. 133, Ben. Municipal Act, the resulting assessment is *ultra vires*.

L. P. A. against the judgment of Mr. Justice Jack, in Appeal No. 937 of 1935, dated May 18, 1937.

Messrs. S. N. Banerjee, Suresh Chandra Sen and Prakash Chandra Pakrashi, for the Appellants.

Mr. A. N. Bose, Dr. S. C. Basak and Mr. Jitendra Kumar Sen Gupta, for the Respondents.

Narsing Rau, J.—This is an appeal under cl. 15, Letters Patent, from a decision of Jack, J., and arises out of a suit for a declaration that the conservancy rates imposed by the Commissioners of the Dacca Municipality upon certain holdings described in Schs. A, B and C to the plaint are *ultra vires* and illegal and for an injunction restraining the Commissioners from realizing the rates. The suit was instituted before the Munsif of the Third Court of Dacca who dismissed it. There was an appeal to the District Judge of Dacca who also dismissed the suit. Then there was an appeal to the High Court heard by Jack, J., who allowed the appeal and decreed the suit and this is now an appeal from his decision.

The Dacca Municipality appears to have been originally constituted as a Municipa-

lity under the Ben. Municipal Act of 1884, hereinafter referred to as the old Act. This Act was repealed in 1932 by the Ben. Municipal Act of 1932, hereinafter referred to as the new Act, which came into force on December 1, 1932. The proviso to s. 2 of the new Act states, among other things, that all Municipalities constituted under the old Act shall be deemed to be constituted under the new Act, so that the Dacca Municipality is now to be deemed a Municipality constituted under the new Act. Under s. 13 of the old Act there were to be Commissioners for each Municipality and s. 29, provided that the Commissioners shall in the name of their Chairman, by the description of "the Chairman of the Municipal Commissioners of..." be a body corporate and in such name shall sue or be sued. The position under the new Act is slightly different. For each Municipality constituted under the new Act there is, as before, to be a body of Commissioners and these Commissioners are a body corporate, but they have now to be sued in their own name and not as before in the name of their Chairman: see s. 15 of the new Act.

The first point raised in this appeal arises out of this provision. It arises in this way. When the suit was first brought, that is to say on December 2, 1933, it was brought against the Chairman of the Municipal Commissioners of the Dacca Municipality. It will be noticed that the suit was brought after the commencement of the new Act but the plaintiff, presumably through ignorance of the change made by the new Act, brought the suit against the Chairman of the Commissioners instead of against the Commissioners themselves. The mistake appears to have been discovered subsequently and the plaint was amended on June 5, 1934, so as to implead the Municipal Commissioners themselves as required by the new Act. The point now taken before us on behalf of the appellant is that the suit in its amended form must be regarded as a new suit, brought on the date on which the amendment was made, that is to say on June 5, 1934. If this view is accepted, the suit was barred by limitation by virtue of the provisions of s. 535 of the new Act, which requires that the suit shall be brought within six months of the accrual of the cause of action. According to the plaintiff, the cause of action in this case accrued on July 31, 1933; but, if we hold that it accrued on the date on which bills for the rates in question were presented to the plaintiff for payment the date of

where the sale is by a Qurq Amin as distinguished from any other ministerial officer of the sale is complete the moment the Qurq Amin accepts the bid and the deposit of one-fourth of the highest bid is made. In support of his contention he places strong reliance upon paras. 1023 and 1027 of the Revenue Manual. Paragraph 1023 of the Revenue Manual enumerates the duties of a Qurq Amin in addition to such other duties as the Collector may require him to perform. One of such duties is laid down in cl. (e) and is the sale of immovable property other than land paying revenue to Govt. e. g., houses, or groves in Oudh, etc., in execution of decrees of Revenue Courts, unless, owing to the property being of considerable value, the Court directs it to be sold by the Tahsildar or Naib Tahsildar.

Paragraph 1027 runs as follows:

"When a sale is held in execution of a decree the proceeds, after deduction of commission and other charges, may be paid by the Qurq Amin direct to the decree-holder if he is properly identified;

Provided that if there are several decree-holders and they are not all present, or any of them object to immediate payment, the balance, after deduction of charges, shall be paid into the treasury."

From these two paragraphs the learned Counsel for the opposite party contends that as the Qurq Amin is empowered to sell immovable properties other than land paying revenue to Govt. and as he is further entitled to distribute the sale proceeds amongst the decree-holders, it necessarily follows that the sale by him is a complete sale. We regret we are unable to agree with this contention. Paragraph 990 was referred to. This paragraph finds place in Chap. XL, which regulates the sale of ancestral land by the Collector in execution of Civil Court decrees. This paragraph has, therefore, no application to the present case. Chapter XLI, of the Revenue Manual deals with the sale of ancestral land in execution of Revenue Court decrees which also has no application to the present case.

In the present case we are told that the sale was of certain groves. The proceedings of sale were, therefore, clearly governed by O. XXI of the Civil P. O. The sale was, therefore, really by the Rent Court even though by the force of certain rules in the Revenue Manual the officer to carry out the sale on the spot may have to be the Qurq Amin. Paragraphs 1023 and 1027 fall in Chap. XLII, which provides for process fees and disposal of sale proceeds in sales carried out by Amins.

It does not provide for the procedure for sale in execution of a decree by a Rent Court under the provisions of the Civil P. O. The enumeration of duties of the Qurq Amin in this Chapter does not mean that where the Qurq Amin is employed as a ministerial officer for selling the property in execution of a decree, then the Qurq Amin is substituted for the Court itself. The Qurq Amin, in our opinion, remains but a ministerial officer to carry out the sale and has to obtain the order of the Court accepting the sale. Even in the present case we find that Qurq Amin sent a report to the Court for acceptance of the sale. We find nothing which might distinguish the present case from the cases referred to above.

We hold that the sale in the present case took place when on February 7, 1935, the Court passed an order accepting the sale and fixing March 4, 1935, as the next date for hearing, and that the application under O. XXI, r. 89 of the Civil P. O., and the deposit in pursuance thereof were within time.

We allow the application, set aside the order of the lower Appellate Court and restore that of the trial Court. The applicant will get his costs in all the Courts.

D.

Application allowed.

CALCUTTA HIGH COURT

Letters Patent Appeal No. 5 of 1937

December 18, 1939

NARSING RAU AND B. K. MUKHERJEE, JJ.
MUNICIPAL COMMISSIONERS, DACCA

—DEFENDANTS—APPELLANTS

versus

GANGAMANI CHAUDHURANI w/o
AKSHOY KUMAR BASAK—PLAINTIFF—
RESPONDENT

Bengal Municipal Act (XV of 1932), ss. 15, 136, 133, 2, Proviso—Suit against Chairman of Commissioners intended against corporation—Amendment impleading Commissioners themselves—It is mere correction of misdescription under O. I, r. 10, Civil Procedure Code (Act V of 1908)—S. 22, Limitation Act (IX of 1908), does not apply—Valuation and assessment, distinction—Assessment without preparing valuation list under new Act, validity—S. 2, Proviso, applicability—Valuation and assessment made under old Act, if kept alive by proviso.

The name is not always the true criterion for determining the party really sued. The Court has to consider the nature of the allegations in the plaint and the nature of the relief sought. [p. 607, col. 2.]

Where a suit for declaration that the assessment is *ultra vires* and illegal, intended to be brought against the Corporation is through mistake institut-

On the same date, i. e., February 7, 1935, the judgment-debtor applied for permission to deposit the decretal amount together with penalty under O. XXI, r. 89 of the Civil P. C. The order was that the judgment-debtor should first make the deposit before any order could be passed. The judgment-debtor deposited the necessary amount on March 8, 1935, which was accepted by the Court and the sale was set aside.

From this order an appeal was filed by the decree holder and the auction-purchaser and the learned District Judge, who heard the appeal, allowed it and dismissed the application of the judgment-debtor under O. XXI, r. 89 of the Civil P. C., and passed an order of confirmation of sale under O. XXI, r. 92 of the Civil P. C.

The present application is in revision against that order of the learned District Judge passed in appeal and the main question for decision is whether the deposit required by O. XXI, r. 89 of the Civil P. C., was within time or not.

Order XXI, r. 89 of the Civil P. C., authorises the judgment-debtor to apply to have the sale set aside on his depositing in Court (a) for payment to the purchaser, a sum equal to five per cent. of the purchase money and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale have been received by the decree-holder. Rule 92 (2) of O. XXI of the Civil P. C., lays down that where in the case of an application under r. 89, the deposit required by that rule is made within thirty days from the date of the sale, the Court shall make an order setting aside the sale.

Article 166 of the Indian Lim. Act is as follows:—

"166. Under the same Code to set aside a sale in execution of a decree, including any such application by a judgment-debtor."	Thirty days	The date of the sale."
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Both from Art. 166 of the Indian Lim. Act, and r. 92 (2) of O. XXI, of the Civil P. C., it is clear that an application to set aside a sale in execution of a decree by a judgment-debtor and the deposit required by that rule must be made within thirty days from the date of sale. The question in the present case is, what is the date of the sale.

The lower Appellate Court has held on the facts of the present case that the sale must be taken to have taken place on February 1, 1935, when the Qurq Amin accepted the bid of Iftikhar Husain and ordered him to deposit one-fourth of the purchase money and accepted the deposit.

It is contended before us that the sale actually took place on February 7, 1935, when the Court executing the decree accepted the Qurq Amin's report as to sale and adjourned the case for March 4, 1935. Numerous cases have been cited by the parties before us and we shall refer only to a few of those our own Court.

In *Hari Shankar v. Amina Bibi*, reported in 1935 Oudh Weekly Notes, 205 (1), a Bench of this Court, of which one of us was a member, in the case of a self-acquired property held that the Collector conducting the sale is only a ministerial officer of the Civil Court appointed to sell the property; and the sale, although held by the officer of the Court or by a person appointed in this behalf is, nevertheless, a sale by the Court itself. It is not completed until the Court formally accepts the bid and declares the purchaser under O. XXI, r. 84 of the Civil P. C. Prior to such order, the bidder, whose bid has been accepted by the sale officer at the time of the bid, does not acquire any interest in the property. He becomes the purchaser only when the sale is approved by the executing Court, and, therefore, the starting period of limitation under Sch. I, Art. 166, of Indian Lim. Act for an application to set aside the sale under O. XXI, r. 89 of the Civil P. C., is the date when the sale is so approved by the executing Civil Court, and not the date when the Collector or sale officer accepts the bid and reports the sale to the Civil Court.

In this case two earlier decisions of this Court in *Kanwal Ram v. Gurdei*, 8 O. W. N. 633 (2) and *Mahabir Singh v. Lal Ambika Bakhsh Singh*, (10 O. W. N. 816) (3), were relied upon.

The learned Counsel for the opposite party has contended that none of these three cases is applicable to the facts of the present case where the sale was by a Rent Court and through a Qurq Amin. The learned Counsel has referred us to certain paragraphs of the Revenue Manual and contended that

(1) 1935 O W N 208; 153 Ind. Cas. 719; 7 R O 376; A I R 1935 Oudh 131; 1935 R D 92; 1935 O L R 35.

(2) 8 O W N 633; 132 Ind. Cas. 263; Ind. Rul. (1931) Oudh 263; A I R 1931 Oudh 291.

(3) 10 O W N 816; 145 Ind. Cas. 281; 6 R O 38; A I R 1933 Oudh 401.

to the question whether the appellant would be entitled to claim an increased amount if circumstances changed, but he was of the opinion that the case fell within the decision in *Brij Mohanlal v. Shiam Singh* (1). There the Allahabad High Court held that where an award has been accepted by the parties, and one of them has received benefits under it he is not entitled at a later stage to challenge its validity. In the present case it is certainly not open to the appellant to raise any question as to the validity of the award. She knew of the provisions in the award and for fourteen years she accepted without question the the amount given to her by it. That she knew of the terms of the award and accepted it as being valid is shown by Ex. 3 which is a receipt given by her in respect of the payment of the first annual payment of Rs. 42. The receipt reads as follows:

"As my husband Subbarayadu, your undivided brother is dead, and as you are bound to protect me, the mediators who were chosen by you and me have settled that a sum of Rs. 42 per annum should be given as maintenance by you to me. I consented to the said settlement. You have therefore paid me in cash this day a sum of Rs. 42 (Rupees forty-two) being the amount of maintenance for one year from the 15th *Margasira Sudda* of this year to the 15th *Margasira Sudda* of the ensuing *Rakshasa* year. Hence the same has been received."

In the face of the express statement that she had consented to the award it is not possible for the appellant to contend that she did not accept it or that she did not know the terms of it. The District Judge has found as a fact that she did accept the award and this finding is conclusive on the question. It was held in *Mohieswara Rao v. Durgamba* (2) that a contract by a Hindu widow with her husband's co-parceners to receive a fixed sum per annum for maintenance and not claim any increase in future even in case of change of circumstances was a valid agreement. If it were open to the appellant at this late stage to question the award—I hold that it is not—she accepted the arrangement embodied in it and this constituted an agreement between her and her husband's co-parceners under which she was to be paid this sum for life without any right in either party to claim a variation, whatever change there might be in circumstances. From whatever point of view the case is considered the decision must be against the appellant. The appeal

consequently fails and will be dismissed with costs.

N.-D.

Appeal dismissed.

OUDH CHIEF COURT

Application No. 111 of 1937

March 26, 1940

THOMAS, C. J. AND RADHA KRISHNA, J.
S. HADI HUSAIN—JUDGMENT-DEBTOR
—APPELLANT—APPLICANT

versus

S. ZAINUL IBAD AND OTHERS—DECREE-
HOLDERS AND ANOTHER—AUCTION-
PURCHASER—RESPONDENTS
—OPPOSITE PARTY

Limitation Act (IX of 1908), Art. 166—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 99 (2)—Application to set aside sale under Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Starting point of limitation—Sale held by Rent Court through Qurq Amin, whether makes any difference.

The starting period of limitation under Sch. I, Art. 166, of the Lim. Act, and r. 99 (2) of O XXI, Civil P. C., for an application to set aside the sale under O. XXI, r. 89 of the Civil P. C., is the date when the sale is approved by the executing Civil Court, and not the date when the Collector or sale officer accepts the bid and reports the sale to the Civil Court. The same is true even where the sale is by a Rent Court and even though by the force of certain rules in the Revenue Manual the officer to carry out the sale on the spot may have to be the Qurq Amin. 153 Ind. Cas. 719 (1), 132 Ind. Cas. 263 (2) and 145 Ind. Cas. 281 (3), relied on.

App. against the order of the District Judge of Fyzabab, dated May 27, 1936.

Mr. Akhtar Husain for Mr. Ali Zaheer, for the Applicant.

Mr. K. P. Srivastava, for the Opposite Party No. 2.

Judgment.—The facts of this case are that certain immovable property of the judgment-debtor, the applicant before us, was sold in execution under a rent decree passed by the Rent Court. The sale was held by the Qurq Amin of the Court. He proceeded to the spot on February 1, 1935, conducted the sale and accepted one-fourth of the amount of the highest bid from Syid Iftikhar Husain, the highest bidder. Out of the deposit he purchased court-fee labels worth Rs. 11-14 for the sale fee and deposited the balance, i. e., Rs. 33-12 in the treasury. After this he reported to the Court for acceptance of the sale on February 5. The Court on February 7, 1935 noted the fact of sale for Rs. 180, the realisation of one-fourth of the price, and ordered the case to be put up on March 4, 1935.

(1) 24 A 164; A W N 1901, 208.

(2) 47 M 308; 78 Ind. Cas. 831; A I R 1924 Mad. 687; 46 M L J 189; 19 L W 165; (1924) M W N 266.

bhog which need be no more than the ordinary daily food of the family. We are satisfied that the defendant has spent more for the benefit of the idol than was spent by the testator himself and at least as much as was spent by the original managers or by the defendant's own father. Even if, therefore, there was a trust and the defendant was the manager of it, he has done nothing contrary to the terms of the trust and, therefore, the plaintiffs are not entitled either to replace him as managers or to be joined with him in the management of this property.

The learned Counsel for the plaintiffs appellants urges that the suit was brought *bona fide* and the costs should be met from the estate, i. e., the property disposed of by the will. Presuming that this could be done, it appears to us that the real object of the plaintiffs was to displace the defendant in order to have themselves as managers the very wide powers given by the will if such powers could validly be conferred, that is to say, the plaintiffs were suing for their own advantage and not for the benefit of the idol. In the circumstances we see no reason why they should be granted costs.

We, therefore, dismiss the appeal with costs.

D.

Appeal dismissed.

MADRAS HIGH COURT

Letters Patent Appeal No. 64 of 1937

March 13, 1939

LEACH, C. J. AND SOMAYYA, J.

KODUKULA KAMESWARAMMA—

APPELLANT

versus

KODUKULA THAMMANNA AND OTHERS—

RESPONDENTS

Arbitration—Award—Party accepting and receiving benefit under it—Whether can subsequently challenge its validity—Hindu Law—Widow—Maintenance—Contract with husband's co-parceners to receive fixed sum per annum even in case of changed circumstances, is valid and binding on her.

Where an award has been accepted by the parties, and one of them has received benefits under it he is not entitled at a later stage to challenge its validity. *Brij Mohanlal v. Shiam Singh* (1), relied on.

A contract by a Hindu widow with her husband's co-parceners to receive a fixed sum per annum for maintenance and not to claim any increase in future even in case of change of circumstances is a valid agreement and binding on her. 78 Ind. Cas. 831 (2), relied on.

L. P. A. against the judgment of Mr. Justice Venkataramana Rao, dated March 23, 1937 in S. A. No. 626 of 1933.

Messrs. G. Lakshmanna and G. Chandrasekhara Sastri, for the Appellant.

Mr. Y. Suryanarayana, for the Respondents.

Leach, C. J.—The appellant is the widow of one Subbarayadu who died in August 1913. Subbarayadu was joint with his brothers, respondents Nos. 1 to 4. After the death of her husband the appellant went to live with her maternal grandfather and continued to live with him until his death in 1926. Shortly after her husband's death the appellant claimed the widow's right of maintenance out of the joint family property. The question of the amount to be paid to her was referred to arbitration. She was a major at the time and signed the reference, which is dated April 25, 1914. The arbitrators gave their award on October 18, 1914 under which the appellant was to receive from her brothers-in-law by way of maintenance a sum of Rs. 42 per annum during her lifetime. The award also provided that the appellant should not be entitled to an increase in the rate even if circumstances changed. The rate was to be Rs. 42, no more and no less. Notwithstanding the award, the appellant, after grandfather's death claimed to be entitled to maintenance at the rate of Rs. 20 per mensem, to an annul payment of Rs. 25 for clothing, and to a sum of Rs. 200 for residence and cooking utensils. She based her claim on two grounds: (1) at the time of the award and until his death her maternal grandfather was helping to support her; and (2) the income from the joint family property had increased. The members of the family refused to accede to the appellant's demand. The consequence was she filed in the Court of the District Munsif of Vizagapatam the suit out of which this appeal arises. The respondents pleaded the award and their plea was accepted. The appellant then appealed to the District Judge of Vizagapatam. The District Judge agreed with the decision of the District Munsif and dismissed the appeal. She then filed a second appeal which was heard by Venkataramana Rao, J., who considered that the decisions of the lower Courts were right but granted a certificate under cl. 15 of the Letters Patent.

Venkataramana Rao, J. accepted the contention of the appellant that the award went beyond the terms of reference in that the question referred was merely the amount of maintenance to be paid without regard

and the entire income was only Rs. 800. We would here add that even this provision for the managers was a temporary one for eventually the Govt. was to be the manager. Obviously the facts there are very different from those in the present case where the expenditure on the idol which the managers could not avoid could be reduced by them to a very small sum while the income of the property amounted to at least Rs. 5,000 annually. We might also note that there was a temple there and not an idol in one room of a residential house as is the case here.

Srinibash Das v. Monmohini Das (3 C. L. J. 224) (3) was a case of an absolute gift to an idol after certain legacies of fixed amounts and it was held on the facts that there was no colourable intention but a real dedication.

Manohar Mukherjee v. Bhupendra Nath Mukerjee (A. I. R. 1932 Cal. 791 at 793) (4) has also been cited as it is there laid down that the direction that the *shebait* shall spend any surplus income on certain charitable objects or pious acts does not make the dedication incomplete. The dedication if merely colourable would be bad, but the provisions in question in that case affected the surplus income only and were subordinate to the main religious purpose and a Hindu God may be allowed to do some works of charity.

This does not help us in the present case because *nek kam* or good works is vague and not necessarily an expenditure on a charitable object and apart from that it was not merely a small surplus that could have been devoted to such a purpose but the whole income after *bhog* and as we have said *bhog* might have involved only a very small expenditure.

The learned Counsel for the respondent has cited cases to support his argument that in the present case there was either no dedication at all or at most only a trust or charge for the benefit of the idol.

In *Jagadindra Nath Roy v. Hemanta Kumari Debi* (I. L. R. 32 Cal. 129) (5) their Lordships of the Privy Council laid down that in dedications of the completest kind an idol is rightly regarded as a juridical person capable as such of holding property; but there are less complete endowments in which notwithstanding a religious

(3) 3 O L J 224.

(4) A I R 1932 Cal. 791, (793); 141 Ind. Cas. 544; 37 O W N 29; 56 O L J 468; 60 O 452; Ind. Rul. (1933) Cal. 115 (F B).

(5) 32 O 129; 31 I A 203; 6 Bom. L R 765; 1 A L J 565; 8 O W N 809; 8 Sar. 698 (P O).

dedication property descends (and beneficially) to heirs subject to a trust or charge for the purposes of religion.

In *Sonaton Bysack v. Sreemutty Juggut Soondree Dossee* 8 Moore's Indian Appeal, 66 (6) although the testator declared that he had granted to a certain idol which he had established in the house the whole of his movable and immovable property, it was held that the bequest to the idol was not an absolute gift and the four sons of the testator were entitled to the surplus of the property after providing for the performance of the ceremonies and festivals of the idol.

In *Pande Har Narayan v. Surja Kunwari* (48 I. A. 143) (7) the will provided that the property of the testator should be considered to be the property of a certain idol but further provisions such as that the residue after defraying the expenses of the temples should be used by the legal heirs to meet their own expenses, and the circumstances, such as that the ceremonies to be performed were fixed by the will and would absorb only a small proportion of the total income, might indicate that the intention was that the heirs should take the property subject to a charge for the performance of the religious purposes named.

We do not think it necessary to refer to other cases which have been cited because while the principle to be applied is what we have stated above, no two wills are the same and so decisions are only a guide to the application of the principle.

We find in the present case that the will is altogether so vague that it is not possible to say for certain that the testator intended a permanent dedication to the idol absolutely. Supposing, however, that the words "*ba nam zad Sri Thakurji Maharaj*" could be held to denote, in the absence of anything else, an absolute dedication, yet the succeeding clauses show either that the testator really meant to benefit the family and not the idol, or he intended the managers to spend practically as much as they liked on good works which were independent of the idol and which form a provision too vague to be given effect to, for good works are not necessarily confined to charitable purposes.

We agree, therefore, with the learned Civil Judge that no valid trust was created by the will and that at most there was a charge or trust in favour of the idol for

(6) 8 M I A 66; 2 Suther. 37; 1 Sar. 721 (P O)

(7) 48 I A 143; 63 Ind. Cas. 34; 43 A 291; 35 O W N 961; 14 L W 633 (P O).

incorrect and the other view is manifestly preferable. If the words *parwarish karen* mean maintaining and not merely feeding from the *bhog* a number of persons composed solely in all probability of what we might call dependents of the deceased, if no one else was chosen by the managers and they need choose no one else, the result would be that the income of this property which was to stand in the name of the Thakurji would be devoted almost wholly to the upkeep of the family and not for the benefit of the Thakurji. After this *bhog* and maintenance or maintenance by *bhog*, whatever the meaning be attached to it, the directions are as follows :

"Aur jo munafa baqi rahe usse Thakur Maharaj ke kharch jo munasib ho ya jo nek kam tajwis kiya jaye karte rahin."

We are asked by the learned Counsel for the appellants to insert the words *Thakurji Maharaj ke* after *nek kam*, so that the alternative would be expenditure for the benefit of the idol for *kharch* or for *nek kam*. We find it quite impossible to do this. Two alternatives are there, either spending money on or for the Thakurji as appears suitable to the managers, or performing *nek kam* which can well be translated as "good works." If by *kharch* be meant expenditure on the Thakurji, in the circumstances it would have been very little seeing that in the time of the testator it was composed of expenditure at two festivals amounting to an average under Rs. 40 a year and there is no reason to expect that the two managers would think it proper to spend more than the testator did himself. If by *kharch* is meant expenditure on behalf of the Thakurji it would include good works unless they were independent of the Thakurji so that *nek kam* in the second part of the sentence can only be taken to mean good works independent of the Thakurji. If, therefore, the managers chose to spend the money on good works they could do so in preference to spending it for or on the Thakurji and the only expenditure for the benefit of the Thakurji would be *bhog* which was really *bhog* to the Thakurji and was not expenditure for the benefit of the family or of dependents and not of the Thakurji. The term "good works" is certainly exceedingly vague and in *Bai Bapi v. Jamna Das Hathisang* (I. L. R. 22 Bom. 774) (1) a similar provision was held to be void for uncertainty.

It appears from the evidence on the

record that Shiam Sunder, father of Mohan Lal was treated more or less as a son by the testator, but at the time that this will was executed he was only about 20 years of age and, therefore possibly in the opinion of the testator unsuitable to have absolute disposing power over the property of the deceased. The testator may also have considered it dangerous to leave his wife in the position of a Hindu widow and, therefore, he may have intended nothing more than making a temporary arrangement by appointing two managers of the Thakurji to be in reality guardians of Shiam Sunder. This might well explain why he did not clearly say that the idol was to be *malik* and why there was no provision for the appointment of managers after the death of the two actually named by the testator.

The learned Counsel has referred us to certain cases as supporting his argument that this was a genuine dedication forever and ever of the whole property of the deceased to the Thakurji. The principle in all such cases is clear: if the real intention of the testator was to benefit the idol and there was clear dedication then the idol becomes the owner of the property. If, on the other hand, the dominating intention was to benefit individuals and not a deity then the whole transaction would be a mere colourable imitation of a dedication or at most there might be a charge in favour of the particular idol.

The first case that the learned Counsel relies on is *Jadu Nath Singh v. Thakur Sita Ramji* (44 I. A. 187) (2). Here a Hindu dedicated the whole of his property to a temple. Half the income was to be enjoyed by the managers without power of alienation and upon the death of the named managers the Govt. was to become manager and the whole net income was then to be applied to the expenses of the temple. Their Lordships of the Privy Council said that there was in the beginning a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple and the rest was only a gift to the idol *sub modo* by a direction that of the whole which had already been given part was to be applied for the upkeep of the idol itself and the repair of the temple and the other was to go for the upkeep of the managers. The shares were half and half

(2) 44 I A 187; 42 Ind. Cas. 225; 21 O W N 953; 22 M L T 52; 20 O O 200; 19 Bom. L R 687; (1917) M W N 605; 26 O L J 309; 39 A 553; 4 O L J 586; A I R 1917 P O 177 (P O).

(1) 22 B 774.

parts of the will, might be believed to be more probably the intention of the testator. The learned Judge has taken separately the sentence starting *badeen lihaz kul jaidad ghair manqula* and ending *banamzad Shri Thakurji Mahraj ke karke* as showing the intention of the testator to dedicate the whole of the immovable property to the Thakurji Mahraj. We think, however, that this sentence must be construed with what follows because the whole of the will must be considered together to arrive at the meaning of it. The words *banamzad Sri Thakurji Mahraj ke karke* are ungrammatical, but we think they can be read as corresponding to *Sri Thakurji Mahraj ke nam men karke*. We note then that no word showing absolute interest without limitation of time appears. The idol is not made *malik* nor is it said that he shall have the full powers which the testator had. It would perhaps not be an unfair translation to say that the testator is putting this property in the name of the idol without saying exactly what right the idol shall have. This is the first example of vagueness. Next Ram Raghubir wrongly described as "son-in-law" and *Mst. Jhabbo* the widow are given the management of the property, *ba Sarbarkari mukhtiar*. They are not called *shebais* or *mutwallis*, or any similar words. Nothing is said as to who is to succeed, and it is a remarkable omission if the Thakurji was being given the property for ever and ever. This is not even a case where the persons appointed had heirs who would obviously succeed them at their death. *Jhabbo Bibi* had no son while Ram Raghubir was not of the family except that he married a daughter of Mahadeo Prasad, brother of the testator, and there is nothing to show that he had any son to succeed him. This made it especially remarkable that the testator should not provide for successors when as he says in the beginning his intention in making this will was to avoid future litigation.

Coming now to other duties of these managers, we come to that sentence *aur amdani munafa se Thakur Mahraj ka bhog lagakar sab log yani zouja waghaira minmuqir wa jisko ki zouja minmuqir wa Lala Ram Raghubir munasib samjhen parwarish karen*. There are two possible readings of this—(1) that the two managers should make offerings to the idol in the shape of *bhog* and distribute those offerings, after presentation to the idol, to the wife of the deceased, to persons described as *waghaira minmuqir* and also to any other persons chosen by the two managers or

(2) that they should give offerings and after doing that they should maintain the wife etc., not merely from the offerings.

The learned Judge has adopted this second reading and has therefore held that the testator really meant to provide food, clothing etc., for the wife and other persons. This would certainly be a considerably greater expenditure than giving offerings to the Thakurji and could easily swallow most, if not all, of the income of the property.

This idol was with two other idols kept in a room in the upper storey of the house of the testator which upper-storey was composed otherwise of female apartments. There is evidence to the effect that the custom of *bhog* in families like that of the testator consists in presenting to the idol the daily food of the family which is afterwards eaten by the family. This would in fact be submitting for the blessing of the deity the daily food and would not involve the provision of food beyond that required by the family. We note in this connection that in the accounts maintained by the testator as expenses of the idol there is an average of under Rs. 40 consisting of expenditure on two festivals a year, but nothing for daily *bhog* so that it appears that there was no custom of feeding strangers with the *bhog*. The idol had no separate temple nor did this will order any temple to be built and only such persons as were chosen by the two managers were entitled to the *bhog* besides the widow *waghaira*. Unless, therefore the two managers went out of their way to select persons to receive *bhog*, the expenditure on *bhog* would be very little. An example of obscurity here is the use of the term *waghaira minmuqir*. No manager could possibly decide looking at the will alone who constituted this *waghaira*. He might guess that the testator meant the persons residing in the house who in his life time ate the daily food, but this would be mere guess work. If we hold that by this sentence the testator meant that a certain number of people were merely to share the *bhog*, we find the difficulty that the term *parwarish karen* is an every day expression which means far more than mere giving food to persons, and includes the provision of clothes and other reasonable expenses. We find it quite impossible to say which of the two alternatives the testator intended, and we certainly cannot say that the view held by the learned Civil Judge is manifestly

Bisheshar Nath had or had not been adopted by Kanjimal. Various members of the family held different views, but for practical purposes this question was set at rest by a deed of relinquishment by Parmeshuri Das in favour of Shiam Sunder if Parmeshuri Das was in fact the nearest reversioner, that is to say, if Bisheshar Nath had been adopted by Kanjimal which Parmeshuri Das denied.

Bisheshar Nath executed a will Ex. 1, dated November 20, 1887, and the case of the plaintiffs was that that will left the property of the testator absolutely to an idol to which we shall refer as Thakurji, the managers being *Mst. Jhabbo Bibi* and *Ram Raghubir* who will be found in the pedigree. The plaintiffs then alleged that Shiam Sunder came into possession adversely or if he was a *mutwalli* then he did not perform his duties properly. Consequently the plaintiffs were entitled to the following reliefs:

- (a) that plaintiffs Nos. 1 and 2 be appointed *mutwallis* of Thakurji and Mohan Lal, son of Shiam Sunder defendant, be ordered not to interfere with the plaintiffs, or
- (b) that if the defendant is a *mutwalli* then he be required to render accounts and a decree be passed for any amount found due after payment of additional court-fees if necessary;
- (c) that if the plaintiffs alone be not appointed trustees then they should be appointed trustees jointly with the defendant;
- (d) that if reliefs (a) and (c) be not granted then a perpetual injunction be issued to the defendant to the effect that he should not prevent plaintiffs Nos 1 and 2 from worshipping the Thakurji and taking offerings and taking part in the management, and finally;
- (e) that any other relief consonant with justice be also passed in plaintiffs' favour.

The learned Civil Judge came to the conclusion that the will was duly executed, that there was no valid trust in law creating an endowment in favour of the Thakurji because at every stage of the will one comes upon different possible interpretations and taken as a whole the will certainly reserves a substantial portion of the income for the *shebait* and his favourites and that it is vague and uncertain about the disposition of the property bequea-

thed. The property would, therefore, devolve on the heirs-at-law of the testator subject to a charge for the daily *bhog*, periodical *utsavs* and other incidental expenses of the Thakurji.

In the appeal the learned Counsel for the plaintiffs has argued that an absolute interest was given to the idol and so the property did not go by inheritance to the heir-at-law of the testator and even if the defendant be regarded as the manager for the idol, his conduct in denying the rights of the Thakurji and in appropriating to himself income which should have gone to the Thakurji entitles the plaintiffs to be substituted as managers in the place of the defendant.

The whole decision of this appeal must, therefore, be based on a consideration of the terms of the will and the legal effect of it.

In this will the following passages occur:

Badeen lehar kul jaedad ghair mangula jo ki bila shirkat ghair wa bila masalih digre hai aur ba qabza wa dakhil malikana hamare ke hai, kisi warisan ya azizan ka koi haq nahin hai, lihaza bahalat sehat-i-nafs wa sabat-i-aqal bila ikrah wa ajhar, ba durusti hawai khamsa ba nam zad Sri Thakur Ji Mahraj key karkey iqar karta hun aur likhe deta hun ki kul jaedad ka intizam mawaziat wa jaedad ghair mangula ka ikhtiar Lala Ram Raghubir wald Bhairon Prasad damad apne ko aur niz Mst. Jhabbo zauja-i-mankuha apne ko deta hun ki ba sarabararkari mukhtiar hamare ke kul jaedad ka intizam karen aur jis kadar qarza dena hai uska hal bahikhata wa niz dastawezat se zahir hoga wa munafa amdani muwaziat se ada kia jaye aur mula-zmin hamare badastur qaem rakkhe jawen. Aur amdani munafa se Thakur Mahraj ka bhog lagakar sab log yani zouja waghaira minmuqir wa jisko ki zouja minmuqir wa Lala Ram Raghubir munasib samjhen parwarish karen. Aur jo munafa bagi rahe usse Thakur Mahraj ka kharch jo munasib ho ya jo nek kam tajwiz kiya jaye karte rakin. Illa jaedad ghair mangula ke ekhtiar bai wa rahan ka na ziua minmuqir ko aur na damad hamare ko hasil hoga, agar barkhilaf iske kiya jaweto batil wa na-masmua ho.

The learned Counsel for the plaintiffs states that we should place ourselves in the armchair of the testator and construe the will so as to give effect to the intention of the testator by suitably construing passages in the will which are not obviously plain, so as to give them the meaning which the testator would have given them. He urges that intestacy should be avoided whenever possible. We agree generally with what he has urged, but we must say that there are cases when a Court with the best of intentions cannot understand what was the intention of the testator, and further, when the testator has used plain language, we cannot give a meaning contrary to this plain language even if to give such contrary meaning might give effect to what, from other

drawn from the fact that the grantor did not remain in possession and that therefore there was an indication that the document was an out-and-out sale rather than a mortgage, falls to the ground. Where the usufruct is to be taken into consideration, the indications point clearly to a mortgage, and the test of possession, which would only be of value in the absence of any stipulation for interest or deduction for profits made from the use of the property, disappears. Thus not only is the presumption that the document is a mortgage un rebutted, but the majority of the tests which the learned Judge placed before himself for consideration would indicate that the document was a mortgage and must be interpreted as such, and the decision which has been reached on the one test which the learned Judge interpreted as giving a contrary indication was reached on no evidence at all.

The decision of the lower Appellate Court is reversed and its decree set aside, and the decree of the trial Court is restored. Costs in the trial Court will be as ordered in that Court and the costs in the lower Appellate Court and in this Court will be borne by the defendant No. 3 Jagannath.

s.

Appeal allowed.

OUDH CHIEF COURT
First Civil Appeal No. 4 of 1937
March 13, 1940

HAMILTON AND YORKE, JJ.
GAURI SHANKAR AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MOHAN LAL—DEFENDANT—
RESPONDENT

Will—Construction—Principles—Value of decisions—"Good work" whether vague—Held there was no permanent dedication absolutely in favour of idol.

In interpreting a will the Court should place itself in the armchair of the testator and construe the will so as to give effect to the intention of the testator by suitably construing passages in the will which are not obviously plain, so as to give them the meaning which the testator would have given them. Intestacy should be avoided whenever possible. But there are cases when a Court with the best of intentions cannot understand what was the intention of the testator, and further, when the testator has used plain language, it cannot give a meaning contrary to this plain language even if to give such contrary meaning might give effect to what, from other parts of the will, might be believed to be more probably the intention of the testator. [p. 598, col. 2; p. 599, col. 1.]

No two wills are the same and so decisions are

only a guide to the application of the principle. [p. 601, col. 2.]

The whole of the will must be considered together to arrive at the meaning of it. [p. 599, col. 1.]

The term "good works" is certainly exceedingly vague and is void for uncertainty. *Nek kam* or good works is vague and does not necessarily mean an expenditure on a charitable object. *Bai Bapi v. Janna Das Hathising* (1), relied on [p. 600, col. 1; p. 601, col. 1.]

If the real intention of the testator was to benefit the idol and there was clear dedication then the idol would become the owner of the property. If, on the other hand, the dominating intention was to benefit individuals and not a deity then the whole transaction would be a mere colourable imitation of a dedication or at most there might be a charge in favour of the particular idol.

[Case-law referred to.]

Held, after construing the terms of the will that the will was altogether so vague that it was not possible to say for certain that the testator intended a permanent dedication to the idol absolutely. No valid trust was created by the will and that at most there was a charge or trust in favour of the idol for *bhog* which need be no more than the ordinary daily food of the family. [p. 601, col. 2; p. 602, col. 1.]

[Case-law referred to.]

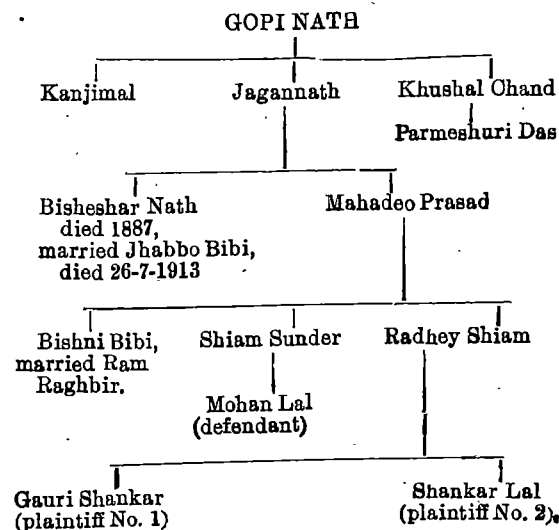
F. C. A. against the decree of the Sessions and Civil Judge, Lucknow, dated October 28, 1936.

Messrs. G. Hasan, Makund Behari and Harish Chandra, for the Appellants.

Messrs. P. L. Banerji, Rajeshwari Prasad and Ramapat Ram, for the Respondent.

Judgment.—This is a first appeal by plaintiffs against a decision of a Civil Judge of Lucknow dismissing a suit with costs.

To understand the appeal the following pedigree is necessary:



On the death of Bisheshar Nath the nearest reversioner was either Parmeshuri Das or Shiam Sunder according to whether

The correctness of the calculation has not been the subject of dispute. As this amount was paid within three years and as the result of a transaction between Rao Ranjit Singh and the plaintiff, I do not see how it can be construed as other than a re-purchase. The document in question is in my opinion a mortgage by conditional sale. The learned Judge of the lower Appellate Court has taken notice of the various tests which have been applied from time to time in the Courts in India in distinguishing a mortgage from a sale with a condition of re-transfer and has referred to the summary of the most important tests which appear in Sir Dinshab Mulia's Transfer of Property Act, second edition, on p. 330. The learned Judge has quoted the first five of the six tests given in that work, namely, (1) the existence of a debt, (2) the period of re-payment, (3) the continuance of the grantor in possession, (4) the stipulation of interest on re-payment and (5) a price below the true value. He has, however, omitted the last test, namely, whether the stipulation for re-conveyance is in a contemporaneous deed or in one executed after a lapse of time. It is possible that he omitted this particular test inasmuch as by virtue of the Proviso to s. 58 (c) of the T. P. Act, which was added to it by the amending Act of 1929, no transaction purporting to be a mortgage by conditional sale shall be deemed to be a mortgage unless the condition of re-transfer is embodied in the document which effects or purports to effect the sale, and the question whether deed is contemporaneous or subsequent does not arise. The proposition, however, that a contemporaneous entry stipulating re-conveyance indicates a mortgage still holds good, and the obvious effect of the added proviso is that *prima facie* the document is a mortgage and that the burden lies on the opposite party to show that it appears rather to be an out-and-out sale, in which case the tests mentioned would have to be applied.

The learned Judge of the lower Appellate Court has failed to notice that the burden of proving that the document is not a mortgage when *prima facie* it must be taken to be one lay on Jagannath who contested it. Without any discussion of this point the learned Judge immediately proceeded to an application of the tests. The first test, the existence of a debt, although mentioned by him is not considered neither did he consider whether the period of repayment was a short period indicating

a sale or a long period indicating a mortgage. As the length of a period as an indicating factor is always relative, the point is not one of any particular importance. The learned Judge did not attach any importance to the next two tests enumerated by him, apparently considering that they cancelled each other out since the grantor did not continue in possession, such continuation being held to indicate a mortgage, whereas the stipulation for interest on repayment, which undoubtedly existed in this case, did indicate a mortgage. He based the whole of his reasoning on the fifth test, namely, that a price below the true value of the fields indicated a mortgage, and he came to the conclusion that the full value of the fields had been mentioned in the sale deed Ex. P-2. This finding has been challenged as having been improperly arrived at inasmuch as there was no pleading in respect of what the original price of the fields was and that the matter was not put in issue. The learned Judge's reasoning is that if the value was as low as 1850 in 1932 it could not possibly have been worth more than Rs. 2,500 in 1930, I do not consider that the learned Judge is entitled to come to this conclusion in so empirical a manner without any evidence on the subject being on the record. If he wished to ascertain what the value of the fields was in 1930 and the correctness of his interpretation of the document turns in his view entirely on this point he should have afforded the parties opportunity to lead evidence on the subject. It was certainly no part of the plaintiff's duty to plead that the price mentioned Rs. 2,500, was below the true value of the fields. That was a point which, as I have shown, should have been taken by the defendant in order to rebut the presumption that the document was not what by reason of the Proviso to s. 58 (c) of the T. P. Act it must be presumed to be.

In any case the one test which the learned Judge has discussed is not in itself conclusive but only an indication. There was a stipulation for re-payment of the sum with interest, which is certainly a weighty factor inclining to the interpretation of the document as a mortgage. A still weightier factor is the deduction of the profits which the grantee made during the time of his possession, and it may be added here that as the usufruct was to be considered, the inference which the lower Appellate Court appears to have

On June 15, 1930 Rao Ranjit Singh, the defendant No. 1, had executed a document in favour of Gokuldas, the defendant No. 2, and the point for determination is whether this document is to be interpreted as a mortgage or as an out-and-out sale with a condition of re-purchase. The document is Ex. P-2, and after declaring that the fields had been sold and the title transferred contained the further stipulation that if at any time within three years Rao Ranjit Singh was to pay back the Rs. 2,500 paid to him in respect of these fields with compound interest at 1 per cent. per mensem after deducting the income which Gokuldas might derive from these fields, there should be a re-conveyance in his favour. It may be added that on June 30, 1932 Gokuldas executed an agreement to sell in favour of Jagannath, the defendant No. 3. This agreement was not fulfilled, and on July 11, following the defendant No. 2 executed another agreement to sell in favour of the plaintiff Saheba. In the agreement in favour of Jagannath there was no mention by Gokuldas of the agreement to re-convey to Rao Ranjit Singh on re-payment within three years, although this was mentioned in the agreement in favour of Saheba. Neither of these agreements was implemented, and Jagannath brought a suit for specific performance during the pendency of the hearing of the suit which is now the subject of second appeal and obtained a decree, the Judge, who is the same Judge who decided the case now under appeal in Saheb's favour, holding that however imperfect Gokuldas's title to sell to Jagannath may have been, Jagannath had sued for specific performance with his eyes open as to the doubt of Gokuldas's title to sell and was entitled to his decree for specific performance for what it was worth. On October 6, 1932 Rao Ranjit Singh executed a sale deed of the property in favour of the plaintiff, and of the purchase money which amounted to Rs. 2,000 Rs. 150 was paid to Rao Ranjit Singh and Rs. 1,850 was paid to the defendant Gokuldas, on a calculation based on the assumption that the document between Rao Ranjit Singh and Gokuldas was a mortgage, in full satisfaction of the mortgage claim. It will be noted that this sum of Rs. 1,850 is the sum for which Gokuldas had contracted to sell to Jagannath. The document Ex. P-2 was then given back to Rao Ranjit Singh, and the plaintiff claimed that he had bought

the fields clear of any incumbrance since the mortgage had been satisfied.

The trial Court in a brief judgment came to the conclusion that the document between Rao Ranjit Singh and Gokuldas was in effect a mortgage, basing his opinion on the wording of the document, fortified by what he considered the surrounding evidence as shown by the oral evidence. The learned Judge did not consider that s. 92 of the Evi. Act debarred him from admitting oral evidence on this point as it was not sought to contradict or vary the terms of the document. The learned Judge also came to the conclusion on the issue whether the plaintiff had any notice of the agreement to sell between Gokuldas and Jagannath that the plaintiff had no notice. The plaintiff's claim was accordingly decreed.

In first appeal in the Court of the District Judge, Nimar, the Appellate Court rightly held that the trial Court was wrong in admitting evidence as to the intention of the parties and held that the document must be construed on its merits alone. The Court also held as a question of fact, and in my opinion quite correctly, that the plaintiff did have notice of the transaction between Gokuldas and Jagannath. The Court held that the correct interpretation to be placed on the document was that it was not a mortgage but an out-and-out sale and that the defendant Jagannath, who was the appellant before it, had acquired an absolute title to the fields when the defendant No. 1 had failed to repurchase them from the defendant No. 2, and that he was in possession of the fields and that the plaintiff was not entitled to oust him from that possession. The decision of the trial Court was reversed and the plaintiff's suit was dismissed. The plaintiff has preferred this second appeal in which the only contesting defendant is Jagannath.

If the document Ex. P-2 is to be treated as a mortgage, there can be no question that the mortgage has been satisfied, and even if it were to be held that it is not a mortgage, I do not think that the lower Appellate Court can be said to be correct in stating that the defendant No. 1 failed to re-purchase. There is no doubt that on October 6, 1932 Gokuldas was paid and accepted a certain sum of money which purported to have been reached on a calculation of the amount due plus interest after deducting the profits he had received from the usufruct of the field.

case however, we are not concerned with any process which has been issued under Chap. V of the Regulation for the recovery of the amount due to the Local Board. The Board have chosen to institute a civil suit for the recovery of the money due to them, and I find nothing in the Regulation to debar them from adopting this course if they wish to do so. It is true that in a previous proceeding the Local Board resorted to various processes for the realization of their dues. It appears that some portion of the amount due to the Board was recovered in this way, but the present civil suit is for the realization of the balance due to the Board. The claim of the Board arises directly from a breach of the conditions of the defendant's lease and does not appear to be connected with the processes previously issued, in such a way as to bring it within the scope of s. 154 (g) of the Regulation. As far as those particular processes are concerned, it is not contended that any difficulty occurred which could have given rise to any claim. All that appears to have happened was that the Tezpur Board attached and sold some of the moveable properties belonging to the defendants under s. 69 of the Regulation and no objection or claim was filed by any person in connexion with this procedure.

It is further urged that, as the Tezpur Board once resorted to the revenue authorities for the recovery of their dues, they were thereby debarred from recovering any portion of the money due to them in a Civil Court. I am not however prepared to accept this argument. Chapter V of the Regulation merely provides a speedy execution procedure for realizing revenue and quasi revenue. As in the present case the whole of the amount due could not be realized in execution, the debt due to the Board remained unsatisfied, and, in my view, it remained open to them to recover this money by instituting a civil suit if they considered this method the most convenient means for the purpose of realizing their dues. It is argued that s. 84 of the Regulation indicates that all the sums realizable as arrears of land revenue must be recovered under the provisions of Chap. V, but I do not think that that section can bear this interpretation. I consider that s. 84 should be read as subject to s. 154 by which the jurisdiction of the Civil Courts is expressly excluded in connexion with certain matters only. If a process were issued under Chap. V for the recovery of a sum realizable as land revenue the provisions of Chap. V would

automatically apply by virtue of s. 94, but if the party entitled to recover such a sum instituted a suit in a Civil Court for this purpose there is nothing, in my opinion, in the Regulation to prevent the party from doing so. In this view of the case, I consider that the decision of the learned Subordinate Judge is correct. This appeal is therefore dismissed with costs. The hearing-fee is assessed at three gold mohurs. Leave to prefer a further appeal under cl. 15 of the Letters Patent is refused. The Rule for stay is discharged. No order is made as to costs in the Rule.

s.

Appeal dismissed.

NAGPUR HIGH COURT

Second Appeal No. 277 of 1937

August 14, 1939

GRILLE, J.

SAHEBA—PLAINTIFF—APPELLANT

*versus*JAGANNATH AND OTHERS - DEFENDANTS—
RESPONDENTS*Transfer of Property Act (IV of 1882), s. 58 (c),
Proviso—Effect of—Transaction whether mortgage
or sale with condition of re-purchase.*

A contemporaneous entry stipulating reconveyance indicates a mortgage and the effect of the added Proviso to s. 58 (c), T. P. Act, is that *prima facie* the document is a mortgage and that the burden lies on the opposite party to show that it appears rather to be an out-and-out sale.

A document after declaring that the fields had been sold and the title transferred contained the further stipulation that if at any time within three years the purchase price was paid back with compound interest after deducting the income which the purchaser might derive from these fields, there should be a reconveyance in favour of the vendor:

Held, that the document amounted to a mortgage and not an out-and-out sale with condition of re-purchase.

A. from the appellate decree of the Court of the District Judge, Nimar, dated December 11, 1936.

Mr. G. R. Deo, for the Appellant.

Mr. N. T. Mangalmoorty with Mr. K. B. Tare, for the Respondents.

Judgment.—This is a second appeal by the plaintiff who succeeded in the trial Court but against whom the decision was reversed in the lower Appellate Court. The claim was for possession of *malik makbuza* lands which the plaintiff claimed he had purchased from Rao Ranjit Singh.

CALCUTTA HIGH COURT

Appeal No. 129 of 1938

December 15, 1938

EDGLEY, J.

RAGHUBIR SINGH CHETRI—DEFENDANT

No. 1—APPELLANT

versus

TEZPUR LOCAL BOARD—PLAINTIFFS

AND ANOTHER—RESPONDENTS

Assam Land and Revenue Regulation (I of 1886), ss. 154 (1) (g), 94—Claim of Local Board for recovery of money arising from breach of lease and not connected with process issued under Chap. V—Suit in Civil Court, if competent—S. 94, interpretation.

The expression "process" obviously has a technical meaning under the Assam Land and Revenue Regulation and refers to the various processes for the recovery of arrears of land revenue which are mentioned in Chap. V of the Regulation, and the methods which may be adopted in this connection are actually described as "processes" in s. 91 of the Regulation.

Where the claim of the Local Board arises directly from a breach of the conditions of the defendant's lease and is not connected with the processes issued under Chap. V, there is nothing in the Regulation to debar the Board from instituting a suit in Civil Court for the recovery of the money due to them. The mere fact that the Board once resorted to the revenue authorities for the recovery of their dues, does not debar them from recovering any portion of the money due to them in a Civil Court.

Section 94 cannot be interpreted to mean that all the sums realizable as arrears of land revenue must be recovered under the provision of Chap. V. Section 94, Assam Land and Revenue Regulation should be read as subject to s. 154 by which the jurisdiction of the Civil Courts is expressly excluded in connection with certain matters only. If a process were issued under Chap. V for the recovery of a sum realizable as land revenue the provisions of Chap. V would automatically apply by virtue of s. 94, but if the party entitled to recover such a sum instituted a suit in a Civil Court for this purpose there is nothing in the Regulation to prevent the party from doing so.

A. from the appellate order of the Special Sub-Judge, Assam Valley Districts, dated April 29, 1938.

Mr. Hemendra Kumar Das, for the Appellant.

Messrs. Panchanon Ghose and Paresh Nath Mukherji (Sr.)—for the Respondents.

Judgment.—In this case, the Local Board of Tezpur have sought to recover by a civil suit a certain sum of money due from the defendants in their capacity as the lessees of the Borgong Hat. In view of the provisions of s. 93-A, Assam Local Self-Govt. Act, there is no doubt that the amount due to the Board may be recovered as if the same were an arrear of land revenue recoverable under the Assam Land and Revenue Regulation 1886, but the question for consideration is whether this Regulation

will have the effect of preventing the Board from realizing their dues by instituting a civil suit if they prefer to adopt the latter procedure. The learned Munsif held that the effect of s. 154 (1), Assam Land and Revenue Regulations, was to debar the Board from instituting a civil suit in connexion with this matter. A contrary view has been adopted by the learned Subordinate Judge. The relevant provisions of s. 154 of the Regulation are as follows:

"Section 154 (1)—Except when otherwise expressly provided in this Regulation, or in rules issued under this Regulation no Civil Court shall exercise jurisdiction in any of the following matters: . . . (g) claims connected with, or arising out of, the collection of land revenue or any process for the recovery of an arrear of land revenue or of any sum which is by this Regulation, or by any other enactment for the time being in force, realizable as an arrear of land revenue . . . (2) In all the above cases jurisdiction shall rest with the revenue authorities only."

As I read sub-s. (g) of s. 154 (1) of the Regulation, the intention of the Legislature was to exclude the jurisdiction of Civil Courts in respect of claims of two kinds, namely (1) those connected with or arising out of the collection of land revenue and (2) similar claims connected with or arising out of any process for the recovery of (a) of an arrear of land revenue or (b) of any sum realizable as an arrear of land revenue. The present claim clearly does not fall within the first category mentioned above. The sum which the Local Board are now seeking to recover is admittedly a sum realizable as an arrear of land revenue, but, it is necessary to consider whether the claim of the Board connected with this sum arises out of any process so as to bring it within the second category of the claims mentioned above. In my opinion this condition has not been fulfilled. The expression "process" obviously has a technical meaning under the Assam Land and Revenue Regulation and refers to the various processes for the recovery of arrears of land revenue which are mentioned in Chap. V of the Regulation, and the methods which may be adopted in this connexion are actually described as "processes" in s. 91 of the Regulation. It is clear from the provisions of such sections as 69, 79, 91 of the Regulation that ample scope is allowed to the aggrieved parties to file claims for the adjustment of their grievances in regard to these processes, and in such cases it would follow from what is stated in s. 154 read with s. 94 that the revenue authorities only would have jurisdiction to deal with such claims. In this

application, there is no executable decree. It seems to me that there can be no question of the execution of a decree which is not in being at the time of the application. It would not be proper to couple an application for execution along with the application to set aside the order of satisfaction for until the decree had been restored to being, there would be nothing to execute, nor even any determination of the amount for which execution could issue. I have been referred to two decisions, *Rajagir Sahay v. Ishwardhari Singh* (1) and *Ratanchand v. Chandulal* (2), wherein it has been held that an application to re-construct a lost decree is not a step-in-aid of execution. Still less, it seems to me, can we regard an application to revive a decree, which according to the record is finally satisfied, as a step-in-aid of execution of that decree which unless and until it is revived has no judicial existence.

The argument that the decree must be treated as having been suspended during the pendency of the application to set aside the satisfaction order and appeals therefrom does not rest on any specific provision of the Lim. Act nor on any definite authority but is only based on analogies from observations in cases arising out of very different facts. It seems to me quite clear that this decree was not suspended during the appeals from the order on this application and the fact that it was not suspended is shown by the filing of an execution petition while the second appeal was pending. Had this decree been in suspense so that no execution petition could be filed, it might be argued that limitation would not run. But in fact an execution petition was filed and the existence of the second appeal would not have been a valid objection to the executability of the decree in pursuance of that execution petition. It seems to me therefore that it cannot be contended that this decree was in suspense while these appeals were pending.

It has been suggested, however, that if this application cannot be regarded as a step-in-aid of an existing decree, it can be regarded as an application for the decree itself so that the provisions of cl. (2) of Art. 182 would be directly applicable. This contention seems to me to have more basis in logic than those which have succeeded in the lower Appellate Court. It is arguable as a matter of pure logic that when you

are seeking to get a decree, you are not obliged to execute that decree until the scope and extent of that decree have been finally determined in appeal; by analogy, therefore, when you are seeking to revive a decree which has lost its judicial existence, you should not be required to execute that decree until the precise scope of its revival has been ascertained by a final order in appeal. Unfortunately for the respondent, however, questions of limitation cannot be determined by pure logic and any exception from the general rules laid down in the Schedules to the Lim. Act must be brought within the four walls of the statute. It is, I think, definitely established that cl. (2) of Art. 182 has no application to appeals other than appeals against the decree itself. Its scope has been extended to cover an appeal against a preliminary decree in a mortgage suit when there is an executable final decree which is liable to be modified in the light of that appeal. But I am not aware of any authority for extending the scope of Art. 112, cl. (2) to appeals from orders in collateral proceedings which may affect the decree to be executed. It has been definitely held that this clause does not apply to appeal from orders on an application to set aside the decree—*vide Brijaraj v. Nauratan Lal* (3) and *Fakir Chand v. Daiba Charan* (4) and from the very provisions of the Code itself it may be inferred that the principle of cl. (2) has not been extended to appeals against an order in review of a judgment or appeals against an order amending a decree. In effect, the proceedings of which the respondent seeks to take advantage were more in the nature of an appeal against an order in review than anything else and I do not think there is any statutory provision whereby the person whose decree has been modified as a result of a review application against an order recording satisfaction can have been benefited for purposes of limitation of the period taken up by appeals against that order. In the result, therefore, I allow the appeal and dismiss the Execution Petition No. 730 of 1934 with costs throughout. Leave to appeal is granted.

N.D.

Appeal allowed.

(3) 3 Pat. L J 119; 44 Ind. Cas. 575; A I R 1917 Pat. 157.

(4) 54 O 1052; 104 Ind. Cas. 466; A I R 1927 Cal. 904.

(1) 11 O L J 243; 5 Ind. Cas. 660.

(2) A I R 1934 Bom. 113; 150 Ind. Cas. 886; 36 Bom. L R 115; 1 R B 34.

sentence of five years' rigorous imprisonment would meet the ends of justice.

The result, therefore, is that I would discharge this reference, set aside the conviction under s. 302 and the sentence of death and convict the appellant of an offence under s. 304, I. P. O., and sentence him to a term of five years' rigorous imprisonment.

Varma, J.—I entirely agree.

D. *Reference discharged.*

MADRAS HIGH COURT

Appeal No. 1 of 1937

August 7, 1939

WADSWORTH, J.

THARKAM KOJINIYAKATH MOIDIN

KUTTI—APPELLANT

versus

K. N. SUBRAMANYA IYER—RESPONDENT.

Limitation Act (IX of 1908), Art. 182 (5)—Application to revise decree finally satisfied—Whether step-in-aid—Decree, if suspended pending application to set aside satisfaction order or appeals therefrom—Art. 182 (5), applicability to appeal against review application to set aside order recording satisfaction of decree.

When at the time of making an application there is no executable decree, the application cannot be regarded as step-in-aid of execution. There can be no question of the execution of a decree which is not in being at the time of the application. It would not be proper to couple an application for execution along with the application to set aside the order of satisfaction, for, until the decree had been restored to being, there would be nothing to execute, nor even any determination of the amount for which execution could issue. An application to revive a decree which is finally satisfied, cannot be regarded as a step-in-aid of execution of that decree which unless and until it is revived has no judicial existence.

A decree cannot be treated as having been suspended during the pendency of the application to set aside the satisfaction order and appeals therefrom.

Clause (2) of Art. 182, Lim. Act, has no application to appeals other than appeals against the decree itself. Its scope has been extended to cover an appeal against a preliminary decree in a mortgage suit when there is an executable final decree which is liable to be modified in the light of that appeal. But there is no authority for extending the scope of Art. 182, cl. (2) to appeals from orders in collateral proceedings which may affect the decree to be executed. There is no statutory provision whereby the person whose decree has been modified as a result of a review application against an order recording satisfaction can have the benefit for purposes of limitation of the period taken up by appeals against that order.

A. against the appellate order of the District Court, South Malabar in A. S. No. 41 of 1935.

Mr. P. Govinda Menon, for the Appellant.

Mr. C. M. Ramalinga Aiyar, for the Respondent.

Judgment.—This appeal raises a question of limitation which, so far as I am aware, is not covered by any express authority. The appellant is the judgment-debtor. The decree was dated December 7, 1923 and on December 23, 1924 there was an order, passed at the instance of the decree-holder, recording satisfaction. The decree-holder subsequently made an application to the Court as a result of which, on August 24, 1925 the order recording satisfaction was in part cancelled and the decree as an executable decree was revived. This modifying order was itself the subject of an appeal which was dismissed on January 4, 1927. Against this dismissal, there was a second appeal which was dismissed on August 5, 1932. In the interval between the dismissal of the first appeal and the dismissal of the second appeal, an execution petition was filed on August 3, 1927 and it was dismissed. The present execution petition was filed on March 29, 1934; that is to say more the six years after the previous execution petition, but within two years of the dismissal of the second appeal against the order setting aside the record of satisfaction of the decree. Now, the question is whether this execution petition is within time having regard to the provisions of Art. 182, Lim. Act.

In the lower Appellate Court, the matter was put on two grounds. Firstly that the application to modify the order recording satisfaction of the decree must be regarded as a step-in aid of execution, so that the starting point for limitation will be the final appellate order passed on that application with reference to cl. (5) of Art. 182. The other ground was that the decree must be regarded as under suspension during the period of the trial of the application to set aside the satisfaction order and the appeals therefrom. The learned Judge actually decided the matter on the basis that this application was a step-in-aid of execution. I find it very difficult to accede to this proposition. Granting that there are circumstances in which an application may be regarded as a step-in-aid of execution though not filed in a pending execution petition, as when the decree-holder applies for the transfer of a decree to another Court for execution, it is to my mind very difficult to regard an application as a step-in-aid of execution, when at the time of making this

does not establish it, and I am not satisfied with Sibū's evidence when I find that he made no mention of this important fact when first seen by the Police.

The learned Advocate-General has frankly admitted that the case, as presented by the prosecution is difficult to sustain. It is a version of a series of attacks for no apparent reason. An attempt was made by some of the witnesses to show that Jate was drunk; but the Sub-Inspector makes it clear that when he arrested him at 10 A. M. he was not under the influence of drink. Sibū makes contradictory statements concerning his condition. He said:

"When I was trying to take him to the Police Station he appeared to be the worse for drink. He was talking correctly, but his eyes were small and blood-shot. I did not notice any smell of drink about him. It was about 7 A. M. when we started for the Police Station with Jate."

If no smell of drink was noticeable, it is fairly clear that early that morning Jate was not so drunk as to attack everybody at sight. Yet that is what is suggested he did. An attempt was also made to show that Jate was mad; but the Sub-Inspector stated that when he arrested him he showed no signs of madness. Jate was kept under observation for some time in jail, but the medical evidence is to the effect that he was perfectly sane. If Jate was neither mad nor drunk, then his actions, as described by the prosecution, cannot possibly be accepted. Why should a sober and sane man first attack two people and chase them away, then go into the house of a friendly neighbour and attack him and later kill his wife with a plough-share? That, however, is the case which the prosecution in the Sessions Court asked the Court to accept. In my view the admitted facts of this case establish beyond all doubt that Jate on the morning in question was moved by some substantial motive, and the learned Advocate-General admits that this is probably true. The question is what was the motive which impelled Jate to attack Bahura and his wife. Jate says that he found them in bed together and I see no reason for rejecting his statement. Jate has been consistent throughout. He has frankly admitted that he attacked Bahura and killed his wife and also stated in his confession that he would have killed Bahura if he could only have caught him. There is a ring of truth about his confession, and it appears to me that he must have found his wife in a compromising position to cause him to attack Bahura and when the latter escaped to kill his

wife. The version given by Jate explains what happened subsequently.

The case for the prosecution is inexplicable. No man, whether he be an aboriginal or not, would career about the village attacking persons unless something had moved him. Of course, if he was drunk or mad, he might act in that way; but drunkenness and madness must be eliminated from this case. Jate was clearly enraged at something and acted upon an impulse caused by what he had seen. I am satisfied that Jate's version of what occurred is the true one and that he acted under grave and sudden provocation.

It was argued on behalf of the appellant that as a matter of law a Court is bound either to accept the confession as a whole or to reject it. I am not accepting Jate's confession as a whole, because I am bound to in law. I am accepting it as a whole, because I believe it to be substantially true. In my view a Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion. The law upon this subject has been clearly laid down by this Court in the case of the *King-Emperor v. Itwa Munda* (1), in which a Full Bench held that if an accused person makes a confession, the whole of that confession must be placed before the Court and is receivable in evidence. But there is no rule of law which compels belief in the whole of the statement. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entirely entitled to disregard the statements which it may hold in circumstances not to be true. The point of law does not arise in this case; but I merely mention it because I wish to make it clear why I accept Jate's statement as a whole, that is, that he saw his wife in a compromising position and lost control of himself and first attacked Bahura and then killed his wife. It appears to me that the only consistent version in this case is the version given by Jate throughout, namely in his confession and in both Courts. Accepting that version, I hold that he acted under grave and sudden provocation and that causing Teju's death was not murder but culpable homicide not amounting to murder.

The crime, however, is a serious one, and taking everything into consideration I think

(1) 19 P L T 476; 175 Ind. Cas. 300; A I R 1938 Pat. 258; 10 R P 606; 39 Cr. L J 554; 4 B R 595 (F B).

assault and that he searched for Jate. He went to Jate's house and there found Teju pounding *mahua* seeds but Jate was not there. As he was going away from his house, he met Jate on the road and told him to accompany him to the *thana*. Jate did so, and if this evidence be accepted Teju was alive when Jate and the *chaukidar* set off for the *thana*. This is a most important fact; but it is clear from the Police diary that when Sibū was interrogated by the Police he made no reference whatsoever to the fact that he had seen Teju alive at her house shortly before he met Jate and persuaded him to accompany the party to the *thana*. The learned Advocate-General has pointed out that Sibū does not appear hostile to Jate, but if he had seen Teju alive immediately before Jate left, he would, in my view, have undoubtedly mentioned the fact to the Police.

The suggestion now made on behalf of the prosecution is that Teju was alive when Jate and the *chaukidar* left the village for the *thana* and that she was murdered later on after Jate had left the *chaukidar* and returned to his village. In those circumstances, it is said that whatever happened previously, such could be no justification for killing his wife. Even if he had seen his wife in the embraces of Bahura, the killing of his wife some hours afterwards could not have been said to be the result of sudden provocation, though it might be said to be the result of grave provocation. It is, therefore, very important in this case to ascertain whether there was or was not a lapse of time between the attack on Bahura and the attack on Teju. If Sibū's evidence be accepted, there was such a lapse of time, but having regard to the fact that he never mentioned having seen Teju alive to the Police I cannot accept his evidence.

The prosecution also called Teju's son Hari Uraon (P. W. No. 11). According to him, he returned to the house about *kalwa* time (which is said to be about 10 A. M.) from the fields and found the door of the house fastened on the inside. He says he heard his mother crying "come and save me, Jate is killing me." He tried to push open the door, but he failed to do so and then went weeping to the house of his cousin Sukru Uraon and told him that his mother had been killed. Sukru, who is said to be a lame man, declined to go to Teju's assistance. When this witness was examined by the Police when the investigation

commenced, he made an entirely different statement. That statement was to the effect that when he came home he found that his mother had been killed. In short he admitted that he had seen and heard nothing at all, yet in Court of Session he stated that he had actually heard his mother crying for help. In my view the evidence of Hari cannot possibly be accepted, and the learned Advocate-General has very properly not invited the Court to accept the evidence of this witness.

A number of witnesses were called with a view to establishing what Hari did and said after he is supposed to have heard his mother cry for help; but if Hari's evidence be rejected obviously the evidence of these witnesses must also be rejected. There was also the evidence of a number of witnesses who stated what they had been told by other witnesses. I cannot understand the relevancy of this evidence as most of it is hearsay and not admissible. Even if it was admissible, it establishes little or nothing.

The prosecution also tendered in evidence the confession of the accused, and that is undoubtedly evidence against him. That confession, however, if accepted, establishes not murder but the lesser crime of culpable homicide not amounting to murder. It is clear that if a person sees his wife in the arms of another and in the anger of the moment kills either his wife or her paramour, he is not guilty of murder. The provocation would be both grave and sudden and would, in my view, reduce the crime to culpable homicide not amounting to murder. Such is Jate's version; but it is said that such portion of the confession as suggests grave and sudden provocation is clearly false by reason of the evidence for the prosecution which suggests that Teju was alive after Bahura had been assaulted and was alive when Jate accompanied the *chaukidar* to the *thana*. Jate left the *chaukidar* some time afterwards, and it is said that Teju must have been murdered when Jate returned to the village. In those circumstances, it is urged that the provocation, even if it existed, could not be described as sudden. A man who thinks over what he has seen for some hours might still act under grave provocation, but such could not be described as sudden. I have, however given my reasons for finding it impossible to accept the evidence of the prosecution that Teju was alive when Jate left with the *chaukidar* for the *thana*. Karma's evidence, even if accepted,

The evidence is that shortly afterwards Jate went into Bahura's house and there attacked him. Bahura (P. W. No. 1) says that he was sleeping in his house with his wife, child and mother. Jate came with an axe and forced the door open shouting "where are you" Bahura said "what do you want?" On hearing Bahura's voice Jate struck with the axe which caused an injury on Bahura's thigh. Bahura tried to get away, but Jate followed him into the inner room where they grappled. Bahura's wife also intervened and Manga rushed from his own house and joined in the scuffle. Jate was disarmed and fled from the house. Again no reason whatsoever has been suggested for this attack upon Bahura. Bahura said that he had no feud with Jate nor with his brother Karma and that he used to visit Jate's house on occasions. It is to be observed that in the first information report Bahura said that Jate had gone mad since the night previous; but in evidence he said

"I cannot say whether Jate's mind was really affected at that time. I said in my first information report that he was mad, because he was behaving like a mad man, viz, in trying to assault people."

The evidence of Bahura is supported by the evidence of Manga Uraon (P. W. No. 2) and Charia (P. W. No. 3) Bahura's wife. In my view it is impossible to accept this version of the attack on Bahura. If the evidence is to be accepted, Jate, for no reason whatsoever, went into a house of a friendly neighbour and attacked him with an axe. That in itself is a difficult story to believe; but it is impossible to believe that the present version when it is compared with the version given by Bahura in the first information report. In the first information report the suggestion is that immediately after the attack on Bhinsaria and Manrakhan, Bahura was attacked. No mention is made in that report of the attack having taken place in Bahura's place. Further, no mention is made of intervention by Bahura's wife or by Manga P. W. No. 2.

Bahura and Manga went to Sibu *chaukidar*, and they are alleged to have told the latter what had occurred. A search was made for Jate and when he was found the *chaukidar* and the others accompanied by Jate went towards the *thana*. According to the prosecution, *Mst.* Teju was alive at that time, and if that fact was satisfactorily established there could be no question that Jate's confession is false. Karma (P. W. No. 6) a brother of Jate gave evidence, and he stated that, on the

early morning of the day of the murder Teju came to his house and told him that Jate had an axe in his hand and was talking angrily. Teju asked him to intervene but he refused to do so owing to fear. About an hour later the witness said that he was informed by Sibu *chaukidar* that Jate had wounded Bahura with a *balwa*. He says that he went to see Bahura and then met Jate in the village. He mentions how they all went to the *thana* accompanied by Jate, but the latter left them before reaching the *thana* saying that he would not go with them. This witness said that when they left the village to go to the *thana*, Teju was still alive because he had seen her in the morning. The witness does not say that he saw Teju immediately before he left for the *thana*. Even if this witness's evidence is accepted in its entirety, it does not establish that Teju was alive when the *chaukidar* and others left for the *thana*. All it would establish is that an hour previously Teju was alive. The learned Advocate-General had asked us to accept this witness's evidence and to hold that it establishes that Teju was alive when Jate and the *chaukidar* set-off for the *thana*. I, however, find it difficult to believe this witness because according to the Police diary he made no mention of seeing Teju in the early morning when he was interrogated by the Police. In the interests of the accused we have carefully scrutinised the statement which he made. There is no reference whatsoever in it to having seen Teju on the morning on which she undoubtedly was killed. The learned Advocate-General has very rightly pointed out that Karma is a witness who is apparently not hostile to his brother Jate. In cross-examination he tried to make out that Jate had been mad previously and that he had killed Teju and struck Bahura because he was mad. The witness admitted in cross-examination that he had not mentioned to any one that Teju came to him early in the morning; but he said that he told the Daroga about it at the Police Station. As I have said it is clear that he did not tell the Sub-Inspector because there is no reference whatsoever to it in his statement. For these reasons I find it impossible to accept Karma's evidence that Teju was alive when the party left for the *thana*.

The learned Advocate-General has also invited us to accept the evidence of Sibu Dusadh (P. W. No. 5) the village *chaukidar*. According to him, Bahura told him of the

on July 5, Bahura made a first information report. The contents of this report are important and I think it advisable to set out the report *in extenso*:—

"My name is Bahura Uraon. My father's name is Mangli Uraon. I am resident of Dewaki, *thana* Ghaghra. To-day on Wednesday, date not known having come to you with Karma Uraon and Sibuchaukidar, at 9 o'clock I beg to report that Jate Uraon has gone mad since (last) night. He had pursued the two persons, Bhinsaria Uraon and Manrakhan to assault them, but they fled away. Musammat Tejui, Jate Uraon's wife, stopped him, and they fled away. Then he caught hold of a *balwa* and came to me and wanted to assault me also with the *balwa*. I caught hold of his *balwa*, and a scuffle took place, and I got slight injury in the right thigh at his hands. I was bringing him to the *thana* but he ran away while on his way after he had covered half the distance. This is my statement. Investigation may be made."

The suggestion in this report is that immediately after the appellant had chased Bhinsaria Uraon and Manrakhan, he caught hold of an axe and attacked the informant Bahura. Bahura does not suggest that the attack took place in the latter's house, and there is no reference to Bahura's wife intervening or to Manga (P. W. No. 2) arriving on the scene. What is said is that the wife of the appellant intervened when Bhinsaria and Manrakhan were attacked and that immediately afterwards Bahura was attacked. After this report had been recorded, the Sub-Inspector Sheonarain Prasad (P. W. No. 22) set off for the village of Dewaki. On the way he met the appellant Jate, who made a statement to him, and in consequence of which Jate was arrested. Shortly afterwards some villagers came along and told the Sub-Inspector that Jate had killed his wife. Jate was arrested at 10.5 A. M. and the Sub-Inspector recorded the information concerning the death of Jate's wife at 10.30 A. M.

Jate was produced before a Magistrate on July 10, 1939, as he desired to make a confession. The Magistrate cautioned him and told him that he was not bound to make a statement and that any statement he may make might be used as evidence against him at his trial. He asked him if he desired to make a statement of his own free will, and Jate answered that he was making the statement of his own accord. Jate's confession to the Magistrate is in these terms:

"A few days ago, I went to drink *handi* at night. When I returned home in the morning, I saw my wife Teju sleeping with Bahura Uraon. They were in compromising position. I was enraged. I took down a *balwa* which was hanging and I first gave a blow to Bahura in the right leg. He took to his

heels. He also snatched my *balwa* and ran away. Then I picked up a plough share and struck my wife twice on the neck. She died on the spot. Had not Bahura fled away, I would have killed him also. Then I at once went to the *thana* alone and reported all the matter to the S. I. of Police. This is my statement. Teju was my brother's wife. I had married her later on, in *Sagai* form. She is older than I. She had a daughter by me."

In the Court of the Committing Magistrate the appellant admitted making this confession and again repeated that he had found his wife sleeping with Bahura and that he had assaulted Bahura and killed his wife in consequence of what he had seen. In the Court of Sessions the appellant repeated this version and throughout his statements have been entirely consistent.

There can be no doubt whatsoever that Teju met her death by violence. There were very severe injuries on the skull and on the face and the neck and the cause of death, according to the Assistant Surgeon who conducted the *post mortem* examination, was shock and brain concussion caused by the injuries which he described in his report. The appellant admits that he caused these injuries; but it is contended on his behalf that the case cannot be one of murder because the assault on Teju was committed as the result of grave and sudden provocation.

The prosecution alleged, however, that this was not a case where there was any provocation either grave or sudden. As I have stated, it was alleged that Jate for no apparent reason, first attacked two men who made good their escape. One of those men Manrakhan Chik (P. W. No. 10) was called as a witness. According to him, he had come out of his house at sunrise to make water when Jate came up to him with a *balwa* in his hand and said "Who are you? I will cut you". He makes no mention of Bhinsaria, and this latter person was not called as a witness. The first information report suggests that the two men were attacked together, but Manrakhan's version is that he was alone when he was attacked. Manrakhan stated that Jate did not appear to be drunk and he could not say what was the matter with him. Manrakhan says that some time afterwards there was an outcry from Bahura's house, and on going there he found that Bahura had a cut on his thigh. As I have stated the prosecution can offer no explanation whatsoever for this attack on Manrakhan and Bhinsaria if such ever took place.

inconvenient and unfair because the half of a house is not necessarily half as valuable to an auction-purchaser as the whole of it is. In *Amulya Krishna v. Dilip Kunwar* (6) in which the sale was not entirely set aside the facts and circumstances were different and the other judgment-debtors had previously put in applications which failed. In *Chhaterbijai Singh v. Damodar Das* (7) a good distinction was drawn between an irregularity and injury which could be allotted to one part only of the sale, in which case a Court may be justified in setting aside the sale of that part only, and an irregularity affecting the whole property and all the lots, where the sale should be set aside *in toto*. In the present case there is only one house, and the irregularity cannot be apportioned. Also, on the view that there has been illegality it is immaterial whether both judgment-debtors objected or not. The application is allowed with costs, and the order of the first Court setting aside the sale is restored. Counsel's fee Rs. 20.

s.

Revision allowed.

(6) 41 O W N 224.

(7) 12 Pat. 181; 144 Ind. Cas. 62; A I R 1933 Pat. 223; 14 P L T 493; Ind. Rul. (1933) Pat. 215.

PATNA HIGH COURT.

Death Reference No. 3 of 1940 and
Criminal Appeal No. 16 of 1940
February 29, 1940

HARRIES, O. J. AND VARMA, J.,
EMPEROR—PROSECUTOR

versus

JATE URAON—ACCUSED.

Penal Code (Act XLV of 1860), ss. 302, 304—Grave and sudden provocation—Accused seeing wife in compromising position with another and immediately killing her—Offence—Criminal trial—Confession—Admissibility in part.

If a person sees his wife in the arms of another and in the anger of the moment kills either his wife or her paramour, he is not guilty of murder. The provocation would be both grave and sudden and would reduce the crime to culpable homicide not amounting to murder under s. 304, I. P. O. But a man who thinks over what he has seen for some hours might still act under grave provocation, but such could not be described as sudden. [p. 589, col. 2.]

[Conviction under s. 302 was set aside and the accused was convicted under s. 304 and sentenced to five years' rigorous imprisonment.]

A Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion. 175 Ind. Cas. 300 (1), relied on. [p. 590, col. 2.]

Cr. A. from the decision of the Judicial

Commissioner of Chota Nagpur, Ranchi,
dated January 24, 1940.

Mr. Hareshwar Prasad Sinha, for the Appellant.

The Advocate-General, for the Crown.

Harries, C. J.—This is a reference made by the learned Judicial Commissioner of Chota Nagpur under s. 374, Criminal P. O., for confirmation of a death sentence passed upon one Jate Uraon. There is also an appeal by Jate Uraon against his conviction for murder and the sentence of death passed upon him. It will be convenient to dispose of the reference and the appeal in this judgment.

Jate Uraon is a man of about forty-four years of age and was tried by the learned Judicial Commissioner of Chota Nagpur upon a charge of murdering his wife Teju on July 5, 1939. The learned Judicial Commissioner came to the conclusion that the evidence established that Jate Uraon had murdered his wife, and as the learned Judge could find no extenuating circumstances he sentenced Jate Uraon to death.

The case, as presented in the Sessions Court, for the prosecution is a somewhat surprising and unusual one. It is said that in the early morning of July 5, 1939, the appellant Jate Uraon, for no apparent reason, attempted to assault two men named Bhinsaria Uraon and Manrakhan Oak. These men made good their escape, whereupon Jate is said to have attacked Bahura Uraon (P. W. No. 1). Again the prosecution can offer no explanation or reason for this attack. It is said that after chasing the two men who managed to escape Jate Uraon went to the house of Bahura Uraon and attacked the latter with an axe injuring him on the thigh. Bahura's wife came to her husband's rescue, and there was a scuffle and Jate was disarmed. Shortly afterwards Bahura together with a witness Manga Uraon (P. W. No. 2), who is said to have witnessed the assault, went to Sibhu *chaukidar* and reported that Jate had caused the injury on Bahura. A search was made for Jate who was found, and eventually Bahura, Sibhu *chaukidar*, Karma Uraon, a brother of Jate and Sania Uraon (P. W. No. 21) proceeded to the *thana* which was four miles away. On the way it is said that Jate refused to accompany the *chaukidar* and the others and went off; but it is surprising that no attempt whatsoever appears to have been made to detain Jate and to bring him to the *thana*. At 9 A. M.

injury had been caused to the judgment-debtors. The District Judge's order proceeds on the ground that this objection had not been raised by the judgment-debtors in their application and in fact not till some time later in February 1937. In his opinion this was too late, and the objection should not have been entertained at that stage. The application says that the price obtained is inadequate and that there has been a mistake in the proclamation. The real objection now put forward is not of course any mistake in the proclamation but in the holding of the sale at a time at variance with that given in the proclamation.

The applicants-judgment-debtors contend, however, that they should not be tied down to defective phraseology in their application, that the objection was taken when after renewal of the proceedings which had been stayed the matter was taken up for disposal, that issues were framed, evidence led and the irregularity clearly made out and so it is improper now to disallow the objection altogether. It is also contended that the holding of a sale before the hour fixed is not merely an irregularity but an illegality, which means that there was no sale at all and that the Court itself should set it aside, apart from any application under O. XXI, r. 90. The findings of the first Court about inadequacy of price and injury caused by reason of the irregularity have not been upset by the Appellate Court and so must stand good.

On the other hand it is contended that the objection was an afterthought which occurred to the judgment-debtors' legal advisers later on when they went through the auction papers. It is not made out that the holding of the sale at this time had any thing to do with the low price obtained. The matter must be decided under O. XXI, r. 90, and not on the wider ground of illegality. Finally it is said that as only one of the judgment-debtors took objection the sale could be set aside only so far as his interest is concerned.

There is no doubt authority for the view that the holding of a sale before the time fixed is not merely an irregularity but an illegality which in itself renders the sale void. It was so held in *Basharutulla v. Uma Churn Dutt* (1), which was followed in *Mohendro Narain v. Gopal Mandul* (2) see also *Bakhshi Nand Kishore v. Malak*

Chand (3). In *Jayarama Ayyar v. Vridhagiri Aiyar* (4) it was said that the difference between an irregularity and an illegality was one of degree, and that an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. Now when sale is held two or three hours before the advertised time it is more than likely that intending bidders relying on the proclamation would not turn up until too late. It is said that in the present case there was beat of drum in the village just before the sale was actually held. Still that would not make any difference to intending bidders from outside, and even in the village, the beat of drum and its import may not have been appreciated by all. I, therefore, think that there was a good cause for the Court to set aside the sale on its own initiative.

In any case the matter can be dealt with under O. XXI, r. 90 Civil Procedure, as the illegality is at least a material irregularity. In *Narhor v. G. M. Buti* (5) the omission to state the time of sale was held to be a material irregularity. It was within the power of the Court to consider the objection even if not taken specifically in the application, and seeing that the irregularity was demonstrable from the record itself I do not think that the Court's dealing with it should have been questioned at a later stage on the ground of delay. There is a finding which has not been reversed that an inadequate price was obtained. The sale papers show that there were only two bidders, one of them being plaintiff's agent, and there were only three bids. There is a strong probability that there might have been more bidders if the advertised time had been adhered to, so that it is reasonable to conclude, as the first Court did, that substantial injury has been caused by reason of the irregularity. It is unfortunate that the execution proceedings should be so delayed, but the decree-holder himself might have noticed the wrong procedure and pointed it out to the sale Amin.

Although only one judgment-debtor has objected I do not think that the sale can be set aside in part. That would be most

(3) 7 A 289; A W N 1885, 42.

(4) 44 M 35 (38); 59 Ind. Cas. 167; A I R 1921 Mad. 523; 39 M L J 188; 12 L W 182; (1920) M W N 490.

(5) 15 N L R 125; 51 Ind. Cas. 264; A I R 1919 Nag. 128.

(1) 16 C 794.

(2) 17 C 769 (782).

ratification in the absence of it being shown that they were authorised to settle land with tenants by defendant No. 4. Now these receipts bear the words *tahsil khas malik* indicating that they were receipts granted by the *gomasta* or *patwari* for money actually received by the landlord herself. The question of the authority of the *gomasta* and *patwari*, therefore, does not arise to be considered. If the money was received by the landlord herself that is evidence on which a finding of ratification of the contract could be based. In addition to the receipts for rent there is the fact that from 1929 onwards defendants Nos. 1 to 3 have been in possession of this land without any interference from the landlord. That is a circumstance from which it may not only be inferred that the landlord ratified the settlement by her *mukhtar-am* but it is also a circumstance from which it may be inferred that the *mukhtar-am* had authority to make the settlement. In my opinion, therefore, the finding of the Court below that the *mukhtar-am* had implied authority to make the settlement and also the finding that the settlement by the *mukhtar-am* was ratified by defendant No. 4 is based on evidence which supports the finding although the Court committed an error in relying also on the money order coupon.

It was strenuously argued that the Court of appeal below was wrong in placing on the plaintiff the onus of proving that the *mukhtar-am* had authority to make the settlement with defendants Nos. 1 to 3. In view of the evidence that I have already referred to, the question of onus is entirely immaterial. There was evidence, as I have already indicated, on which the finding with regard to ratification and implied authority could be based and those findings must, therefore, be accepted.

The appeal is accordingly dismissed with costs to defendants Nos. 1 to 3.

D.

Appeal dismissed.

NAGPUR HIGH COURT

Civil Revision No. 50 of 1938

December 5, 1938

GRUBE, J.

PANNALAL AND ANOTHER—JUDGMENT-DEBTORS—APPLICANTS

versus

FIRM OF HASAN DADA—DEFENDANTS

—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), O. XXI, r. 90
—Irregularity and illegality, difference—Sale held

few hours before advertised time—If illegality rendering sale void—Sale—Setting aside of—Application by one of two judgment-debtors—Only one item sold—Irregularity not apportionable—Sale to be set aside as whole—Irregularity apparent on face of record—Objection based on it can be considered at any stage.

The difference between an irregularity and an illegality is one of degree, and an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. When sale is held two or three hours before the advertised time there is an illegality, as it is more than likely that intending bidders relying on the proclamation would not turn up until too late. The mere fact that there was beat of drum in the village just before the sale was actually held would not make any difference to intending bidders from outside. There is therefore a good cause for the Court to set aside the sale on its own initiative. In any case the matter can be dealt with under O. XXI, r. 90, Civil P. O., as the illegality is at least a material irregularity. *Basharutulla v. Uma Churn Dutt* (1), *Mohandro Narain v. Gopal Mandul* (2), *Bakshi Nand Kishore v. Malak Chand* (3), 59 Ind. Cas. 167 (4) and 51 Ind. Cas. 864 (5), relied on.

A distinction can be drawn between an irregularity and injury which can be allotted to one part only of the sale, in which case a Court may be justified in setting aside the sale of that part only, and an irregularity affecting the whole property and all the lots, where the sale should be set aside *in toto*. Where only one house is sold and the irregularity cannot be apportioned, the sale must be set aside as a whole and it is immaterial that one of the two judgment-debtors has not objected. 144 Ind. Cas. 62 (7), relied on. *Amulya Krishna v. Dilip Kunwar* (6), distinguished.

It is within the power of the Court to consider the objection even if not taken specifically in the application, when the irregularity is demonstrable from the record itself and the Court's dealing with it cannot be questioned at a later stage on the ground of delay.

App. for revision of an order of the Court of the District Judge, Chhindwara, dated December 23, 1937.

Mr. N. T. Mangalmurti, for the Applicant.

Mr. R. N. Padhye, for the Opposite Party.

Order.—On an objection preferred by one of the judgment-debtors Babulal under O. XXI, r. 90, Civil P. O. the First Court set aside the sale in execution of the judgment-debtors' house. This order was reversed by the District Judge in appeal and the judgment-debtors now come up in revision. The findings of the first Court are that the house was worth Rs. 1,500 and the price obtained in auction (Rs. 350) was inadequate, that there was an irregularity, as the sale was proclaimed for 12 midday but was held at 9 A. M. and that by reason of this irregularity substantial

rightly decided the issue of defendant's adverse possession and held the plaintiff's claim as time-barred. It is, therefore, ordered that this appeal be rejected. The respondent is allowed no costs on account of her absence.

s.

Appeal rejected.

PATNA HIGH COURT

Appeal from Appellate Decree No. 363
of 1939

February 29, 1940

AGARWALA, J.

KUER RAI—APPELLANT

versus

BABURAM KUER AND OTHERS—

RESPONDENTS

Evidence — Admissibility — Person in possession — If can rely on unregistered patta to explain nature of possession — Landlord and tenant — Rent receipts by agent of landlord — Continuance of possession by tenant — Presumption of authority to agent.

Where a person relying on the unregistered patta is admittedly in possession he is entitled to refer to the unregistered patta for the purpose of explaining the nature of his possession, that is to say, for the purpose of explaining that he was let into possession as a tenant. *Ramautar Singh v. Juthi Tatma* (1), distinguished, 79 Ind. Cas. 26 (2), relied on.

Where in addition to the receipts for rent granted by the *mukhtar-am* of the landlord there is the fact that defendants have been long in possession of land without any interference from the landlord, that is a circumstance from which it may not only be inferred that the landlord ratified the settlement by her *mukhtar-am* but it is also a circumstance from which it may be inferred that the *mukhtar-am* had authority to make the settlement. In such circumstances the question of onus regarding the proof of the fact whether the *mukhtar-am* had implied authority of the landlord, is immaterial.

A. from a decision of the District Judge of Saran, dated January 21, 1939.

Mr. Sarjoo Prasad, for the Appellant.

Rai G. S. Prasad and Mr. Girijanandan Prasad, for the Respondents.

Judgment.— This is an appeal by the plaintiff from a decision of the District Judge of Saran reversing a decision of the Munsif of Chapra. The appeal arises out of a suit for recovery of 2 *bighas* and odd. The plaintiff claimed the land under a registered patta dated September 15, 1936, granted by defendant No. 4, the admitted landlord of the property. Defendants Nos. 1 to 3 resisted the claim on the basis of an unregistered patta granted to them on May 1, 1929, by Kedar Prasad the *mukhtar-am* of defendant No. 4. The Court below has found that defendants

Nos. 1 to 3 were granted settlement by Kedar Prasad, that he had authority to make the settlement, that even if he had not such authority the settlement was ratified by defendant No. 4 and that defendants Nos. 1-3 are settled *rai-yats* of the village. The decision is challenged on various grounds. In the first place, it is contended that the unregistered patta on which the defendants relied was inadmissible for the purpose for which it has been used by the Court below, namely, for explaining the nature of the defendant's possession. Reliance was placed on the decision in *Ramautar Singh v. Juthi Tatma* (1). In that case a person who was not in possession sued to recover possession basing his title on an unregistered patta and on receipts granted by the landlord, it was held that the Courts below were not justified in admitting the unregistered patta or the receipts for the purpose of proving that the plaintiff was entitled to recover possession. The facts of the present case are quite different. A person relying on the unregistered patta is admittedly in possession and under the decision of this Court in *Maharani Janki Kuer v. Brij Bhikhan Ojha* (2) he is entitled to refer to the unregistered patta for the purpose of explaining the nature of his possession, that is to say, for the purpose of explaining that he was let into possession as a tenant. The first objection of the appellant is, therefore, overruled.

With regard to the finding that defendant No. 4 ratified the settlement made by her *mukhtar-am*, the Court relied on a money order coupon evidencing the receipt of money as rent of the disputed land by defendant No. 4 from defendants Nos. 1 to 3, and on receipts for rent granted by the *gomasta* and *patwari* of defendant No. 4. The learned Advocate referred to the proviso to s. 54 (2) of the Bihar Tenancy Act, which provides that where rent is paid by money order an entry in the money order shall not be evidence of the relationship of landlord and tenant between the persons who are described as such in the money order form. To the extent to which the Court below relied on the coupon its finding with regard to ratification of the contract of defendant No. 4 is vitiated. It was also contended that the receipts granted by the *gomasta* and *patwari* of defendant No. 4 were insufficient to establish

(1) 18 P. L. T. 1012.

(2) 5 P. L. T. 541; 79 Ind. Cas. 26; 3 Pat. 349; (1924) Pat. 185; A. I. R. 1924 Pat. 641.

M. A. Khan, C. J.—The plaintiff brought a suit in the Court of the Sub-Judge, Goharganj (Bhopal State) for ejectment of the defendant with the allegations that the defendant was a tenant-at-will of a part of the plaintiff's house in dispute, while the defendant pleaded adverse possession. The learned Sub-Judge decided that the suit was time-barred and dismissed it with costs.

On appeal to the District Judge, Raisen Division, the plaintiff on February 7, 1938, applied under O. XXIII, r. 1 of the Civil P. C., for permission to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on the basis that he had forgotten to implead along with the defendant her son, Murlidhar also. The learned District Judge, disallowed plaintiff's application and rejected his appeal on merits.

The plaintiff filed a second appeal in the High Court, in which the same question of permission to withdraw from his suit with liberty to institute a fresh suit was again agitated but the learned Court confirmed the decision of the first Appellate Court. Now this special appeal has also been presented on the same ground.

Under order O. XXIII, r. 1 permission to withdraw from the suit with liberty to institute a fresh suit on the same cause of action may be granted to the plaintiff only in two cases. That is to say, when the Court is satisfied (i) that a suit must fail by reason of some formal defect, or (ii) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject-matter. The facts as stated in the plaint restrict the suit wholly and solely to the present defendant who had already succeeded in defeating the plaintiff's claim on merits in the lower Court. Therefore, to permit the plaintiff to re-start the proceedings by adding a new defendant would mean to re-open the entire case against the successful defendant for no fault of hers. Addition of a new defendant in such cases virtually amounts to a complete alteration in the nature of the suit, which is not permitted in law, and in our opinion help of O. XXIII, r. (1) of the Civil P. C., cannot be invoked to attain this end. Failure to implead even a necessary party as defendant is neither such a formal defect as can be cured in appeal nor does it afford sufficient ground to withdraw from the suit with permission to institute the same afresh after it has once been heard and decided. In *Ramcharan*

Mandal v. Radha Raman Mandal (1) the Calcutta High Court has laid down that the plaintiff should not be allowed to withdraw after the suit has been decided on merits. There is a slight diversity of opinion among the High Courts on the point whether the expression "sufficient grounds" used in cl. (b) of sub-r. 2 means only such grounds as are analogous to a "formal defect." The trend of decisions is for holding that "other sufficient grounds" must be *ejusdem generis* with the expression "some formal defect," and this view seems to have found favour merely on account of the fact that practically every ground for withdrawal ultimately resolves into some mistake or other in the part of the plaintiff in framing or instituting the suit. Therefore in following the above view one is not really carried far from the intention of the Legislature. But cases may arise in which the form may be free from defect of any kind, yet ends of justice may demand that without depriving the defendant of any existing material right permission be accorded to the plaintiff to withdraw with liberty to bring a fresh suit on the same cause of action. Two provisions of law occurring side by side cannot in a piece of good Legislature be identically one in meaning. Therefore to be on the safe side we are inclined to hold that the sphere of "other sufficient reasons" is wider than the sphere of "some formal defect." In the present suit the plaintiff has full right to sue the son of the present defendant for ejectment without withdrawing his present suit with leave of the Court, and without regard to the result of this suit. Thus it appears that the plaintiff's remedy against Murlidhar remains unaffected even if the present suit fails on merits. Therefore under these circumstances there exists no sufficient ground to allow a withdrawal under O. XXIII, r. 1.

As regards merits, the plaintiff had adduced in the lower Court sufficient evidence to prove that the defendant had been residing in the house in suit for the last eight to ten years as a tenant-at-will; while, on the other hand, the defendant had in that Court produced a notice dated June 16, 1923, served on her by plaintiff's father which proves beyond all doubt that she was in adverse possession of the house. The present suit was brought after thirteen years from the date of the said notice, on the basis of which the lower Court has

(1) 55 O 1087; 113 Ind. Cas 847; A I R 1929 Cal. 88; Ind. Rul. (1929) Cal. 156.

that in the present case a decree for ejectment had already been passed by the lower Courts and it was duly executed and possession taken before the new s. 48-A came into force. To my mind, this makes no difference. The suit shall be deemed to be still pending in appeal before us and we must have to decide the appeal according to the law that is now in force with retrospective effect.

Here it may be useful to refer to certain decisions of this Court which are all based on the above cited Privy Council case *K. C. Mukerjee v. Ram Ratan Kuer* (1), and relate to s. 26-N of the Bihar Ten. Act. These are : *Thakur Rai v. Issardyal Parshad* (2), *Mohammad Shafait v. Nithali Ram* (3) and *Chandrika Prasad Singh v. Ram Lal Sahu* (Letters Patent Appeal No. 20 of 1938 decided on August 2, 1939*). In the first two cases their Lordships had to deal with the rights of unrecorded transferees of occupancy holdings who, having been dispossessed by landlord-purchasers under rent sales, sued them for recovery of possession. Their Lordships held that those transferees had a valid title by virtue of s. 26-N and were therefore entitled to recover possession. In the last case in which the position of the parties was the reverse, that is to say, the landlord-purchaser under rent-sale was the plaintiff and the un-recorded transferee the defendant their Lordships dismissed the suit on the ground that the defendant was protected under s. 26-N of the Bihar Ten. Act. The result of these decisions is that s. 26-N, on account of its retrospective operation, had the effect of reviving rights which had already been extinguished. To put it more clearly, the rent-sales had already extinguished the rights of the un-recorded transferees but s. 26-N revived those rights.

There is, therefore, no escape from the position that under the provisions of the new s. 48-A of the Bihar Ten. Act the defendants had occupancy rights in respect of the disputed land at the date of the suit and as such were protected from eviction.

The result, therefore, is that this appeal

(1) 15 Pat. 268; 160 Ind. Cas. 105 (2); A I R 1933 P. O. 49; 1936 O L R 69; 1936 A L R 101; 8 R P O 142; 40 O W N 263; 17 P L T 25; (1936) M W N 35; 2 B R 225; 70 M L J 105; 62 O L J 419; 43 L W 336; 63 I A 47 (P. O.).

(2) 17 Pat. 333; 179 Ind. Cas. 104; A I R 1938 Pat. 559; 5 B R 176; 11 R P 327.

(3) 18 P L T 345; 169 Ind. Cas. 1000; A I R 1937 Pat. 387; 10 R P 62; 3 B R 644.

*Reported in 187 Ind. Cas. 629.—[Ed.]

must be allowed and the decrees of the Courts below set aside and the suit dismissed. In the circumstances the parties should bear their own costs throughout.

Rowland, J.—I agree.

D.

Appeal allowed.

BHOPAL HIGH COURT

Letters Patent Appeal No. 1 of 1939

August 10, 1939

MOHAMMAD AHMAD KHAN, O. J. AND

FAZLE AZIM, J.

Seth KISHORILAL—PLAINTIFF—

APPELLANT

versus

Mst. SUNDARBAI—DEFENDANT—

RESPONDENT

Civil Procedure Code (Bhopal), O. XXIII, r. 1—“Other sufficient reasons,” scope—Suit decided on merits—Failure to implead as defendant necessary party, whether ground for withdrawal of suit with liberty to bring fresh one, in appeal—Suit for ejectment against sole defendant dismissed on merits—Application in appeal to withdraw suit with permission to bring fresh one on ground that plaintiff forgot to implead defendant's son also—Permission held could not be granted.

The sphere of “other sufficient reasons” in O. XXIII, r. 1, Civil P. O., (Bhopal) is wider than the sphere of “some formal defect.”

Failure to implead even a necessary party as defendant is neither such a formal defect as can be cured in appeal nor does it afford sufficient ground to withdraw from the suit with permission to institute the same afresh after it has once been heard and decided on merits. 113 Ind. Cas. 847 (1), relied on.

Where a suit for ejectment brought against a sole defendant is dismissed on merits and plaintiff in appeal applies under O. XXIII, r. 1, Civil P. O., for permission to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on the basis that he had forgotten to implead along with the defendant her son also, such permission cannot be granted as to do so would mean to re-open the entire case against the successful defendant for no fault of hers. Addition of a new defendant in such cases virtually amounts to a complete alteration in the nature of the suit, which is not permitted in law, and the help of O. XXIII, r. (1) cannot be invoked to attain this end. Moreover the plaintiff has full right to sue the son for ejectment without withdrawing his suit with leave of the Court, and without regard to the result of the suit. Thus the plaintiff's remedy against the son of the defendant remains unaffected even if his suit fails on merits. Therefore there exists no sufficient ground to allow a withdrawal under O. XXIII, r. 1.

Special Appeal under the Letters Patent from the judgment of the Single Judge of the High Court, dated February 6, 1939.

Molvi Syed Mcham-mad, for the Appellant.

Emperor (8), referred to in *Pritam Hariomal v. Emperor* (9), in obiter remarks, made by a Single Judge in Sessions Court jurisdiction, will require reconsideration at some future time. We think therefore the learned Judge was right in his conviction of the appellant; the sentence is the only proper sentence under the circumstances. We confirm the conviction and sentence of transportation for life and dismiss the appeal.

S.

Appeal dismissed.

(8) A I R 1930 Sind 225; 126 Ind. Cas. 449; (1930) Cr. Cas. 865; 31 Cr. L J 1026; Ind. Rul. (1930) Sind 241.

(9) (1939) Kar. 449; 184 Ind. Cas. 145; A I R 1939 Sind 185; 40 Cr. L J 882; 12 R S 90.

PATNA HIGH COURT

Appeal from Appellate Decree No. 186 of 1938

August 8, 1939

ROWLAND AND CHATTERJI, JJ.

AGIN SINGH AND ANOTHER—DEFENDANTS
—APPELLANTS

versus

BHUDEO SINGH AND ANOTHER—PLAINTIFFS
—RESPONDENTS

Bihar Tenancy Act (VIII of 1934 as amended by Act XI of 1938), s. 48-A — Section if retrospective—Applicability to pending actions.

Section 48-A, Bihar Ten. Act, which was incorporated by Amending Act XI of 1938, by use of the words "shall be deemed to have acquired" is expressly made retrospective, and the section is applicable to pending actions. The suit shall be deemed to be still pending in appeal, even if a decree for ejectment had already been passed by the lower Courts and it was duly executed and possession taken before the new s. 48-A came into force. 160 Ind. Cas. 105 (2) (1), 179 Ind. Cas. 104 (2), 169 Ind. Cas. 1060 (3) and 187 Ind. Cas. 629 relied on.

A. from a decision of the Subordinate Judge of Muzaffarpur, dated January 21, 1938.

Dr. P. K. Sen and Mr. N. K. Prasad II, for the Appellants.

Messrs. S. M. Mullick and K. K. Banerjee, for the Respondent.

Chatterji, J.—This is an appeal by the defendants in a suit for ejectment sought on the ground that they are under-*raiyats* of the disputed land and refused to vacate it in spite of service of notice under s. 49 of the Bihar Ten. Act. The suit was contested on various grounds with which we are no longer concerned in this appeal. Both the Courts below have decreed the suit. The new point which has been raised in this appeal and must succeed is that under

the provisions of the new s. 48-A of the Bihar Ten. Act, which was incorporated by the Amending Act XI of 1938 and came into force, during the pendency of this appeal, on December 10, 1938, the defendants must be deemed to have acquired occupancy right in the disputed land. The relevant portion of s. 48-A runs as follows:—

"Every person who, for a period of twelve years, whether wholly or partly before or after the commencement of the Bihar Ten. (Amendment) Act, 1938 has continuously held land as an under-*raiyat* in any village, whether under a lease or otherwise, shall be deemed to have acquired, on the expiration of that period, a right of occupancy in the land which he has so held for the said period."

It is not disputed that the defendants continuously held the disputed land as under-*raiyats* for more than twelve years before the institution of the suit. Now s. 48-A by use of the words "shall be deemed to have acquired" is expressly made retrospective. Therefore by operation of this section the defendants shall be deemed to have acquired occupancy right in the disputed land before the institution of the suit.

The effect of the words "shall be deemed to have" when used in a new statutory enactment came up for consideration before their Lordships of the Judicial Committee in *K. C. Mukerjee v. Ram Ratan Kuer* (1). In that case their Lordships had to deal with s. 26-N (since repealed and replaced by s. 26-B) of the Bihar Ten. Act which came into force when the appeal before the Judicial Committee was pending. Section 26-N was in these terms:—

"Every person claiming an interest as landlord in any holding or portion thereof shall be deemed to have given his consent to every transfer of such holding or portion by sale, exchange, gift or will made before January 1, 1923, and, in the case of the transfer of a portion of a holding, to have accepted the distribution of the rent of the holding as stated in the instrument of transfer, or if there is no such instrument, as settled between the transferor and the transferee."

Their Lordships held that the words "shall be deemed to have given his consent to every transfer of such holding" clearly indicated that the section was intended to be retrospective. Their Lordships further held that there being no saving clause the section would apply to pending actions; and accordingly their Lordships decided the rights of the parties before them on the basis of that new section. The same reasoning will apply with equal force in the present case. The only distinction which is sought to be made by Mr. Mullick on behalf of the respondents is

other judgments, care must be taken to limit it to its own facts, and we think it is clear that considerations which attach to the question of the admissibility of a confession made under s. 162, Criminal P. O., are different from the consideration which attach to a confession made before a Magistrate. The protective provisions of s. 162, Criminal P. O., which apply, their Lordships now hold, to statements by accused persons to the Police, or at least to accused persons who are at first witnesses, have their origin in the infirmities which it is believed, may affect the evidence of the Police in India as to statements made by accused persons. Such considerations are obviously not applicable to statements made to Magistrates either under s. 164 or s. 342, Criminal P. O. On the other hand, it may be said that a confession, whether it be made to the Police or to a Magistrate, must be a confession of the crime or of the facts which constitute it. In the words of their Lordships (see p. 134*):

"Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession."

But their Lordships do not say that an admission of incriminating facts made by an accused person to a Magistrate under s. 164, Criminal P. O., or a statement made to the Court during the course of the trial is not admissible in evidence for what it is worth against the person who makes it under ss. 18 to 21, Evi. Act. In *Nga Ba Kyaing v. Emperor* (2), at p. 133, two men were convicted of murder. One Nga Win said that when Ba Kyaing stopped the Indians he pushed him back. Mosely, J., said with reference to Nga Win's statement:

"This statement, of course, amounts to an admission that Nga Win was at the scene of the crime and that he was accompanying the person who committed the crime; otherwise it is self-exculpatory and fixes the sole guilt on the other man. As evidence against Ba Kyaing, of course, it is entirely inadmissible. As an admission it is admissible, for what it is worth, against Nga Win, under s. 18; vide *Illus. (c) and (d) to s. 21, Evi. Act.*"

See also *Golam Mohammad Khan v. Emperor* (3). In this case the appellant's statement exonerates not only himself but his companion, but it is an admission that he was at the scene of the crime when Bhaikhan was killed. This admission was

(2) A I R 1936 Rang. 131 (133); 162 Ind. Cas. 6; (1936) Cr. Cas. 219; 37 Or. L J 531; 8 R. Rang. 543.

(3) 4 Pat. 327; 86 Ind. Cas. 814; A I R 1925 Pat. 536; 26 Or. L J 878; 6 P L T 598.

*Page of (1939) Kar. P. O. (Ed.)

made not only in the statement under s. 164, Criminal P. O., but in the statement made in the Court of the committing Magistrate and in the Court of the trial Judge. It is difficult to see how or why this admission should be ruled out as inadmissible in evidence or not be admitted for what it is worth as an admission against the accused. It is not necessary now to consider whether s. 164, Criminal P. O., applies to exculpatory statements as well as to incriminating statements made by accused persons because the statement under s. 164 can be ignored and the statements made to the committing Magistrate and the trial Judge still stand. The appellant's admission that he was at the scene of the offence when Bhaikhan was killed cannot be excluded from the record or be ignored; but it in no way amounts to a confession on which the appellant can be convicted. It is an admission against himself for what it is worth, which must be read with the other evidence. The other evidence on the record shows that the appellant was present at the scene of the offence as a guilty party. His admission that he was present to that extent confirms the evidence of Iso, and his statement and Iso's evidence have this in common, that the appellant was there. But his statement cannot be read, as the Judge has read it, as a confession that the appellant was present and assisted Bachal to kill Bhaikhan and had the common intention to kill within the meaning of s. 34, I. P. O. The guilt of the appellant must be proved in the main from other evidence, and it is, in our opinion, so proved.

We do not find it necessary, for the reasons we have given, to decide here in all its aspects the question whether s. 162, Criminal P. O., applies generally to statements made by accused persons as well as to statements made by witnesses, but clearly in view of the above Privy Council judgment and their Lordships' approval of the Madras case, *Emperor v. Syamo Mahapatro* (4), as opposed to the Calcutta case, *Emperor v. Azimuddy* (5), the judgments of this Court in *Adho v. Emperor* (6), *Hussain Bibi v. Emperor* (7) and *Muhammad Yusif v.*

(4) 55 M 903; 137 Ind. Cas. 9; A I R 1932 Mad. 391; (1932) Cr. Cas. 355; 33 Or. L J 418; 62 M T J 742; (1932) M W N 305; Ind. Rul. (1932) Mad. 336; 35 L W 705 (F B).

(5) 54 C 237; 99 Ind. Cas. 227; A I R 1927 Cal. 17; 28 Or. L J 99; 44 O L J 253.

(6) 19 S L R 6; 86 Ind. Cas. 961; A I R 1925 Sind 247; 26 Or. L J 897.

(7) 20 S L R 74; 93 Ind. Cas. 248; A I R 1926 Sind 151; 27 Or. L J 456.

charge of the sub-jail then sent him to the Civil Hospital at Hyderabad. The *post mortem* revealed a fracture of the skull and an injury to the brain which resulted in his death. He had also an incised wound on his right forearm. He was 25 years of age. The appellant himself when examined by the medical officer at Tando Adam on November 22, had a slight injury on his right wrist, an incised wound $3/5" \times 1/10"$ caused by an axe.

There was to the actual fight one eye-witness Iso. He is a boy of some 15 years of age. He knew Bhaikhan, Hayat and Sain Bakhsh. He says he knew them for eight to ten years and that his village was one mile from their village and also one mile from the village of the accused. He says he was grazing his goats and Bhaikhan was grazing his goats. He (Iso) had gone to fetch his goats back from the canal where they had strayed when he heard cries of murder and looking behind saw Bhaikhan attacked by the accused and Bachal. Bhaikhan had a hatchet and the accused had a hatchet and Bachal a *lorh*. Bhaikhan struck Bachal in self-defence. Bhaikhan fell down. He did not see Sain Bakhsh or Hayat there. The appellant and Bachal then ran away. He (Iso) raised cries and then he went to Ismail who was grazing his goats a survey number away and told him what had happened and together they came and saw the body of Bhaikhan and at Ismail's instance he went and told Dino, Bhaikhan's relation. It is said that this boy's evidence is unworthy of belief, among other things because he is a relation of Bhaikhan. There seems no such relationship, and Iso's evidence is corroborated by that of Ismail. Ismail is a man of 40 years of age; he seems to have no interest in the matter one way or the other. Dino says Iso came and told him that the accused and Bachal had killed Bhaikhan and he (Dino) went and told Jumo. Jumo made the first report, Ex. 11, without delay. That there was enmity between the family of the appellant and Hayat's family on account of Hayat's affair with Changi there can be no doubt. It is no use saying that peace had been made when Changi was restored to her people because two quite respectable men Noorshah and Pairoon speak of the incident when Hayat was chased by Bachal armed with a hatchet and Hayat took refuge in the mosque where these two witnesses were.

Hayat speaking of this incident says that four days after Changi was returned Darya-

khan, the appellant, and Bachal waited for him when he was returning from grazing his cattle with Sain Bakhsh. They had axes and chased him and he took refuge in the mosque. Sain Bakhsh corroborates Hayat in this. Hayat also says that after this his father warned him not to take the goats in the jungle and Bhaikhan took them himself. There is no reason at all to disbelieve this evidence of Hayat and Sain Bakhsh. It explains Bhaikhan's presence in the jungle that day. It explains also why he should be attacked by the appellant and Bachal. They could not get the son, so they would get the father. It was much the same to them. It is quite impossible to reject this evidence in favour of the statement of the appellant, improbable in itself and supported by no evidence, that Sain Bakhsh, Hayat and Bhaikhan would attempt to steal the appellant's camels in broad daylight. There was no evidence of the presence of those five camels, three of the appellant's and two of Bachal's that day in the jungle except the appellant's word. The whole story appears improbable and it does not appear that either the appellant or any of his relations would put this story into the form of a complaint. It is true that there is a discrepancy in the evidence of Iso in that the medical evidence shows no blow of a *lorh* upon Bhaikhan. Iso says that Bachal had a *lorh* and struck Bhaikhan with it and a *lorh* stained with human blood was found in Bachal's house by the Police. In all probability Bachal had a *lorh* and the fact that the boy Iso believed that he used it appears to us a matter of no importance in the circumstances.

Quite apart then from the so-called confession of the appellant, there is in our opinion, sufficient evidence to prove the appellant's guilt, but his learned Advocate argues that he has been convicted on his confession and that his statement is not a confession at all. He relies upon the recent Privy Council ruling in *Pakala Narayana Swami v. Emperor* (1). The learned Judge has distinguished this Privy Council case from the case before him on the ground that their Lordships were then considering not a judicial confession but a confession said to have been made to the Police. We think that in interpreting this judgment as

(1) (1939) Kar. (P O) 123; 180 Ind. Cas. 1; A I R 1939 P O 47; 66 I A 66; 18 Pat. 234; 1939 O L R 134; (1939) M W N 185; 40 Or. L J 364; 11 R P O 166; (1939) O W N 282; 20 P L T 265; 49 L W 249; 43 O W N 473; (1939) A L J 298; 41 Bom. L R 428; 41 P L R 272; 69 O L J 273; (1939) I M L J 756.

goats when he heard cries, of "murder, murder" and saw the appellant and his cousin Bachal striking Bhaikhan with an axe and a *lorh*. Bhaikhan had a hatchet and struck Bachal in self-defence, but the appellant and Bachal killed Bhaikhan and ran away. One Ismail was also grazing his goats near by. Iso told Ismail of what had happened and they went together and saw the dead body of Bhaikhan. Ismail told Iso to inform Bhaikhan's relations. Iso told Dino who told Juman, Bhaikhan's son-in-law, and Juman went and reported the matter first to the Police outpost at Mulla Katiar and then to the *thana* at Tando Muhammad Khan at 4 p.m. The head constable came to the scene of the offence and next morning went to the village of the appellant, some two miles away, and arrested the appellant and Bachal who was seriously hurt. Bachal was unconscious and could make no statement. The appellant produced two blood-stained hatchets; his trousers were stained with blood; his footprints were picked out by a *pagi* in a test, and on November 21, 1938, (the offence having been committed on the 19th) the appellant was sent to a Magistrate for recording his confession, and what has been regarded in this case as a "confession" was recorded. The chemical analysis showed that the hatchets and a *lorh*, which the Police had also taken in the course of the investigation, and the trousers of the appellant, were stained with human blood. The appellant and Bachal were both challaned for the murder of Bhaikhan, but Bachal died in the hospital.

The case for the defence was put forward by the appellant in his statement made before the Magistrate on November 21, and adhered to by him at the trial. This statement is not and is not intended to be a confession of the murder of Bhaikhan. It is intended by the appellant to exculpate himself completely, and, if believed, the appellant would be entitled to be acquitted, for the appellant says he was with Bachal grazing camels in the jungle when Hayat and Sain Bakhsh, who were in the jungle while Bhaikhan stood near by, attempted to steal one of the appellant's camels. He and Bachal ran crying "thief, thief" when Sain Bakhsh and Hayat who had hatchets fought with Bachal while Bhaikhan fought with him. Bhaikhan struck him on the head and in consequence his turban was cut; his hand was also injured; he however grappled with Bhaikhan and they both fell on the ground Bhaikhan being uppermost,

and it was while he was in this helpless position that he heard blows falling upon Bhaikhan; he got up and found Bhaikhan and Bachal on the ground; Bachal was injured in two places with a hatchet; one injury was on the head and one injury was on the arm; Bhaikhan was also injured but he did not notice his injuries minutely; Sain Bakhsh and Hayat were running away; he carried Bachal away who told him he had struck blows at Bhaikhan because he thought that Bhaikhan would kill him; he carried Bachal to his house and then Bachal's father came and then Daryakhan the appellant's father, came and Daryakhan asked Bachal's father to go and make a report; they set no guard on the body of Bhaikhan, but in the afternoon Jumo, Ali and Hayat came to his house armed with hatchets to do them harm but Bachal remonstrated with them and sent them away; he said he had no hatchet with himself; he said he had no enmity with anyone but that Changi, his sister, was criminally intimate with Bhaikhan's son Hayat.

If this statement be true, the appellant is entitled to be acquitted, but we cannot believe the statement to be true, and though the learned Judge has in some way, which is not clear to us, regarded this statement as a confession by the appellant that he with Bachal murdered Bhaikhan—and we do not think it can be so regarded—there appears to us sufficient other evidence on the record to prove the guilt of the accused beyond all reasonable doubt. There can be no doubt that Bhaikhan was killed. The medical evidence shows that he had four incised wounds. The first injury was a dreadful injury cutting through the side of the face into the head and the cervical vertebra. One other wound cut away the left ear; one other cut through the nose and one other cut completely through the shoulder blade; all these injuries, as the learned Advocate for the appellant points out, were on the left side of the body. There can be no doubt that Bhaikhan died from axe blows. The accused in his statements admits this, though his case is that Bhaikhan was killed in self-defence. It is also clear that Bachal died of injuries inflicted on him in this same fight. He did not die till January 8, 1939, in the Hyderabad hospital whence he was sent from the sub-jail at Tando Muhammad Khan because though his injuries were not at first sight serious, he did not get better as he should have, and the medical officer in

the refusal of the High Court to extend the time for receiving the deposit, and that, even if we had, we should be slow to interfere with the exercise by the High Court of its discretion in a matter of this kind. We also refused to entertain any application which did not specify the rules from the requirements of which the applicants desired to be excused; and Counsel then stated that he asked to be excused from compliance with the requirements of O. X, rr. 1, 2 and 3. By a regrettable error on the part of officers of the Court the amended petition served upon the respondents was made to appear as an application under O. XXXVII, rr. 1, 2 and 3, instead of an application to be excused compliance with O. X, rr. 1, 2 and 3. No point however was made of this at the subsequent hearing and neither Counsel for the respondents nor any one else was left in any doubt as to the precise nature of the application.

When the application was heard on February 14, the respondents were also represented. Counsel for the applicants gave an explanation of the delay in making the deposit which was not wholly consistent with the account apparently given to the High Court, and I think it right to remind litigants that, if they ask for the indulgence of this Court, it is necessary for them to show the utmost good faith, and to make a complete disclosure of all relevant facts. But whether the delay was due to want of means, or to negligence, or to some genuine mistake with regard to payment into Court during vacation, the consequences to the applicants are serious enough. It was admitted that the facts of the case did not differ in any material respect from those of other cases which have been before us recently from Patna and in which the Bihar Money-lenders (Regn. of Trans.) Act, 1939, became law after the judgment of the High Court had been pronounced; and it was urged on behalf of the applicants that, unless they are able to bring their appeal before this Court, they cannot claim the benefit of the Act of 1939 and are likely to suffer serious loss. But under the provisions of O. XLV of the Code, they cannot have their appeal admitted until the deposit is made; and until the appeal is admitted they cannot, under rr. 1, 2 and 3 of O. X of the Federal Court Rules, get the record transmitted to this Court or even printed; and the time for lodging

their appeal in this Court cannot even begin to run. Counsel for the respondents was content to argue that, as the letter of the law had been broken, the applicants must take the consequences, and he contended that the circumstances were not such as to entitle the applicants to any indulgence at the hands of the Court.

I should be unwilling, if it can be avoided, to allow a not very serious default in a matter of procedure wholly to deprive the applicants of the benefits conferred by the new Bihar Act of 1939. I agree that rules of Court are framed to be kept and not to be broken; but they are framed for the purpose of assisting justice and not for the purpose of enabling it to be defeated. If therefore a strict adherence to the rules is likely to deprive a litigant of advantages which the Provincial Legislature clearly intended to give him then in my opinion the Court may properly exercise the dispensing power conferred by O. XXXVII, in order that substantial justice may be done. It is however necessary to examine carefully the provisions of the rules, in order to see what this Court has or has not power to do, premising that it can only excuse compliance with its own rules and cannot excuse compliance with rules of a High Court and still less with the provisions of a statute.

By s. 205 (1) of the Constitution Act, if a High Court certifies that a case before it involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder, an appeal lies to this Court—

(1) on the ground that the question has been wrongly decided.

(2) on any ground on which an appeal would have lain to the Judicial Committee without special leave if no certificate had been given, and

(3) with the leave of the Federal Court on any other ground. Of these, (2) clearly refers to ss. 109 and 110 of the Code, where the cases in which an appeal lies to the Judicial Committee without special leave are set out. When Parliament determined to give a right of appeal to the Federal Court on what may be described as constitutional questions, it would have been plainly impossible, if other issues arose in the case, to allow the case to be appealed in part to the Federal Court and in part to the Judicial Committee; and accordingly s. 205 provides that if a constitutional question has arisen in a case, the whole case becomes appeal-

able to the Federal Court, even though other issues are also involved. By s. 214 (1) of the Act, the Federal Court is empowered to make rules for regulating generally its practice and procedure; and it might be thought from this that the Court would be in a position to control from first to last the conduct of appeals which may be brought before it. But, as I have said, O. XLV of the Code which regulates the procedure in appeals from a High Court to the Judicial Committee, has been extended with the necessary adaptations and modifications to appeals from High Courts to the Federal Court by the Govt. of India (Adaptation of Indian Laws) Order, 1937. It is for this reason that it has become necessary for litigants who desire to appeal to the Federal Court to go through the process of getting their appeals "admitted" in the High Court before they can lodge their petition of appeal; and they cannot get their appeal "admitted," until they have filed a petition in the High Court in the manner prescribed by O. XLV and have deposited a sum sufficient to cover the cost of having the record printed. It is difficult to say why it should have been thought necessary thus to fetter this Court; but the result is that a good part of the preliminary proceedings connected with an appeal are removed from its control and put under the control of the High Court. Whether the provisions of O. XLV, in their application to Federal Court appeals, can be amended by this Court as High Courts are able to amend them under s. 122 of the Code, it is not necessary now to determine. The Court clearly has no power to do so under s. 122, but a question may arise as to the effect of the opening words of s. 109, as extended by s. 111-A. It seems to have been forgotten that the Court does not possess any such overriding powers as are conferred on the Judicial Committee by s. 74 of the Judicial Committee Act, 1833, by s. 1 of the Judicial Committee Act, 1944, or by s. 112 of the Code.

There is nothing in Chap. I of Part IX of the Constitution Act to suggest that Parliament did not intend the Federal Court to have the amplest power over its own procedure and I do not know why the High Courts have been given power to prevent a litigant who has already been granted a certificate under s. 205 (1) of the Act from prosecuting his appeal to this Court. It ought surely to be the

exclusive prerogative of this Court to decide whether a litigant has done anything which forfeits his right to prosecute his appeal. In saying this however I must not be taken as criticising in any way the law as they found it; and, as I have already said, this Court has no power or wish to excuse anyone from compliance with rules applicable to the High Court alone.

Order X, r. 1, of the Federal Court Rules, provides that an appellant shall, subject to the provisions of the Code and of any rules made by the High Court relating to appeals to the Federal Court, take all necessary steps to have the record prepared in the High Court and transmitted to the Federal Court; r. 2 of O. X is consequential on r. 1. Rule 3 provides that within sixty days of the admission of the appeal by the High Court, the appellant shall lodge in the Federal Court his petition of appeal, containing a concise statement of the facts of the case, of the grounds of appeal, and of the arguments and authorities upon which he proposes to rely at the hearing. If his appeal cannot be admitted, it would seem that the sixty days can never begin to run, and therefore that the appeal can never be lodged; and thus a would-be appellant can be deprived of a right which Parliament clearly intended that he should have. In these circumstances I am of opinion that, if the justice of the case requires it, we are entitled to excuse the applicants from compliance with so much of O. X as requires them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within sixty days of the admission of the appeal by the High Court, and I am of opinion that the applicants in the present case ought to be so excused. I do not think that the absence of any admission of the appeal by the High Court is a statutory bar to the prosecution of the appeal before this Court. The provisions of O. XLV of the Code are procedural provisions only, and I am not prepared to hold that non-compliance with them in the High Court necessarily ousts the jurisdiction of this Court, if a certificate under s. 205 (1) of the Constitution Act has once been given.

The effect of the order which I propose is that the applicants will be at liberty to lodge their petition of appeal in this Court within such time as this Court may consider reasonable, which I think should be fixed as twenty-eight days from the date of our

order. Since they have come here to ask for an indulgence, and have no one but themselves to blame for having been compelled to do so, they must pay the costs of this application as between agent and client in any event.

Sulaiman, J.—This is an application for being excused from the compliance with the Rules of the Federal Court and for the enlargement of time. The date of the High Court's decree and the certificate was December 19, 1938, and yet it was not till September 1, 1939, that an attempt was made to offer (not tender) the amount involved, which was only Rs. 253-3. The learned Chief Justice, with whom Fazl Ali, J., agreed, held that the High Court has power to extend the time, but that there were no cogent reasons for the exercise of the discretion. Agarwala, J., has held that no such power exists. If the question were merely one of discretion, this Court even though a superior Court, would not disagree with the High Court's refusal to exercise it in favour of the applicants. There would be no revisional power for interference with the order. And even if there were an appeal we should not interfere with the non-exercise of a mere discretion by the High Court, unless some question of principle were involved. But unfortunately the difficulty is far more fundamental.

Power to 'adapt' the existing Indian Laws by Order in Council has been conferred by s. 293 of the Act, but is confined to bringing the provisions of those laws 'into accord' with those of the Act and in particular into accord with those which re-constitute under different names, governments and authorities and prescribe the distribution of certain powers. But the section gives no power to legislate afresh. The Federal Court was not a re-constituted Court at all, but an altogether new Court, and there were no previously existing laws relating to it which must necessarily be brought into accord with the Govt. of India Act. On the other hand, some adaptation was necessary when in cases fulfilling the requirements of s. 205 direct appeals to the Privy Council, with or without leave, were abolished. But there was no absolute necessity to make the whole of O. XLV, Civil P. O., applicable to Federal Court appeals, even where the only ground taken is a constitutional one. The Federal Court could under s. 214 of the Act and s. 109, Civil P. O., frame its own rules for regulating practice and

procedure, and the High Courts also could under s. 122, Civil P. O., subject to the procedure prescribed in Part X, annul, alter or add to the rules in O. XLV, Civil P. O., so far as the procedure in their own Courts was concerned and so long as it was not in conflict with any rule framed by the Federal Court. To remove any possible doubt as to the Adaptation of Indian Laws Order, and indeed in deference to it, the Federal Court by O. IX, r. 1, made O. XL, Civil P. O., 'as modified and adapted' by that Order in Council, applicable to Federal Court appeals also, so that O. XLV may not be deemed to have been excluded by virtue of O. I, r. 5, F. O. R.

The difference of opinion in the High Court is caused by the circumstance that "Code" is defined in O. I, r. 2, F. O. R., as meaning 'the Civil P. O., 1908, as amended or modified by any Order in Council or by or under any Central Act', while O. IX, r. 1, applies the provisions of O. XLV of the Code, 'as modified and adapted by the Govt. of India (Adaptation of Indian Laws) Order, 1937. But all the definitions in r. 2 of the Federal Court are subject to the governing condition "unless the context otherwise requires". The term "Code", though defined, must be taken along with the context where it occurs, and cannot be taken out of it. Further, the Privy Council Rules do not profess to amend or modify the provisions of O. XLV of the Code, although it must be conceded that they can by implication amend or modify them if they indirectly do so. On the other hand, the Govt. of India (Adaptation of Indian Laws) Order, 1937, professedly modifies them, and is admittedly the latest Order in Council for this purpose. Rule 17 has been actually added to O. XLV, and lays down in express terms that, with a few particular amendments introduced by it "the provisions of this Order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council". This Order does not make the provisions of the Privy Council rules, which are professedly supplementary, but may in some cases conflict with O. XLV, applicable to Federal Court appeals. Nor does it even make O. XLV, as deemed to have been amended by the Privy Council Rules, applicable to such appeals.

That appears to be the reason why in O. IX of the Federal Court Rules the reference is only to the latest Order in

Council embodying the Adaptation of Indian Laws, and not to any earlier Order in Council. It is to give effect to the mandatory provisions of the latest Order in Council that the reference to the Adaptation of Indian Laws Order was made in the Rule. Had there been a different intention, the Rule could have simply said "any Order in Council".

There can be no doubt that wherever in the Rules the word "Code" has been used by itself, without any qualifications, it must convey the meaning given to it by the definition. But in O. IX, r. 1, that word has not been used by itself, but is qualified by the expression "as modified by the Govt. of India (Adaptation of Indian Laws) Order, 1937". The context indicates that it is intended to have a restricted meaning. If in this Rule also the word "Code" were to include all modifications and amendments by any Order in Council, the reference to the Adaptation of Indian Laws Order would be wholly superfluous and redundant. The definition of the term "Code," which occurs in other Orders as well, is undoubtedly wider, but in this particular context it is subject to the qualification attached to it. The applicant's duty (as distinct from the High Court's power) to have the record prepared in the High Court and transmitted to the Federal Court, which can take place only after the admission of the appeals (as the heading of the Order also indicates), is expressly made subject to the provisions of the Code and rules of the High Court under O. X, r. 1, F. C. R.

There are several considerations which show that the provisions in the Privy Council Rules were never intended to be applicable to appeals to the Federal Court. A comparison of the provisions relating to the appeals to the Federal Court with the provisions relating to the appeals to their Lordships of the Privy Council will show that, although the Federal Court Rules are to a great extent modelled on the Privy Council Rules, they contain parallel provisions intended to be sufficient in themselves and certainly independent of the provisions in the Privy Council Rules. They are obviously not wholly comprehensive; at the same time they cannot be regarded as supplemented by the provisions of the Privy Council Rules that exist for the purposes of Privy Council appeals. Had it been intended to incorporate all the provisions of the latter kind, one would have expected to find an express mention of it in O. IX. The intention appears to

be to incorporate the provisions of the Civil P. O. as modified and adapted by the Adaptation of Indian Laws Order, and supplement them by the Rules framed by the Federal Court itself, irrespective of the Rules which had been framed for the appeals to their Lordships of the Privy Council. It would be easy to quote numerous provisions in the Federal Court Rules which do not correspond exactly to the Privy Council Rules. If O. XLV, as impliedly amended by the Privy Council Rules, were made applicable to the Federal Court appeals, there would inevitably be a considerable conflict in many matters. I, therefore, feel bound to hold that r. 9 of the Privy Council Rules dated February 9, 1920 has not impliedly been made applicable to Federal Court appeals on account of its being covered by the wider definition of "Code," though not included in the context of O. IX, r. 1.

Rule 17 added to by the Adaptation of Laws Order lays down that if only a constitutional question is raised in the grounds, the petition need not pray for the "certificate" mentioned in r. 3 and that "like proceedings shall be had thereon as if such a certificate had been given etc." An examination of the Rules in the Order makes it quite clear that the 'certificate' mentioned in rr. 6 and 7 is the certificate referred to in r. 3, and not the certificate contemplated by s. 205 of the Act. Thus the words "or within six weeks from the grant of the certificate, whichever is the later date" in r. 7, would be meaningless if no certificate is applied for under r. 3, and in that case all references to such 'certificate' and also security must be deemed to be omitted by necessary implication. Rule 17 does not, however, remove the incompleteness of the Order as it stood before the amendment. When Act XXVI of 1920 limited the extended period in r. 7 to one "not exceeding sixty days," it was overlooked that O. XLV itself did not confer any power on Courts to revoke the certificate if, before the admission of the appeal, the costs are not deposited. The words "such order" in r. 11 *prima facie* refer to that in r. 12. Order XLV, r. 17, does not improve matters in this respect. It is the Privy Council r. 9 which empowers the Court "to make such further or other order, as in the opinion of the Court, the justice of the case requires." But the Federal Court has not yet made any rule corresponding to r. 9 of the Privy Council Rules. The posi-

tion would, therefore be one of a deadlock if there were no other way open.

The Federal Court was quite conscious of the fact that the First set of Rules framed by it could by no means be comprehensive or exhaustive. It was clearly anticipated that there would be many matters of detail, relating to practice and procedure, which may not be directly covered by any of the Rules. Powers were accordingly deliberately reserved to meet such a contingency. Order XXXVII, r. 1, provides :

"The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as it shall consider just and expedient."

The two parts of the Rule, although included in the same Rule, are really separate and distinct. The first deals with the exemption of the parties from compliance with any of the requirements which have been expressly laid down in the Federal Court Rules. The second reserves general power to give direction in matters of practice and procedure as considered just and expedient. It follows that in all cases where the Rules are silent this last provision can appropriately be resorted to. But, of course, that would not entitle us to excuse compliance with the Rules of the Code, made applicable by the Adaptation Order.

The present is stage where the certificate has been granted and an application for leave is still pending, but the High Court has refused to extend the time for depositing the printing costs and the appeal has not yet been declared to be admitted, nor can it be admitted so long as the High Court's order stands. There is no provision empowering the High Court to revoke the certificate or dismiss the application unless an inherent jurisdiction can be invoked. We have no power to make any order which would bind the High Court to act in any particular manner. All that we can do to help the applicants is to excuse them from compliance with O. X, r. 2, Federal Court Rules, and give necessary direction.

Varadachariar, J.—As we have not been asked to examine the correctness of the order of the High Court, we have not heard arguments on the question on which there was a difference of opinion in that Court, viz., the applicability of r. 9 of the Privy Council Rules to appeals to this Court. I therefore refrain from expressing any opinion on that question. I am in agreement with the observations of my Lord as to the probable intention of the Constitution Act with reference to the powers of this

Court to regulate the procedure governing appeals to this Court as well as the difficulty caused by the language employed in r. 17 added to O. XXV of the Civil P. C., by the Adaptation of Indian Laws Order, 1937; but I express no opinion on the question mooted in his judgment as to whether the opening words of s. 109 of the Civil P. C., read with s. 111-A empower this Court suitably to modify the provisions of O. XLV of the Civil P. C. I agree with my learned brother that the literal application of the language of r. 7 of O. XLV of the Civil P. C., to appeals to this Court will lead to anomalous results, in cases in which the appeals are preferred on a certificate under s. 205 of the Constitution Act and not on a certificate under O. XLV, r. 3, of the Civil P. C.; and I do not feel sure that the provisions of O. XXXVII, r. 1, of the Federal Court Rules will be found sufficient to obviate anomaly or hardship in all cases. So far as the present application is concerned, it seems possible to grant the indulgence prayed for, without unduly stretching the scope of that rule. I accordingly concur in the order proposed by my Lord.

By the Court.—The Order of the Court is that the applicants are excused from compliance with so much of O. X, rr. 1, 2 and 3, of the Federal Court Rules as requires them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within sixty days of the admission of the appeal by the Court; and they will be at liberty to lodge their petition of appeal in this Court within twenty-eight days of the date of our Order. We propose to direct the Registrar to communicate with the High Court at Patna informing it of the Order which we have made, and it may be that in the circumstances the High Court will be willing to give the applicants facilities for getting the record printed and transmitted to this Court on payment of the proper charges. This however is a matter entirely for the High Court, and it would not be right for us to say anything further with regard to it. The applicants must furnish this Court within twenty-eight days with copies of the record, and if there are any difficulties with regard to the printing of it, there will be liberty to apply in chambers. The applicants must pay the costs in any event of this application as between agent and client.

D.

Order accordingly.

LAHORE HIGH COURT

Special Bench

Civil Reference No. 16 of 1938

April 18, 1939

YOUNG, O. J., DALIP SINGH AND

BLACKER, JJ.

COMMISSIONER OF INCOME-TAX,

LAHORE—PETITIONER

versus

KRISHAN KISHORE—RESPONDENT

Income Tax Act (XI of 1922), ss. 55, 9—Impartible estate—Joint Hindu family of assessee and his sons—Assessee succeeding by rule of primogeniture—Income of estate in his hands, if chargeable in status of 'individual'—Incumbent; whether owner for purposes of s. 9—S. 9, construction—Owner of property, meaning of.

The income of the impartible estate, to which the assessee has succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara, is not chargeable in his hand in the status of 'individual.' The income of the impartible estate cannot be said to be the income solely of the incumbent of the impartible estate there being vested in the junior members of the family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family namely the incumbent of the impartible estate. The incumbent of an impartible estate cannot become for the purposes of s. 9, Income Tax Act, the owner of the property. As the corpus of the property belongs to the joint Hindu family, individual member of that family cannot be held to be the owner simply because by custom in that particular property the major portion of the income is used entirely for his benefit. 141 Ind. Cas. 415 (1), followed. 168 Ind. Cas. 168 (4), distinguished. 150 Ind. Cas. 545 (9), relied on. 82 Ind. Cas. 653 (3) and 138 Ind. Cas. 861 (3), not followed. 148 Ind. Cas. 855 (13), explained and distinguished. 182 Ind. Cas. 712 (12) and 64 Ind. Cas. 801 (14), followed.

On a plain construction of the words of s. 9, Income Tax Act, it necessarily follows that the assessee must be the owner of the property assessed. In construing this section the words 'owner of the property' cannot be construed as meaning owner of the annual value of the property. [p. 680, col. 2.]

O. Ref. by the Commissioner of Income-tax, Punjab, N.-W. F. and Delhi Provinces, Lahore, dated September 8, 1938.

Mr. J. N. Aggarwal, for the Petitioner.

Messrs. Badri Das and Kirpa Ram Bajaj, for the Respondent.

Dalip Singh, J.—The facts of this reference under s. 66 (1), Income Tax Act, are stated at p. 2 of the printed paper book by the learned Commissioner of Income-tax and may, briefly, be recapitulated here. The assessee, Diwan Bahadur Krishan Kishore, is the present holder of an impartible estate to which he succeeded under the rule of primogeniture prevailing in his family. The income of

that impartible estate consists mainly of rent of property and interest. This latter source is however small and the income consists mainly of rent from house property. It appears that up to 1923-24 the liability to super-tax of this income was determined as if it were the income of an individual. In a revision petition in that year however the assessee contended that he formed a joint Hindu family with his sons and that he should get exemption from super-tax up to the limit provided in the case of a Hindu undivided family and not as if the income were that of an individual. This contention was conceded. In 1929-30 the Commissioner however cancelled the assessment of the income from the impartible estate as being the income of a Hindu undivided family and directed that the income of the impartible estate and the personal income of the Diwan Bahadur should be assessed in a combined assessment as if the income of the impartible estate were the income of an individual. A reference was made to the High Court and the result is reported in *Kishan Kishore v. Commissioner of Income-tax* (1). One of the questions in that reference was:

"Whether in a view of the fact that the rule of primogeniture prevails in the petitioner's family and of the terms of the award of Mr. Atkins, the petitioner can be said to be the sole owner of the impartible estate the taxable income of which has been assessed on him as an individual?"

The learned Judges held that an impartible estate could belong to an undivided Hindu family and was not the sole property of the person who had succeeded to it by the rule of primogeniture. They therefore, answered the question referred to above in the negative. In other words, they allowed the assessee's claim to be assessed to super-tax on the income from the impartible estate as if the same were the income belonging to a joint Hindu family. Certain other disputes arose on the question of the income of the assessee but they do not concern us here, the question of law referred in this case for the decision of the Hon'ble High Court being:

"(1) Whether the income of the impartible estate, to which the assessee has succeeded by a rule of primogeniture prevailing in his family governed by the Mitakshara, is chargeable in his hand in the status of 'individual,' the assessee being the head of the family consisting of himself and his sons?"

The second question is unimportant, for the answer to the first question would, as (1) 61 T. C. 345; 141 Ind. Cas. 415; A I R 1933 Lah 284; 14 L. 255; 34 P. L. R. 560.

rightly pointed out by the learned Commissioner, determine the answer to the second question. The reason for the reference in the face of the Division Bench ruling reported in *Kishen Kishore v. Commissioner of Income-tax* (1) is given in the opinion of the Commissioner at pp. 4 and 5. The learned Commissioner there pointed out, relying on the ruling of their Lordships of the Privy Council in *Kalyanji Vitthal Das v. Commissioner of Income-tax, Bengal* (2) (at p. 95) that though certain property might be described as family property yet the income from the property might be regarded as the income of an individual and therefore chargeable to income-tax as the income of an individual. He also pointed that the Patna High Court in the case reported in *Shiva Prasad Singh v. Emperor* (3) at p. 389 had held that the income of an impartible estate was the income of the incumbent for the time being, nor did the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. Similarly, the Madras High Court in a case reported in *Raja of Bobbili v. Commissioner of Income-tax, Madras* (4) held that the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property. The corpus might belong to the undivided family and the assessee might be a member of a Hindu undivided family but nonetheless the income received was his absolute property and differed in no way from that gained by personal exertions or other self-acquisitions. He distinguished the Lahore case on the ground that in the Lahore case it was only held that the corpus of the property might belong to the undivided family. In the view of their Lordships of the Madras High Court the fact that the corpus belonged to the Hindu joint family did not affect the question of the income, and the income from an impartible estate not being joint family income was not the income of the joint Hindu family but clearly was the income of an individual. Similarly, the Patna

(2) 1937 I.T.R. 90 (95); 166 Ind. Cas. 445; A.I.R. 1937 P.C. 36; 64 I.A. 28; I.L.R. (1937) 1 Cal. 653; 1937 O.L.R. 44; 1937 A.L.R. 87; 9 R.P.C. 145; 3 B.R. 245; 45 L.W. 109; 18 P.L.T. 7; (1937) M.W.N. 63 (2); 1937 O.W.N. 173; 41 O.W.N. 385; (1937) 1 M.L.J. 312; (1937) A.L.J. 408; 65 O.L.J. 64; 39 Bom. L.R. 374 (P.O.).

(3) 1 I.T.C. 384 (389); 2 Ind. Cas. 653; A.I.R. 1924 Pat. 679; 4 Pat. 73; 5 P.L.T. 497.

(4) 1937 I.T.R. 78; 168 Ind. Cas. 168; A.I.R. 1937 Mad. 515; I.L.R. (1937) Mad. 797; 9 R.M. 544; 45 L.W. 573; (1937) 1 M.L.J. 707; (1937) M.W.N. 814 (S.B.).

High Court had in another case followed the Madras judgment and its own earlier judgment and held that the income of the impartible Raj in the hands of the holder was to be assessed on the footing that the income was the income of the individual and not of an undivided family. The learned Commissioner contended that in view of these authorities the answer to the first question referred should be in the affirmative.

It would appear from the opinion of the Commissioner that the learned Commissioner conceded the point that the corpus of the property did belong to a Hindu joint family consisting of Diwan Krishan Kishore and his sons, but, according to the learned Commissioner, this fact did not affect the question of the ownership of the income. Before us however the learned Counsel for the Income-tax Commissioner has contested both the question of the ownership of the corpus and the ownership of the income. A number of rulings of their Lordships of the Privy Council have been cited but the main reliance of the learned Counsel has been on a case reported in *Shibaprasad Singh v. Prayag Kumari Debee* (5) where their Lordships of the Privy Council reviewed a good many of the previous decisions of the Privy Council on the subject of impartible estates. In that case at p. 1413^a their Lordships summarized the discussion as follows:

"Impartibility is essentially a creature of custom. In the case of ordinary joint family property, the members of the family have (1) the right of partition, (2) the right to restrain alienations by the head of the family except for necessity, (3) the right of maintenance, and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari v. Deoraj Kuari* (6) and the first *Pittapur* case (*Venkata Surya Mahipati Rama Krishna Rao v. Court of Wards*) (7) and so also the third as held in the second *Pittapur* case (*Venkata Mahipati Gangadara Rama Rao v. Raja of Pittapur*) (8)."

As regards (4) their Lordships remarked

(5) 59 O.1399; 138 Ind. Cas. 861; A.I.R. 1932 P.O. 216; 59 I.A. 331; Ind. Rul. (1932) P.O. 263; 63 M.L.J. 196; 9 O.W.N. 691; 36 O.W.N. 1046; 56 O.L.J. 92; 36 L.W. 266; (1932) M.W.N. 923; (1932) A.L.J. 919; 13 P.L.T. 659; 34 Bom. L.R. 1567 (P.O.).

(6) 10 A.272; 15 I.A. 51; 5 Sar. 139 (P.O.).

(7) 22 M.383; 26 I.A. 83; 9 M.L.J. 1 Sup.; 7 Sar. 481 (P.O.).

(8) 41 M.778; 47 Ind. Cas. 354; A.I.R. 1918 P.O. 81; 45 I.A. 148; 35 M.L.J. 392; 24 M.L.T. 276; 16 A.L.J. 833; 28 O.L.J. 428; 5 P.L.W. 267; 20 Bom. L.R. 1056; 23 O.W.N. 173; (1918) M.W.N. 922 (P.O.).

that they still maintained that the right of survivorship was inconsistent with the custom of impartibility. From the propositions laid down the learned Counsel contended that the income arising from the impartible estate must be held to be the absolute income of the incumbent for the time being and therefore assessable as the income of an individual. It should here be pointed out that the ruling of their Lordships of the Privy Council referred to by the learned Commissioner, namely *Kalyanji Vithal Das v. Commissioner of Income-tax, Bengal* (2) did not deal with the question of the income arising from an impartible estate at all. Their Lordships took special care to note that they were not dealing with the case of an impartible estate held by the senior of several male members of the family as to which there had been conflicting decisions in India, referring to the Patna case and the Lahore case mentioned above. The passage which is quoted by the learned Commissioner referred to their Lordships' decision that the words "Hindu undivided family" in the Income Tax Act were wider than the words "Hindu co-parcenary." A female might be a member of the Hindu undivided family though she might not be a member of the Hindu co-parcenary, and the question there being discussed by their Lordships was whether the existence of a wife or a wife and a daughter could be held to make the income which went to the sole male member of the family, the income of a Hindu undivided family and it was with reference to this question that their Lordships' remarks must be read. That matter, it appears to me, is perfectly distinct from the question whether, where admittedly a Hindu co-parcenary is existing, the income arising from the corpus of property owned by that co-parcenary can be said to be the absolute income of the head of the family. Normally speaking of course it could not be held to be the income of the individual head of the family but would be held to be the income of the Hindu joint family, but the contention of the learned Counsel for the Income-tax Commissioner is that in the case of an impartible estate the income must be treated as that of the incumbent of the impartible estate.

Speaking entirely for myself and with the greatest deference to the decision of their Lordships of the Privy Council in *Sartaj Kuari v. Deoraj Kuari* (6), and the first *Pittapur case* (7), I find it difficult to understand why the

right to control alienation should be incompatible with the absence of the right to partition. As pointed out in the Lahore case, in the Punjab, Hindu Mitakshara Law has been modified by custom so that sons have no right to demand partition of ancestral property or joint family property as against their father. It has never however been doubted that the sons in the Punjab retain their right to control alienations made by the father except for necessity. Without in the least wishing to detract from the authority of the Privy Council ruling, for it is undoubtedly binding on any Court in this country, I merely state the difficulty that I find it difficult to understand why their Lordships of the Privy Council held that the right to restrain alienations was inextricably involved with the right to partition. Assuming however that this is so, the second *Pittapur case* (8), appears to have laid down that the right to maintenance was also incompatible with the existence of an impartible estate. There are certainly words in that case which would tend to show that this is so. It would appear as if that case had held that there was no right of maintenance held by the junior members of the Hindu joint family in an impartible estate except such as might have been imposed by custom. Their Lordships of the Privy Council have however themselves in a later case, as far as I can understand it, negated this view. That case is reported in *Collector of Gorakhpur v. Ram Sundar Mal* (9). Their Lordships were there dealing with the succession by survivorship to an impartible estate but in the course of that decision they examined a number of previous rulings of the Privy Council and summarized the result of that discussion of the previous rulings at p. 485* as follows :

"1. The decisions of the Board in *Sartaj Kuari v. Deoraj Kuari* (6), and the first *Pittapur case* (7), appeared to be destructive of the doctrine that an impartible *samindari* could be in any sense joint family property.

2. This view apparently implied in these cases was definitely negated by Lord Dunedin when delivering the judgment of the Board in 1921, in *Baijnath Prasad Singh v. Tej Bali Singh* (10).

3. One result is at length clearly shown to be that there is no reason why the earlier judgments of the

(9) 56 A 468 (485); 150 Ind. Cas. 545; A I R 1934 P O 157; 61 I A 286; 7 R P O 1; 11 O W N 8-9; 40 L W 217; (1934) A L J 779; 67 M L J 274; 15 P L T 531; 60 O L J 67; (1934) M W N 751; 36 Bom. L R 867; 38 O W N 1101 (P O.)

(10) 43 A 228; 60 Ind. Cas. 534; A I R 1921 P O 62; 48 I A 195; 19 A L J 317; 33 O L J 388; 40 M L J 387; (1921) M W N 300; 25 O W N 564; 2 P L T 257; 23 Bom. L R 654; 3 U P L R (P O) 35; 29 M L T 358 (P O.)

*Page of 56 A.—[Ed.]

Board should not be followed, such as for instance the Chellapalli case, *Mallikarjuna v. Durga Prasad* (11), which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding *samindari* lands for maintenance could still be considered as joint in estate with the *samindar* in possession."

The right to maintenance therefore of the junior members of the family in an impartible estate was here referred not to custom but to the right arising out of the joint ownership of the estate by the junior members of the family with the present incumbent. Speaking again with the greatest deference and with all proper respect to the decision of their Lordships of the Privy Council, I find it very difficult to reconcile the words quoted in the judgment of the Board with reference to maintenance in *Shiba Prasad Singh v. Prayag Kumari Debee* (5), with the latest judgment of their Lordships of the Privy Council in *Collector of Gorakhpur v. Ram Sundar Mal* (9), at p. 485. In the circumstances it appears to me that the most recent judgment of their Lordships of the Privy Council reviewing the previous decisions must be held to be binding on this Court and the result of all the Privy Council decisions must be taken to be summarized by their Lordships of the Privy Council themselves in *Collector of Gorakhpur v. Ram Sundar Mal* (9). From that decision it seems to me that it would follow (1) that in an impartible estate a Hindu joint family does own the corpus of the property, (2) that the members of this joint family have no right to partition the estate, (3) that the members of the family have no right to control the alienations made by the incumbent of the impartible estate and (4) that the members of the joint family have the right to receive maintenance from the estate and this right arises because they are owners of the estate and is not a right to maintenance from the joint family, though not from the property, as is the case of female members of a joint family. The distinction is really quite clear; in the one case the female member has a right to maintenance from the joint Hindu family but this right does not confer any right in the estate or property of the joint family; in the other case the members of the co-parcenary have a right to maintenance arising from their right in the property of the joint Hindu family of which they are co-owners. It follows from this again that the income of the impartible

(11) 24 M 147; 27 I A 151; 10 M L J 294; 7 Sar. 766 (P O).

estate cannot be said to be the income solely of the incumbent of the impartible estate there being vested in the junior members of the family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family namely the incumbent of the impartible estate.

This would suffice to dispose of the reference, but in case the matter goes further I must refer also to another argument which was raised by the learned Counsel for the assessee *Diwan Bahadur Krishan Kishore*. The learned Counsel in this part of the argument conceded that it would not affect the question of the income arising as interest from security, if any, appertaining to the impartible estate but it did affect the income arising from property which, according to him, was the main source of income of the impartible estate. The contention was that under s. 9, Income Tax Act, the income arising from property could only be assessed on an assessee who was the owner of the property. Therefore according to the learned Counsel as the Commissioner for Income-tax conceded that the corpus of the property belonged not to the incumbent but to the joint Hindu family, it followed that *qua* the property the owner was the Hindu undivided joint family and not the incumbent. On a plain construction of the words of s. 9, which runs,

"the tax shall be payable by an assessee under the head 'property' in respect of the *bona fide* annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner..."

it necessarily follows that the assessee must be the owner of the property assessed. In reply to this contention however the learned Counsel for the Commissioner cited *Commissioner of Income-tax, Bombay v. Abubakar Abdul Rahman* (12), a Bombay ruling of 1939. In construing this section the learned Judges of the Bombay High Court held that the words 'owner of the property' must be construed as meaning owner of the annual value of the property. The judgment of one of the learned Judges concedes that this interpretation does violence to the plain grammatical meaning of the words of the section, but the learned Judges felt that this was the only construction which was reconcilable with the general scheme of the Act. The judgment of the Chief Justice in that case was based upon the ruling of their Lordships of the Privy

(12) 7 I T R 139; 182 Ind. Cas. 712; A I R 1939 Bom 195; I L R (1939) Bom. 284; 41 Bom. L R 232; 18 R B 33.

Council reported in *Currimbhoy Ebrahim Baronetcy Trust v. Commissioner of Income-tax, Bombay* (13), at p. 324. With all deference again to the learned Judges of the Bombay High Court I must admit that I am unable to follow how the judgment of their Lordships of the Privy Council in *Currimbhoy Ebrahim Baronetcy Trust v. Commissioner of Income-tax, Bombay* (13), supports this construction. I do not think I need analyze the matter in any great detail. It is sufficient to say that I am quite unable to see that the judgment of their Lordships of the Privy Council had anything to do with any such forced construction. All that their Lordships of the Privy Council were there concerned with was the question whether in a particular case the word 'owner' should mean the legal owner or the beneficial owner and whether a particular beneficiary could be said to be the owner. Another ruling relied on was *Burma Railways Co. v. Secretary of State* (14), a Burma ruling, but again with all deference to the learned Judges of the Burma Court I am unable to follow why a person in the control and management of certain property should for the purposes of the Income Tax Act be regarded as the owner of the property. The very illustration given in the case of a man handing over property to his sons would appear to me not to be a very happy illustration for I do not know if the Income-tax Authorities would welcome a man with several sons handing over the control of different parts of his property to different sons, thereby escaping assessment himself for the income with the possible result that the sons might not be assessable to income at all, for their divided shares might be less than the taxable minimum.

Be that as it may however I am unable to see that any such forced construction is called for in the circumstances of this case. I agree that the word 'owner' is not defined in the Income Tax Act and that the word 'owner' might very well cover the legal owner, the equitable owner or even the owner of a limited estate carved out of a larger estate. But from all this it would not follow that the incumbent of an impartible estate becomes for the purposes of s. 9 the owner of the property. If, as held by their Lordships of the Privy Council and (13) 58 B 317 (324); 148 Ind. Cas. 855; A I R 1934 P O 116; 61 I A 209; 6 R P O 145; 39 L W 771; (1934) A L J 429; 38 O W N 618; 36 Bom. L R 557; (1934) M W N 582; 59 O L J 403 (P O). (14) 1 I T O 140; 64 Ind. Cas. 801; A I R 1921 L B 9; 11 L B R 33.

conceded by the learned Commissioner, the corpus of the property belongs to the joint Hindu family, I am unable to see that the individual member of that family can be held to be the owner simply because by custom in that particular property the major portion of the income is used entirely for his benefit. In the circumstances therefore I would uphold the contention of the learned Counsel for the assessee on this point also. The result is that I would answer the first question referred by the learned Commissioner in the negative and as a corollary thereto I would also answer the second question in the negative. As regards costs I consider that the assessee is entitled to his costs which are assessed at Rs. 300.

Young, C. J.—I concur.

Blacker, J.—I concur.

s. Answered in negative.

BOMBAY HIGH COURT

Second Appeal No. 231 of 1939
November 3, 1939

BEAUMONT, C. J. AND SEN, J.

VIRABHADRAYYA NAGAYYA
SHIVAPPANMATH—DEFENDANT No. 2—
APPELLANT

versus

BASANGOWDA MUDIGOWDA

PATIL—PLAINTIFF—RESPONDENT

Landlord and tenant—Assignee of lease, if liable by privity of estate to payment of rent to lessor.

In India an assignee of a lease is liable on the covenants by privity of estate to the payment of rent to the lessor. The manner in which the interest of the lessee becomes vested in the assignee is immaterial, provided the method is such as in law vests the whole interest of the lessee in the assignee. The doctrine, therefore, applies even where the title of the assignee is derived under a Court sale. 179 Ind. Cas 328 (2), relied on.

But the liability to interest arises purely under the contract contained in the lease. It is not a liability which runs with the land or is attached in law to the interest of the lessee, and it is not a liability which affects an assignee of the lease.

S. A. from the decision of the District Judge, Dharwar, in Appeal No. 119 of 1937.

Messrs. G. P. Murdeshwar, and R. A. Mundkur, for the Appellant.

Mr. R. A. Jahagirdar, for the Respondent.

Beaumont, C. J.—This is a second appeal from a decision of the District Judge of Dharwar, and it raises a question whether the assignee of a lease in this country is liable by privity of estate to the payment of rent to the lessor. The lease in question was granted on January 6, 1926, by the plaintiff to defendant No. 1, the term being 40 years. On April 1, 1931, the interest of defendant No. 1 under the lease was sold in execution proceedings to defendant No. 2, who is the present appellant. The sale was confirmed on April 9, 1934, and the certificate was granted on April 14, 1934. This suit was started on December 22, 1936, and in it rent is claimed for six years against both the lessee and the appellant as assignee of the lease. The appellant contends, in the first place, that the doctrine of liability of an assignee of a lease by virtue of privity of estate has no application in this country. The question was discussed by a Full Bench of this Court in *Keshavlal Tribhovan v. Maganlal Shivram* (1), and in giving judgment I did myself express a doubt as to whether the doctrine could have any application in India, particularly having regard to the definition of "lease" in s. 105, T. P. Act, which seemed to me to show that a lessee has no estate in the land. I still feel that technical difficulty, but since that case was decided, the subject has been before the Privy Council in *Ram Kinkar Banerjee v. Satya Charan* (2). In that case their Lordships were considering whether a mortgagee of a leasehold interest was liable on a covenant in the lease by privity of estate, and the actual decision was that under an Indian mortgage, in whatever form, the mortgagor does not part with the whole of his interest in the property and therefore the mortgagee, who does not acquire the whole interest of the mortgagor, is not liable by privity of estate under the covenants of the lease. But Lord Porter in giving the judgment of the Board makes these observations (p. 58*):

"By English law and by Indian law an assignee of a lease is liable by privity of estate for all the burdens of the lease, burdens which are imposed upon him by the mere assignment, whether he enters into possession or not,"

(1) 58 B 327; 148 Ind. Cas. 993; A I R 1934 Bom. 134; 36 Bom. L R 197; 6 R B 317 (F.B.).

(2) 66 I A 50; 179 Ind. Cas. 328; A I R 1939 P O 14; 43 O W N 281; 49 L W 229; 1939 O L R 46; 5 B R 258; 11 R P O 134; 1939 O W N 43; 1939 R D 144; (1939) 1 M L J 544; 69 C L J 254; I L R (1939) 1 Cal. 283; 41 Bom. L R 672; (1939) M W N 601 (P O).

*Page of 66 I. A.—[Ed.]

and he then referred with approval to two Madras cases in which the point had been decided. In view of that clear expression of the view of the Privy Council, it seems to me that it is not open to any Court in this country to question the doctrine that an assignee of a lease is liable on the covenants by privity of estate. A second point taken by the appellant is that although that may be the position under an assignment *inter partes* the doctrine does not apply where, as in the present case, the title of the assignee is derived under a court-sale which is not followed by an assignment. But the answer to that contention is to be found in s. 65, Civil P. C., which provides that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. So that the statute operates to vest the property purchased in the purchaser, and no assignment is necessary, nor is it the practice in this country to take an assignment on a court-sale. In my opinion, the manner in which the interest of the lessee becomes vested in the assignee is immaterial, provided the method is such as in law vests the whole interest of the lessee in the assignee. In my opinion in this case the assignee did as from the date of the sale acquire the whole interest of the lessee, and as from that date he is liable on the covenants of the lease which run with the land. That was the decision of the learned District Judge, who modified the order of the trial Court by limiting the liability of the appellant to the period from the date of the sale, which is rather less than six years. The cross-objections, in which the lessor asks for interest on the arrears of rent because under the lease interest is made payable on arrears of rent, are clearly not well founded. The liability to interest arises purely under the contract contained in the lease. It is not a liability which runs with the land or is attached in law to the interest of the lessee, and it is not a liability which affects an assignee of the lease. The appeal is dismissed with costs, and the cross-objections are dismissed with costs.

Sen, J.—I agree.

Appeal and cross-objections dismissed.

D.

ALLAHABAD HIGH COURT
Criminal Reference Nos. 843 and 844 of
1939

December 11, 1939

BENNET, J.

JAGDISH NARAIN BAJPAI—
APPLICANT

versus

EMPEROR THROUGH RAM GOPAL
AND OTHERS—RESPONDENTS

Criminal Procedure Code (Act V of 1898), ss. 75 (2), 205, 540-A—Magistrate writing to another Magistrate to return warrant unexecuted—Effect—Warrant issued subsequently recalled—Accused before Magistrate—Accused, if can be allowed to appear by Pleader—S. 540-A, scope and applicability.

A warrant is an order addressed to a certain person directing him to arrest the accused and to produce the accused before the Court. The warrant may have a further provision for admitting the accused to bail. But in each case the warrant is an order directed to someone to arrest a certain accused and bring him before the Court, and the person to whom it is addressed may if he is a Magistrate or Police Officer endorse the warrant to some one serving under him. When the Magistrate writes to the District Magistrate in another province asking him to return the warrants unexecuted then it is clear that the warrants are cancelled. Section 75 (2), Criminal P. C., does not require that there should be any formal order on the record, of cancellation.

The word "ever" in "whenever" in s. 205 (1), Criminal P. C., implies different occasions and is in contrast to the words used in the previous s. 204 about issuing a summons in the first instance. In the case where a warrant had been issued and recalled and a summons then has been issued s. 205 will apply by virtue of this word "whenever." The same result follows when the accused being before the Magistrate he does not think it necessary for him to issue summons for his appearance. In such a case he can allow the accused to appear by Pleader.

Section 540-A, Criminal P. C., is a general section which will apply to cases of all kinds whether the accused is in jail custody or whether he is on bail or whether he is appearing in obedience to a summons. 129 Ind. Cas. 360 (1), explained.

Cr. Ref. made by the Sessions Judge, Benares, dated September 30, 1939.

Mr. K. D. Majaviya, for the Applicant.

Order.—These are two criminal references by the learned Sessions Judge of Benares at the instance of a complainant Jagdish Narain, a resident of Benares. Jagdish Narain made a complaint under ss. 420-109 and 120-B, I. P. C. against four persons, (1) Babu Ram Gupta of Lucknow; (2) Ramgopal, (3) E. Jones and (4) Balram Gupta, all of Bombay. The complaint alleged that the complainant had accepted an agency for selling cloth supplied by the firm of accused called

the Swadeshi Cloth Mills, Bombay, and that the gist of the offence was in para. 11 :

"they dishonestly and with a view to defraud the complainant and the public all along assured the complainant that the accused were sending the complainant only Swadeshi goods, which the complainant believed,"

but that actually some foreign goods were sent. The complainant filed two letters from the accused's firm but he did not file the alleged written agreement which he had with the accused and of which he complains the accused have committed a breach which amounts to a criminal offence. There is therefore nothing before the Court at this stage to show that there was any such agreement with the accused except the mere allegation of the complainant. The case was sent to a Special Magistrate in Benares and he issued bailable warrants for the four accused. The first accused Babu Ram Gupta appeared in Court on August 11, 1939 and he was directed to execute a personal bond of Rs. 500 with one surety of Rs. 100. He in his petition alleged that the other accused were respectable persons in Bombay and that the accused or some of them had filed a case in Lucknow against Moti Lal and Sri Ram for taking away their property on July 14, 1939. This prior case in Lucknow was also mentioned in para. 16 of the complaint of Jagdish Narain and his complaint on July 26, 1939 was subsequent. The application of Babu Ram Gupta further said that the present case of Jagdish Narain had been filed to harass the accused who were in Bombay and that they would attend on the date fixed. The Magistrate ordered on August 11, 1939 :

"The warrant against other accused may be cancelled if he undertakes to bring them on the next hearing, i. e., August 31, 1939."

Such an undertaking did actually appear in the application of Babu Ram Gupta: "They will appear on the date fixed." The Magistrate then wrote a letter to Bombay of which he did not retain a copy, but he received a reply from the Commissioner of Police, Bombay, dated September 2, 1939 (paper No. 26-B) stating :

"With reference to your letter dated August 11, 1939, to the address of the District Magistrate, Bombay, I have the honour to return the accompanying three arrest warrants unexecuted as desired."

In quoting this letter the Sessions Judge has forgotten to enter the date August 11, and has only entered the month. It is clear therefore that on the very date on which the application was made by accused

No. 1 Babu Ram Gupta, the Magistrate issued a letter to the District Magistrate, Bombay, asking him to return the three warrants unexecuted. Learned Counsel argues that this does not amount to the cancellation of the warrants under s. 75, Criminal P. C. Section 75 (2) states :

"Every such warrant shall remain in force until it is cancelled by the Court which issued it or until it is executed."

Now the Code does not define a warrant but in Sch. V, Form No. 2, the form of a warrant is given under s. 75 as follows :

"To (name and designation of the person or persons who is or are to execute the warrant.)

Whereas of stands charged with the offence of (state the offence), you are hereby directed to arrest the said , and to produce him before me. Herein fail not.

Dated this day of 19."

This form shows clearly that a warrant is an order addressed to a certain person directing him to arrest the accused and to produce the accused before the Court. The warrant may have a further provision for admitting the accused to bail. But in each case the warrant is an order directed to someone to arrest a certain accused and bring him before the Court and the person to whom it is addressed may if he is a Magistrate or Police Officer endorse the warrant to some one serving under him. When the Magistrate in Benares wrote to the District Magistrate in Bombay asking him to return the warrants unexecuted then it is clear that the warrants were cancelled. The essence of the warrant being an order directed to the District Magistrate in Bombay the letter to the District Magistrate telling him to return that written order is a cancellation of that order. When an order is revoked in this manner the order no longer exists. This is perfectly clear in the case of an oral order. If any one said to a Police Officer "arrest that man" and then said "do not arrest him" the order would no longer stand. Section 75 (2) does not require that there should be any formal order on the record of cancellation. The Magistrate has discretion at any time to withdraw his warrant. The Magistrate withdrew his warrant and therefore the warrant was cancelled. It is clear therefore that after this letter had been received and acted upon by the Commissioner of Police in Bombay there was no longer any warrant outstanding for the Commissioner of Police to arrest these accused and the Commissioner of Police could not have

legally arrested these accused. Some argument was made that the Magistrate in Benares might have again sent the warrant to the Commissioner of Police. If he had done so, that would have been again issuing a warrant and the mere fact that he may not have written the warrant again would not make the matter nonetheless the issue of a fresh order. It is probable however that if he had desired to issue a fresh warrant he would not have used the old form because that would have led to confusion and if he had used the old form he would probably have explained in his new letter that he was doing so merely for the sake of convenience. The next proceeding in the case is a written application purporting to be made by the three accused from Bombay identified by Mr. Jagdish Prasad, Advocate, who signs the application as identifying them with the date August 28, 1939. This application sets out as follows :

"That the applicants are respectable persons and are being maliciously prosecuted with absolutely false allegations.

That the applicants are incapable of remaining before the Court and the applicants will be put to serious loss by their appearance in person in your honour's Court.

That the applicants would have to travel from Bombay where they reside for every hearing in the case.

It is therefore humbly prayed that the personal attendance of the applicants may kindly be excused and they may be allowed to appear through their Advocate Mr. Jagdish Prasad

On this the Magistrate wrote the order "Allowed Sd. A. Bari, August 29, 1939." The Magistrate therefore permitted these three accused to appear by their Advocate. One of the criticisms that has been made of this application was made to the Sessions Judge who was told that the three persons did not actually appear before the Magistrate. The Sessions Judge states :

"But the application in itself does not show that these three persons were present in Court that day."

The Sessions Judge failed to read and understand the sentence in the application which states : "That the applicants are incapable of remaining before the Court." This sentence implies that the three applicants were before the Court on the day in question. This is further confirmed by the fact that the Advocate Mr. Jagdish Prasad above his signature and below the signatures of the three accused wrote the words "Id." This is clearly an abbreviation for "Identified" and means that he

identified these three persons before the Court. The story now suggested by the learned Sessions Judge that these people did not appear in Benares would involve either the theory that the Advocate went to Bombay to identify them or that the Advocate told a lie when he wrote on the paper "Identified" below their signatures. Neither theory seems to me at all probable and there is nothing whatever to support these suggestions made by the complainant. If the complainant had any doubts whatever on the question of the presence of these three accused before the Magistrate it was open to the Counsel for the complainant to make an application in writing to the Magistrate asking the Magistrate whether these three persons did or did not appear before him. No such application was made.

The next question argued is the legality of this order. Now the argument addressed to me is that s. 204, Criminal P. C., uses the words "a summons should issue in the first instance" and the suggestion is made that these words should be imported into s. 205 (1). This sub-section does not use these words at all and it uses quite different language and it states as follows:

"Whenever a Magistrate issues a summons, he may if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his Pleader."

The language used in this sub-section begins with the word "whenever." The learned Sessions Judge does not seem to have appreciated the meaning of this English word. The word "ever" implies different occasions and is in my opinion in contrast to the words used in the previous s. 204 about issuing a summons in the first instance. In the case of a warrant having been issued and recalled and a summons then having been issued it would appear to me that s. 205 will apply by virtue of this word "whenever." In the present case as the accused appeared before the Magistrate it was not necessary for him to issue a summons for their appearance. He had them before him, but he had exactly the same powers as if they had appeared before him in obedience to a summons. The point about the reference to a summons in s. 205 appears to me to be shown by the form for a summons in Sch. V, Form No. 1, which is as follows:

"To of whereas your attendance is necessary to answer to a charge of (state shortly the offence

charged; you are hereby required to appear in person (or by Pleader, as the case may be) before the (Magistrate) of on the of . Herein fail not:
Dated this day of 19 ."

This shows that in sending a summons the Magistrate might either require appearance in person or appearance by Pleader and he strikes out whatever words he does not desire to appear in the summons. All that is required in s. 205 (1) is that the Magistrate should consider that a summons is sufficient for the appearance of the accused in the case and if he is of that opinion he may then permit the accused to appear by Pleader. If, on the other hand, a Magistrate considers that a warrant is necessary, then the Magistrate considers that there should be an order for someone to arrest the accused and bring the accused before him or admit the accused to bail to appear before him. If that is the opinion of the Magistrate, it is obvious that he will not at the same time dispense with the personal attendance of the accused. No one would hold those two contrary views at the same time. This is all that is implied by the reference to a summons in s. 205. It appears to me that it was clearly within the jurisdiction of the Court when the accused were before the Court and the warrants had been recalled from Bombay to make the order which the Court did make allowing the accused to appear by Pleader. As to the propriety of this order, I take into account the fact that this is a case filed apparently after the complaint filed in Lucknow, and that the complainant in this case has not yet filed in Court his agreement the breach of which he says amounts not only to be a breach of contract but also constitutes a criminal offence. There is therefore practically no material before the Court at present to indicate that there was any offence committed by the accused and there is nothing in the nature of a *prima facie* case. This is the matter which in my opinion should always be taken into account in considering the propriety of an order under s. 205 (1), Criminal P. C.

Some reference has also been made to s. 540-A, Criminal P. C. That is a general section which will apply to cases of all kinds whether the accused is in jail custody or whether he is on bail or whether he is appearing in obedience to a summons. In that section the words used are "incapable of remaining before the Court." The only ruling which has been shown to me is

Emperor v. Radha Raman (1). In the case one of the accused in the Meerut Conspiracy case under s. 121-A, Penal Code—a non-bailable offence—was in custody and he had been permitted by the Sessions Judge to go to Calcutta to see his sister who was ill. There is nothing in the ruling which indicates that he was allowed to proceed on bail. So the presumption is that he was sent to Calcutta in custody. It was then held by a learned Single Judge of this Court that s. 540-A of the Code would not apply, as in that case it could not be said that the accused was incapable of remaining before the Court and that these words should be used in their plain and ordinary meaning. The Judge however did not proceed to define what he considered would be the plain and ordinary meaning of these words and the ruling therefore does not throw any light on the possible meaning to be assigned to these words. I do not think that this section is relevant to the present case and therefore I need not discuss the meaning of these words and whether they would or would not apply to the present case. In the present case the trial had not begun when the Magistrate passed his order and therefore the stage of s. 205 (1), Criminal P.C., was still existing. For these reasons I consider that no case has been made out for the Criminal Reference No. 843 of 1939.

I now come to Criminal Reference No. 844 of 1939. The date fixed for this trial of these four accused persons was August 31, 1939 and on that date the accused No. 1, Babu Ram Gupta, attended from Lucknow and the other accused were represented by Mr. Jagdish Prasad their Advocate. The complainant failed to attend and he tendered a medical certificate in the following terms:

"Jagdish Narain Bajpai is suffering from fever with dysentery and would take about a week for his recovery. (Sd.) G. R. Mullick, M. B., B. S."

On this there was an application made on behalf of the accused that the fees of the Civil Surgeon would be supplied by them if the Court would direct the Civil Surgeon of Benares to visit the complainant in Benares and see whether he was fit to attend Court. The Civil Surgeon Lt. Col. Vaidya did visit the complainant and sent a long report to the Court. In that report

he states that the complainant whom he saw at 1-55 P. M. that day complained of pain in his stomach and fever and said that the pain was very severe and was still continuing and that he was having five or six loose stools a day since August 25, and from August 29, nine or ten loose stools a day. The Civil Surgeon then applied the usual method of examination of the abdomen and stated:

"The abdomen is soft. There is no rigidity or tenderness. Deep pressure was applied when the patient was talking and he did not wince with pain."

It is perfectly clear from this report on this point that there was no pain in the abdomen such as the complainant alleged. As regards the fever the Civil Surgeon reported:

"The body does not feel warm to show that there is anything like fever. He says he had fever till 10 A. M."

That is, the alleged fever which was preventing him from attending Court that day miraculously stopped before the Civil Surgeon arrived. The report further proceeds that:

"He says he was being treated by Dr. Malik since 29th morning. He gave him some medicine He cannot show the prescription nor the bottle of medicine prescribed by Dr. Malik."

It is clear therefore that the evidence of treatment by Dr. Malik was not forthcoming. In spite of the fact that the complainant said he was passing eight or ten loose stools a day the Civil Surgeon states: "He says he will not be able to pass any stools." It was the passing of these loose stools which was the reason alleged why he did not come to Court, but when the Civil Surgeon examined him he said that no stools were available or would be available. The first question asked by the Court was "How long has he been ill?" and the reply of the Civil Surgeon is: "I am unable to say how long has he been ill or if he has been ill at all." The second question was: "Is the patient able to come to Court?" and the answer was: "The patient did not look seriously ill," and the third reply was: "The present condition did not appear to me to be serious." It appears clear to me that the complainant was not at all ill and that he had other reasons for not desiring to attend Court. In any case no explanation is given as to why the complainant did not produce any other witnesses. Even if he himself had been unable to attend there was no reason

(1) (1930) A L J 1076; 129 Ind. Cas. 260; A I R 1930 All. 817; (1930) Cr. Cas. 1201; 32 Cr. L J 364; Ind. Rul. (1931) All. 132.

why witnesses should not have been produced and why he desired the case to be postponed without any evidence being recorded. On this report of the Civil Surgeon the Magistrate passed the following order:

"From the report of the Civil Surgeon it appears that complainant's condition is not serious. He had no fever at the time he was examined. Besides he had no colic pain in the opinion of the Civil Surgeon. To me it appears that the application is calculated to harass the accused who have to come to Benares from Bombay after incurring heavy expenditure on each hearing, I order the complainant to pay Rs 100 as cost to the accused. The next date is fixed October 15, 1939. The complainant is ordered to bring all his witnesses and the documents upon which he relies."

(Sd.) Abdul Bari, August 31, 1939.

This is the order which is the subject of the criminal reference in question. Even the Sessions Judge who refers this case states:

"On a careful consideration of the Civil Surgeon's report it does appear to me that Jagdish Narain Bajpai was not so ill as not to be able to come to Court. ... He sent this certificate merely to avoid the production of evidence on that day."

The reason why this matter was referred by the Sessions Judge is because he thought that the order for the accused to appear by Pleader was not legal otherwise he says he would not have referred this matter of costs. Some argument was made that the costs of Rs. 100 was excessive. But these costs had to cover several matters. One was the fee of the Civil Surgeon, another was the fee of the Advocate for the accused, the third was the cost of Babu Ram Gupta coming on that day from Lucknow. In view of these matters I do not think that the Rs. 100 was excessive. For these reasons I refuse both these references of the learned Sessions Judge and I direct that the record be returned to the Magistrate through the Sessions Judge.

D.

Reference refused.

LAHORE HIGH COURT

Second Appeal No. 1150 of 1938

December 5, 1938

BLACKER, J.

JOINT HINDU FAMILY FIRM KNOWN AS
Lala KASTURI LAL SANT LAL—

PLAINTIFF—APPELLANTS

versus

MUNICIPAL COMMITTEE, JAGRAON—
DEFENDANT—RESPONDENT

Punjab Municipal Act (III of 1911), s. 169 (g), Proviso—Disposal of part of public street proposed by Municipality—Damage likely to be caused to vested interests of public—Burden to prove that part proposed to be disposed of is no longer required as public street, lies heavily on Municipality—Highway—Rights of public, interference with—Injunction, suit for—Municipality proposing to sell part of public street in front of person's shop—Person's frontage of unusual value likely to be affected—If cause Municipality for injunction—Damages, whether can be assessed in such case—Injunction, if can be granted.

The Municipal Committee cannot act arbitrarily and prejudice the rights of the public in disposing of a part of the public street on the mere pretext, without any substance behind it, that it is no longer wanted as a public street. Where by doing so they will cause damage to the vested interests of members of the public, the burden lies heavily upon the Municipality to prove that in fact the portion of land they propose to dispose of is no longer required as a public street.

For owners of houses abutting on a public highway, the question of frontage means a great deal, and if anything is done by those in whom the highway vests, which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comforts of the occupants of the houses, the owners have an actionable claim against them.

Hence where a Municipal Committee proposes to sell a portion of a street in front of a person's shop for the purpose of building shops and the person has not merely a frontage but it is a frontage of more than usual value because his is the first shop in the *mandi* which persons coming from the station towards the main gate of the *mandi* would have to pass and his shop would be shut out by the buildings proposed to be erected he is entitled to sue the Municipality for an injunction restraining them from selling the proposed land. 152 Ind. Cas. 850 (1), relied on.

In such a suit the damages likely to be suffered by the plaintiff are not in the nature of things, capable of accurate assessment and a mere general statement made by the plaintiff in his evidence that the value of his houses has been reduced by Rs. 2,000 or Rs. 3,000 cannot be taken as being equivalent to an accurate estimate by him of the damages which he would suffer.

The public have right to use every part of the public street, not merely the metalled portion in the centre. 152 Ind. Cas. 850 (1), relied on.

S. A. from the decree of the District Judge, Ludhiana, dated July 15, 1938.

Mr. Mela Ram Aggarwal, for the Appellant.

Mr. Vishnu Dutt, for the Respondent.

Judgment—There is within the jurisdiction of the Municipality of Jagraon a *mandi* known as Andersongunj. It appears to be rectangular in shape and the plaintiff-appellant has a shop in the north-eastern corner of it. On the eastern side of the Gunj, there is a strip of land 66 feet wide which is shown in the revenue papers as a public thoroughfare. Running down the length of this there is a strip of metalled road eight feet wide. It is not in the exact centre but 20 feet from the buildings on the west and 38 feet from the building on the east, that is the plaintiff's shop. The defendants, the Municipal Committee of Jagraon, proposed to sell a portion of this street immediately opposite the plaintiff's shop and 14 feet away from it extending up to the metalled road for the purpose of building shops. The plaintiff sued for an injunction restraining them from doing so. His suit was decreed by the learned trial Judge but dismissed on appeal by the learned District Judge. The plaintiff has appealed against that decision. It is contended for the defendants-respondents that the Municipal Committee being the owners of this site have every right to sell it. It is further contended that even if the site only vests in them as a public street under the Municipal Act, they still have the power to sell any portion of it under s. 169 (g) of the Act as now amended.

A good deal of stress was laid by the plaintiff on a judgment reported in *Municipal Committee, Delhi v. Mahomed Ibrahim* (1), in which in a similar case, the rights of the Municipal Committee were clearly defined. It was there laid down, amongst other principles, that the right to close a street under s. 169 (d) did not include a right to dispose of a part of that street for a purpose such as the present. The subsequent amendment however of the section embodied in cl. (g) has altered the law as far as this finding of the Judges in *Municipal Committee, Delhi v. Mahomed Ibrahim* (1), was concerned. But there is still a very important proviso left which limits the power of the Municipality to sell part of an existing street and that is the proviso that it must no longer be required as a public street. This is a proviso of considerable importance. The Municipal Committee cannot act arbitrarily and prejudice the rights of the public in disposing

of a part of the public street on the mere pretext, without any substance behind it, that it is no longer wanted as a public street. Where by doing so they will cause damage to the vested interests of members of the public, the burden lies heavily upon the Municipality to prove that in fact the portion of land they purpose to dispose of is no longer required as a public street. This burden is not made any lighter when the facts are as in the present case, that the whole area has been used for years as an important public thoroughfare leading from the direction of the Railway Station to one of the main gates of the *mandi* situate on the eastern side of the *mandi* and the plaintiff and his predecessors-in-interest have had a frontage on that wide street for a considerable period. It was laid down in *Municipal Committee, Delhi v. Mahomed Ibrahim* (1) that

"for owners of houses abutting on a public highway, the question of frontage means a great deal, and if anything is done by those in whom the highway vests, which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comforts of the occupants of the houses, the owners have an actionable claim against them."

This principle is not affected by the subsequent amendment of the Act, and in the present case not merely has the plaintiff got a frontage but it is a frontage of more than usual value because his is the first shop in the *mandi* which persons coming from the station towards the main gate of the *mandi* would have to pass. As he uses that frontage for the purpose of retail-sale of goods, it is naturally of very great importance to him that the site of his shop by persons coming to the *mandi* from the station should not be shut out by the buildings which are proposed to be erected immediately in front of his shop. It seems to me therefore that in this case the Municipal Committee had a very heavy burden to discharge in order to prove that they were justified by the language of the section in taking a part of this public thoroughfare and selling it to private persons for building shops. They had to prove clearly that it was no longer required as a public street. *Prima facie*, it would not be easy for them to prove this as it was clearly not only a public highway, but an important public highway. The only way they could show it would be by proving that the street as it existed was too wide. This is a very difficult proposition for them to establish when persons having shops abutting on the street, as it was originally

(1) 16 L 517; 152 Ind. Cas. 850; A I R 1935 Lah. 196; 37 P L R 763; 7 R L 325.

laid out, have acquired a right of easement thereto.

Counsel for the defendants had relied upon another Division Bench judgment of this Court reported in *Jai Narain v. Municipal Committee, Delhi* (2). In that case the facts were somewhat different as it was not a question of the erection of new buildings but the leasing out of a platform which had been in the street for a number of years. In view of the facts that the platform had been there for many years and that there were other platforms of a similar nature in that street, it is to be presumed that that was sufficient evidence that portion of the street which was covered by the platform proposed to be leased out was no longer required as a public street.

Counsel for the defendant in this case has placed some reliance on what he considers to be admissions by the plaintiff. One is Ex. D-10 which refers to the sale of similar land to the north of the *mandi*. But here Counsel has not been able to show any evidence that the land which was sold was actually a part of a public highway and was not in the private ownership of the District Board. The other is a statement made by the body of *sahukars* of the *mandi* generally in which they admitted that the width of 14 feet was sufficient for the *phirni* or circular road which was to be made round the *mandi* outside it. Counsel contends that the learned District Judge has come to a finding of fact that in view of this admission a width of 14 feet in front of the plaintiff's shop has been proved to be sufficient for his comfort and that this is a question of fact which cannot be disturbed in second appeal. Unfortunately, it is impossible to find out from the language used by the learned District Judge exactly what his finding is. The sentence runs:

"It follows that a width of 14 feet was not considered adequate for a road, but that it was understood that this width which is now called a *phirni* was to be used as a street or road."

I must frankly confess that this sentence is unintelligible to me as it stands. Counsel for the defendants has suggested that the word "adequate" should have been "inadequate." There is a certain amount of force in this contention because that would seem to follow from the previous discussion. But on the other hand, if the learned District Judge had meant to say "inadequate" the conjunction following the word

"road" would have been "and" and not "but." It is very difficult therefore to try and guess what question of fact the learned District Judge was arriving at. But in any case it appears to me that even if he had arrived at a finding of fact that 14 feet had been admitted by the *sahukars* as sufficient for a circular road, that finding was irrelevant for the decision of the case. There is no similarity between the eastern side of the *mandi* where there was already a thoroughfare and the other three sides where this 14 feet *phirni* was to be carved out of land which was not at that time a public thoroughfare. The admission of the *sahukars* could only be taken to mean that 14 feet was sufficient as a minimum; it could not be taken to mean that on that side of the *mandi* where the street was already more than 14 feet wide it had to be cut down to 14 feet.

I am of opinion that in this case the defendants have not discharged the burden of proving that the land proposed to be sold was in fact no longer required as a public street. *Prima facie*, it was a part of the public street and as pointed out in *Municipal Committee, Delhi v. Mahomed Ibrahim* (1), the public have a right to use every part of the public street, not merely the metalled portion in the centre. That being so, it seems to me that the plaintiff has a good cause of action against the Municipal Committee, and has established his case. It has also been contended by the Counsel for the defendants that an injunction should not be granted because this is a case in which damages can be assessed. I find myself unable to accept this contention. It is true that the plaintiff in his evidence made a general statement that the value of his houses has been reduced by Rs. 2,000 or Rs. 3,000, but this cannot be taken as being equivalent to an accurate estimate by him of the damage which he would suffer which in the nature of things would not be capable of accurate assessment. I therefore accept the appeal against the decision of the learned District Judge and restore the order of the learned trial Judge granting the injunction sued for with costs against the defendants.

a.

Appeal allowed.

BHOPAL HIGH COURT

First Civil Appeal No. 4/19 of 1939

April 27, 1939

P. C. BIRDIE, J.

FAYAZ MOHAMMAD—PLAINTIFF—

APPELLANT

versus

SARDAR KHAN—DEFENDANT—

RESPONDENT

Tort—Malicious prosecution—Damages, suit for—Defendant making report to Police about rioting—Police after investigation prosecuting plaintiff—Subsequent acquittal—No proof that report was false and based on enmity—Defendant held not liable for damages.

Where, in a suit for damages for malicious prosecution it is found that the defendant himself had filed no complaint in Court against the plaintiff, but had merely entered a report with the Police for rioting etc., and the Police, after due investigation and making sure that the report of the defendant was correct, had filed the *chalan* against the plaintiff, who, after judicial inquiry, was acquitted and the plaintiff has not proved that the report of the defendant was false and based on enmity, and to cause injury to the plaintiff no responsibility for damages lies on the defendant. 125 Ind. Cas. 667 (1), relied on.

A. against the judgment of the Sub-Judge, Bhopal.

Mr. Mohammad Yaqub Khan, for the Appellant.

Mr. Mohammad Nasiruddin, for the Respondent.

Judgment.—This first appeal is filed by Fayaz Mohammad plaintiff-appellant against the judgment of the Sub-Judge, Bhopal. The said plaintiff filed a suit in the lower Court, against Sardar Khan defendant, for the recovery of Rs. 700 as damages for malicious prosecution, and declared that on January 3, 1934 the defendant entered a report at the Kotwali, Bhopal, accusing Kareemullah, Yaqoob Ali etc., of rioting, causing grievous hurt etc., and out of enmity, and without reasonable cause, quite falsely, and contrary to facts, added the plaintiff's name also to the names of the accused, and later the plaintiff was produced in the Court as an accused, and the defendant attempted to have the plaintiff convicted. On February 5, 1934 the defendant got the Police to present a *chalan* against the plaintiff on the same groundless report, which was based on enmity, under ss. 139 and 318, Bhopal Penal Code, in the Court of the District Magistrate, Bhopal which was transferred to the Court of the Special Magistrate, and after over one and a half year's continuous struggle and worry, the said charge was adjudged false and

groundless and the plaintiff was declared innocent and acquitted on September 30, 1935. A warrant of arrest was issued against the plaintiff, who had to remain in custody till some arrangement could be made about furnishing security, and after that he had to be present in Court for 56 hearings, owing to which the plaintiff received much physical and spiritual injury, and suffered great indignity, and had to bear a lot of expenses to get himself acquitted. Keeping in view the status of the defendant, a suit for the recovery of only Rs. 700 as damages is being filed, and it is prayed that a decree for the said amount be passed after inquiry.

The defendant, in his written statement declared that the criminal complaint, which the defendant had filed against the plaintiff, and on which the Police had presented a *chalan*, was quite true, but the plaintiff was acquitted through sheer good luck. The defendant had no grudge or enmity against the plaintiff, nor did the defendant file the complaint with the Police to cause injury to the plaintiff; the defendant had reported the true incident which had occurred. The plaintiff has now filed owing to enmity this suit which deserves to be dismissed.

The lower Court framed two issues, and after enquiry, dismissed the plaintiff's suit, against which the appeal is filed.

The arguments of the Vakils for the parties were heard, and the record was inspected. It is apparent that the defendant himself had filed no complaint in Court against the plaintiff, he had rather entered a report with the Police for rioting etc., and the Police, after due investigation and making sure that the report of the defendant was correct, had filed the *chalan* against the plaintiff, who, after judicial inquiry, was acquitted. Under the circumstances, no responsibility for damages lies on the defendant.

In *Nagendra Nath Ray v. Basanta Das* (1) it was decided as follows :

"If defendant gives correct information to Police, and the Police, without further interference, think fit to prosecute plaintiff, defendant is not responsible in damages."

The plaintiff-appellant could not prove at all that the defendant-respondent had entered the report in Police, which was false and based on enmity, and to cause injury to the plaintiff-appellant. Under these circumstances, this appeal, in my

(1) A. I. R. 1930 Cal. 392; 125 Ind. Cas. 667; 57 O. 25; Ind. Rul. (1930) Cal. 587.

opinion, cannot be entertained, and is, therefore, rejected and the judgment of the lower Court is upheld. The plaintiff-appellant shall bear the costs of the defendant-respondent.

s.

Appeal dismissed.

ALLAHABAD HIGH COURT

Criminal Revision No. 747 of 1939

January 9, 1940

RAGHPAL SINGH, J.

HAIDAR ALI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

Penal Code (Act XLV of 1860), ss. 366, 376, 498—Offence under ss. 366 and 376 not established—Conviction under s. 498, propriety of.

A person who is prosecuted under ss. 366 and 376, I. P. O., cannot be held to be guilty of having committed an offence under s. 498, I. P. O., if the offences with which he was charged are not established. *Empress of India v. Kallu* (1), *Tara Prasad Laha v. Emperor* (2), *Chemon Garo v. Emperor* (3), 145 Ind. Cas. 922 (4) and *Bangaru Asari v. Emperor* (5), relied on.

Cr. R. from an order of the Additional Sessions Judge, Pilibhit, dated June 27, 1939.

Mr. Waheed Ahmad Khan, for the Applicant.

The Deputy Govt. Advocate, for the Crown.

Order.—This is a revision application by one Haider Ali against his conviction under s. 498, I. P. O. The prosecution story was that one *Mst.* Kundania was the wife of Lachhman and she had been abducted by the accused with the intention of committing rape on her. The prosecution of the accused was started under s. 366 and 376, I. P. O. The learned trial Magistrate came to the conclusion that these charges were not established. He however held that the accused had committed an offence under s. 498, I. P. O., and therefore convicted him of the same and sentenced him to rigorous imprisonment for a period of one year. The accused preferred an appeal against his conviction and sentence which was unsuccessful. He has now come up in revision to this Court. The question taken up by learned Counsel appearing for the applicant is purely legal. It has been contended that a person who is prosecuted under ss. 366 and 376, I. P. O., cannot be held to be guilty of having committed an offence under s. 498, I. P. O., if the offences with which he was charged are not established. On a

consideration of this question I am of opinion that the contention of learned Counsel for the applicant is correct and must therefore prevail.

There is a string of authorities which are in favour of the applicant's contention. The first case on the point is *Empress of India v. Kallu* (1). The next case on the point is a Full Bench ruling of the Calcutta High Court: *Tara Prasad Laha v. Emperor* (2). Their Lordships held that the word "complaint" referred to in s. 199, Criminal P. O., means a "complaint" as defined by s. 4 cl. (h) of the Code. In the case before me there was no complaint by the complainant as defined in the Criminal P. O. In *Chemon Garo v. Emperor* (3), it was held that where an accused person was sent up for trial under s. 376, I. P. O., he could not be convicted for adultery because there was no complaint of an offence of adultery against the accused and the mere fact that the husband had appeared as a witness for the prosecution did not alter the matter. The next case to which I wish to refer is *Emperor v. Jagdamba Prasad* (4). In this case the learned Judge who decided it has referred to various rulings on the subject and after a consideration he came to the conclusion that where an accused was tried on a charge under s. 366, I. P. O., he could not be convicted of an offence under s. 498 of the Code in the absence of a complaint made by the husband under that section and that the fact that the husband appeared and gave evidence for the prosecution at the trial under s. 366-A could not take the place of a complaint by the husband which is necessary. The same view was taken by the Madras High Court in *Bangaru Asari v. Emperor* (5). My view therefore is that the conviction of the accused applicant is bad. The result therefore is that this revision application is allowed, the conviction and sentence of the accused are set aside and he is acquitted. He is on bail. He need not surrender and his bail bonds stand discharged.

D.

Application allowed.

- (1) 5 A 233; A W N 1883, 1.
- (2) 30 C 910; 8 C W N 17 (F B).
- (3) 29 C 415; 6 C W N 677.
- (4) 55 A 871; 145 Ind. Cas. 922; A I R 1933 ALL 626; (1933) Cr. Cas. 1005; 34 Cr. LJ 1227; (1933) A L J 701; 6 R A 211.
- (5) 27 M 61; 2 Weir 236.

PATNA HIGH COURT

Miscellaneous Judicial Case No. 41 of
1936

August 25, 1939

FAZL ALI AND MANOHAR LALL, JJ.
COMMISSIONER OF INCOME-TAX,
BIHAR AND ORISSA

versus

Maharajadhiraj Kumar VISHESHWAR
SINGH—ASSEESSEE

Income Tax Act (XI of 1922), ss. 4, 66—Permanent lease granted—Salami received by lessor once for all, whether capital receipt or income—Case sent back to Commissioner—Duty of Commissioner and procedure to be followed—Lease—Construction—Lease held permanent one.

Per *Fazl Ali, J.*—Income in the Income Tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium or *salami* which is paid once for all and is not recurring payment, hardly satisfies this test. If the premium represents the whole or part of the price of the land it cannot be income. [p. 693, col. 2.]

Per *Manohar Lall, J.*—It would be impossible to lay down a hard and fast rule that a *salami* can in no case be taxable but the question would depend upon the facts and circumstances of each case. 126 Ind. Cas. 193 (21), relied on. [p. 697, col. 1.]

Where a certain amount was received by a lessor as *salami* once for all at the time of granting a permanent lease:

Held, that the *salami* must be treated as capital receipt and not as income.

[Case-law reviewed.]

When the case went back to the Commissioner he sent up a re-statement of the case, but without hearing the assessee. The High Court was compelled to send the case back to the Commissioner once again in order that the case might be re-stated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee. The matter then went back to another Commissioner, who instead of re-stating the case, as he was ordered to do, stated that he had no power within s. 66 (4), Income Tax Act to vary an opinion given under s. 66 (2) if no new facts were admitted.

Held, that the Commissioner was in duty bound to carry out the order of the High Court. He should have re-heard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It was also open to the Commissioner to make a submission that the High Court should decide the case not upon the case which he was re-stating (as ordered) but upon the finding of fact already arrived at by the previous Commissioner. [p. 698, col. 2.]

A lease stated that the lands had been settled with the lessee to enable him to build a *gola* house and a platform for rice mill. The settlement was made for an indefinite (*bemeyadi*) period and it provided that neither the lessee nor his heirs and representatives would put forward any plea or objection with regard to the payment of rent. It was further provided that in the event of default of two consecutive instalments, the lessor or his heirs and representatives, would have the power to realize the arrear rent with interest thereon and dispossess the lessee. The lessee bound himself not to sell the residential right to anyone without a

reference to the landlord or his heirs and representatives and without obtaining his or their permission in writing:

Held, that the lease was intended to be a permanent one. 39 Ind. Cas. 658 (1), explained, 77 Ind. Cas. 32 (3) and 133 Ind. Cas. 732 (4), relied on. [p. 692, col. 1.]

Misc. Judi. Case reference made by the Commissioner of Income-tax, Bihar and Orissa, dated July 14, 1936.

Mr. S. M. Gupta, for the Income-tax Department.

Dr. Sir Sultan Ahmad, Messrs. Murari Prasad, S. P. Srivastava, G. Misir and Prem Lall, for the Assessee.

Fazl Ali, J.—The question to be decided in this reference is whether a sum of Rs. 1,800 received by the assessee as *salami* for the settlement of certain lands during the years of assessment is taxable. The lands settled are $4\frac{1}{2}$ bighas in area, and the terms of the settlement are to be found in a *kabuliyat* which is printed at p. 16 of the paper book. Under this *kabuliyat* the settlement was made for an indefinite (*bemeyadi*) period with effect from the beginning of 1340 F. S. and it was provided that rent was payable by the lessee year after year, and "neither the lessee nor his heirs and representatives shall put forward any plea or objection with regard to the payment thereof."

It was further provided that in the event of default of two consecutive instalments, "the lessor or his heirs and representatives, shall have the power to realize the arrear rent with interest thereon and dispossess the lessee by taking proceedings in Court,"

and that "the landlord or his heirs and representatives shall have the power to enhance the rent if at any time the area of the land, as specified in the lease, is on measurement found increased."

Lastly the lessee bound himself not to sell the residential right to anyone without a reference to the landlord or his heirs and representatives and without obtaining his or their permission in writing. The lease clearly stated that the lands had been settled with the lessee to enable him to build a *gola* house and a platform for rice mill. The first question which arose upon the terms of this lease was whether the lease was a permanent one or it created a mere tenancy-at-will or a tenancy from year to year. The learned Commissioner of Income-tax relying upon the decision of this Court in *Parshan Kuer v. Tulsi Kuer* (1), held that the lease was not a permanent one. That case however, is no authority for the proposition that a *bemeyadi patta* can in no circumstances be regarded as a permanent

(1) 2 P L J 180; 33 Ind. Cas. 658; A I R 1917 Pat 46; 1 P L W 447; (1918) Pat. 11.

lease and it has been fully explained in two subsequent cases, viz. *Kangali Charan v. Surja Narain* (2) and *Forbes v. Hanuman Bhagat* (3). In the last-mentioned case where the lessee had obtained settlement of a parcel of land under a *bemeyadi* lease for the purpose of erecting a *gola* on the demised land, it was held that the lease was intended to be a permanent one and not from year to year. In *Janki Nath Roy v. Dina Nath Kundu* (4), the Privy Council held a *bemeyadi patta* to be a permanent lease in the following circumstances: the lease recited that the executant was already in possession of the premises (a hat, *bazar bandar* and *ghat*) under a *meadi* settlement, that his request for a *bemeyadi* settlement had been granted by the executee on receipt of a premium and on an annual rent being fixed, (such premium being a substantial sum and higher than previously), that the executant had been called upon to execute a *kabuliyat* whereupon he was executing the present *bemeyadi kabuliyat* and promising to abide by the terms as set forth therein. Among the terms was one for an enhancement of rent in specified circumstances and another forbidding *bemeyadi* settlements by the lessee whereas other imposed restrictions on the powers of the lessee to dig tanks and erect masonry structures and also provided for the lessor assuming *khas* possession in certain circumstances.

In my opinion the fact that the lands in the present case were let out for the purpose of enabling the lessee to build a *gola* and a platform for a rice mill strongly suggests that the lease was intended to be a permanent one. This inference is supported by two other facts, viz., (1) that no term was fixed in the lease and (2) provision was made for certain rights being exercised not only by the lessor and the lessee but by their heirs and legal representatives. It is abundantly clear on reading the lease that it was to continue as long as the terms settled between the parties were carried out by the lessee and his heirs or legal representatives, and this shows that the lease was intended to be a permanent one. Besides, the settlement was described as a *mukarrari* settlement in the landlord's own *chalan*, a contemporaneous document, to

which reference has been made by the Commissioner of Income-tax as evidencing the payment of the *salami* of Rs. 1,800.

The next question to be determined is whether this *salami* is to be treated as capital receipt or as income. It may be stated here that this is not the first time that this case has come up before this Court. There was an earlier reference to this Court by another learned Commissioner of Income-tax, and in that reference the main argument advanced by him in favour of the view that the *salami* was taxable, was that the lease was not a permanent one but for a period of three years only. It was subsequently discovered that the learned Commissioner of Income-tax had by mistake overlooked the lease under which the *salami* was received and had proceeded to refer to another lease with which we are not at all concerned in this case. The case was then sent back to the Commissioner and in the second reference also the learned Commissioner justified the taxation of *salami* on the ground that the lease was not a permanent one. The implication of the argument clearly was that if the lease was a permanent one, there was room for holding that the *salami* was a capital receipt and not income. Before us however learned Counsel for the Income-tax Department has adopted a bolder line of argument and contends that even if the lease is held to be permanent, the sum of Rs. 1,800 received as *salami* must be treated as income and not as capital receipt and he relies, in support of this contention, on the following observations made by Mookerjee, Ag. C. J. in *Birendra Kishor v. Secretary of State* (5), at p. 780 :

"When a new tenancy is created in respect of unoccupied wasteland or lands which had been abandoned by a previous tenant, the premium represents essentially the capitalized value of a portion of the rent. We are not unmindful that in *Dinanath Mookerjee v. Debnath Mullick* (6), it was ruled that the money payable by a lessee in consideration of a lease granted, whether called *nazar* or *salami*, cannot be looked upon as rent, but is simply a debt due upon a contract and is recoverable by a suit in a Small Cause Court on the money bond executed in that behalf by the tenant in favour of his landlord. It is not necessary to hold that such *salami* is rent within the meaning of the definition given in the Beng. Ten. Act or the T. P. Act. The expression used in the Income-Tax Act, is 'rent or revenue,' and this is obviously wider than rent as defined in the Beng. Ten. Act or the T. P. Act. There can be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalized

(2) 6 P L J 687; 65 Ind. Cas. 303; A I R 1922 Pat. 161; (1922) Pat. 90.

(3) 2 Pat. 452; 77 Ind. Cas. 32; A I R 1924 Pat. 88; 4 R L T 414; 1 Pat. L R 190.

(4) 35 O W N 982; 133 Ind. Cas. 732; A I R 1931 P O 207; Ind. Rul. (1931) P O 268; 61 M L J 377; 54 C L J 412 (P O).

(5) 48 O 766, (780); 61 Ind. Cas. 112; A I R 1921 Cal. 262; 32 C L J 433; 25 O W N 80.

(6) 13 W R 307; 5 Beng. L R App. 1.

value of the sum periodically payable taken along with the premium constitutes in the aggregate the consideration for the grant..... From this point of view, we must hold that the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as 'rent or revenue' derived from land, within the meaning of that expression as used in the definition of 'agricultural income' in s. 2 (1)(a)."

The view put forward by Mookerjee, Ag. C. J., was however, not accepted by this Court in *Raja Shiva Prasad Singh v. Emperor* (7). In that case the question was, whether a sum of money received by the assessee by way of *salami* or premium for granting a mining lease was taxable. Sir Dawson Miller who delivered the judgment in the case dealt with the question as follows:

"There is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases, to have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors, but with regard to *salami* it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather than of kind, recurring payments at short periods being treated as income and a single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged in s. 4 of the Act itself, and, as has been observed, the Income Tax Acts are not cast upon absolutely logical lines. Nor does there appear to be any reason why we should extend the exception made in the case of rent and royalty to the case of a non-recurring payment made to cover a long period."

In my opinion, these observations fully apply to the present case. If the document with which we are concerned in the present case is a permanent lease, then there can be no doubt that the lessor has by this document permanently parted "with the direct enjoyment of the property by himself and his successors," and the lessee though he is not a purchaser out and out of the entire interest in the land was undoubtedly purchaser of a large interest therein. In my opinion, there is no difference in principle between the *salami* realized under the present lease and the *salami* realized on a lease for 999 years in regard to mineral rights. In both cases the real question is whether the *salami* or pre-

mium represents the price for parting with the land, or it is only advance rent. If it can be argued that the *salami* is in fact advance rent, I think that it will be equally plausible to say that rent is to be regarded as "deferred price" of the land. In my opinion there is vital distinction between a single payment made at the time of the settlement of the land and recurring payments made during the period of its enjoyment by the lessee. The distinction is clearly recognized in s. 105, T. P. Act, which defines both premium and rent. In this section, a lease of immovable property is defined as "a transfer of a right to enjoy such property" and it is clearly stated that "the price is called the premium and the money, share, service or other thing to be so rendered is called the rent." It is obvious that if the premium represents the whole or part of the price of the land it cannot be income. As pointed out by Sir George Lowndes in *Commissioner of Income-tax, Bengal v. Messrs. Shaw, Wallace and Co.* (8) income in the Income Tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium or *salami* which is paid once for all and is not recurring payment, hardly satisfies this test. I concede that in some cases where the rent is ridiculously low and the premium abnormally high, it may be possible to argue that the premium includes advance rent, but it has not been suggested anywhere that this is one of such cases. In my opinion, upon the facts stated by the learned Commissioner of Income-tax the sum of Rs. 1,800 received in this case must be treated as capital receipt and not as income. I would therefore answer the question pronounced by the learned Commissioner in the negative. The assessee will be entitled to a hearing fee of ten gold mohurs.

Manohar Lall, J.—I have come to the same conclusion. I have no difficulty whatsoever in construing the *kabuliyats* printed at pp. 16 and 18 of the paper-book. The terms of these *kabuliyats* have a close resemblance to the *kabuliyat* construed in *Forbes v. Hanuman Bhagat* (3). By these *kabuliyats* a settlement was made for erecting a *gola* house and for putting a platform for the rice mill given in lease to the lessee by the assessee by another

(8) 6 I T O 178; 136 Ind. Cas. 742; A I R 1932 P O 138; 59 I A 206; 59 C 1343; Ind. Rul. (1932) P O 156; 9 O W N 515; 36 O W N 653; (1932) M W N 618; 55 C L J 386; (1932) A L J 588; 34 Bom. L R 1033; 36 L W 63; 63 M L J 124 (P O).

(7) 1 I T O 384; 82 Ind. Cas. 653; A I R 1924 Pat. 679; 4 Pat. 73; 5 P L T 497.

document. The settlement was for an indefinite period and was expressly made descendible to the heirs and representatives of the lessee. The usual covenant against alienation is also to be found obviously in the interest of the lessor so that he may not be compelled to recognize an undesirable tenant. In such circumstances the principle enunciated by their Lordships of the Judicial Committee in *Janki Nath Roy v. Dina Nath Kundu* (4) assists in coming to a decision. I hold in agreement with my learned brother that the terms of these *kabuliyats* coupled with the description thereof given in the contemporaneous document, namely the *chalan* of September 14, 1932, point to the clear conclusion that the settlement was in perpetuity. By the settlement evidenced by these *kabuliyats* the assessee admittedly received a sum of Rs. 1,800 by way of *salami* or premium and also secured to himself a fixed annual income calculated at the rate of Rs. 100 a *bigha*. The question which arises for consideration is whether the amount of Rs. 1,800 received by the assessee as the result of these transactions for a permanent settlement attracts income-tax. I propose in the first instance to examine some cases which are of assistance in order to decide how this question is to be approached, bearing in mind that income-tax, as has been stated over and over again, is a tax on income, it does not tax capital: see *Attorney General v. London County Council* (9) at p. 293. In the very recent case reported in *Commissioners of Inland Revenue v. British Salmson Aero Engines, Ltd.* (10) the Master of the Rolls pointed out the difficulty which arises in a large number of cases like the present, which fall upon the borderline. At p. 43* he makes this observation:

"Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter almost as satisfactorily as an attempt to find reasons, but that class of question is a notorious one, and has been so for many years."

As I stated before the only question which has to be decided in the present case is whether the amount of Rs. 1,800 which was admittedly received by the assessee is an income for the purpose of the Income Tax Act. The term income, as has been often pointed out, has not been defined in the Indian Act. It is always a matter of difficulty and embarrassment to draw a

line between what is a capital receipt and what is a revenue receipt, but there is well known distinction and a line must be drawn clearly and firmly.

The case already referred to *Commissioners of Inland Revenue v. British Salmson Aero Engines, Ltd.* (10), is useful and will be of assistance in deciding the present case. In that case the assessee by a certain agreement granted to the licensees an exclusive right for a period of ten years to construct, use and sell in a certain territory Salmson aero engines. The consideration for the licence was that the licensees were to pay a fixed sum of £25,000 payable in three instalments and in addition to these payments and as royalty a sum of £2,500 and a like sum each twelve months during the following nine years. The question which required consideration was whether any of these sums, namely the fixed amount paid in a lump sum in three instalments and the fixed sum to be paid annually for nine years, were assessable to income-tax—the Crown contending that all these payments were income and the assessee insisting, on the contrary that all these payments were in the nature of capital receipts. The Master of the Rolls approached the subject in this way. He pointed out that in the agreement there was

"a fundamental difference in the nature of the two classes of sums in this sense, that the former class starts off by being a lump sum payment, definite and fixed, which is then to be payable by instalments. The other class is not of that description; no lump sum payment is referred to; it is on the face of it, nothing but an undertaking to pay yearly sums as royalty. Speaking quite apart from any close examination of authority, and simply regarding the distinction between those two things, it would appear upon the face of it that, with regard to the latter class, the parties are creating an obligation as between themselves which they choose to describe as a royalty payable each year at a fixed rate."

He then considers the argument that it is illegitimate to look outside the terms of the contract under which the licence was granted and observes:

"I do not wish to lay down any such proposition. What has to be ascertained in these cases is the true nature of a payment, that is to say, the true nature from an accountancy point of view, and that is a question of fact. I do not wish to say anything which will have the effect of circumscribing the matters which may properly be looked into in answering that question of fact."

I now give another quotation from p. 43*: "It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment: is it capital or is it income? and that question has to be decided, as it has to be decided in reference to other subject-matters, upon the particular facts of each

(9) (1899-04) 4 Tax Cas. 265, (293).

(10) (1938) 22 Tax Cas. 29; (1938) 2 K B 482; 107 L J K B 648; 159 L T 147; 62 S J 433; 54 T L R 904; (1938) 3 All E R 383.

*Pages of (1938) 22 Tax. Cas.—[Ed.]

case, including in those facts the contractual relationship between the parties. It has been said that the question is one of fact and it is when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, one does not mean that, in deciding it, questions of law may not have to be discussed and decided. For example, the construction of a contract may be one of the elements which must be taken into consideration in deciding that question; there may be cases where the construction of the contract is of itself the really decisive matter in answering the question. In this case the question of the contract and the terms of the contract is of cardinal importance. . . .

Gillat and Watts v. Colquhoun (11) was a converse case but some observations of Grove, J., are relevant. In that case the question was as to the annual expenditure which should be allowed to an assessee who had taken a lease after paying £34,000 as a premium with a liability to pay a ground rent of £250 a year, the lease being for 20 years. Grove, J., makes this observation at p. 79* :

"But in this case the lessee pays a ground rent of £250 a year and he paid £34,000 as a premium for the lease. The lease has virtually put him almost in the position of a free holder with a quit rent, though not quite that, because it is terminable at a certain time, but the rent is swallowed up, or what we may call the rent is swallowed up in the premium, leaving really a very small rent, much less than what would be real rent of the premises if they were let from year to year."

At the bottom of that page he states :

"I thought the fair mode would be taking the premium into consideration and the ground rent to take what an actuary would put as the fair rent for that lease for the time over which that lease extended; that is supposing a party had taken the lease upon an annual rent, and had paid no premium, and the ground rent was, so to speak, absorbed in the rack-rent or the annual rent of the premises. I still adhere to that idea as the fair mode of compensation."

He puts the question to be decided at p. 80* thus :

"Therefore we have virtually got to this question. Is that the proper sum to be deducted from the income-tax, or is whatever fancy price the party pays for a speculative purchase to be deducted? I think the former of these two is the proper alternative, that is to say, the one insisted upon by the Crown in this case. The other would lead to extreme difficulty, and it would lead possibly to a great deal of fraud because fictitious prices would be given; £50,000 would be handed over for a lease, and £20,000 out of that would be returned the next day, or some arrangement of that sort would be made, and the price paid would afford no reasonable criterion for saying what annual deduction ought to be made from the annual profits or gains."

He finally adopts the test at p. 82* that "the real and proper basis of calculation is the trade value or rent of these premises paid by persons who would take these premises as they would take any other premises which are in the market or for sale, a willing lessee and a willing lessor, the one anxious to make the most of his premises, and the other

(11) (1883-90) 2 Tax Cas. 76.

*Pages of (1883-90) 2 Tax Cas.—[Ed.]

anxious to get the lease, who would settle the bargain upon fair terms, that is the proper criterion."

I take this case as deciding that such questions are really questions of fact which have to be determined by taking into consideration all the circumstances. Smith, J., at the end of his observations states :

"It also seems to me that this case, as my brother Grove says, resolves itself into a question of fact and not of law."

The Commissioners of Inland Revenue v. Adam (12), dealt with a situation where the assessee had obtained a right to deposit soil on a definite area of land at a certain rate for a period of eight years by agreeing to pay to the owner a sum of £3,200 payable in two instalments of £200 each at the end of every six months each year. The question was whether the assessee was entitled to deduct from his assessable income of a sum of £400 which he had paid in the year under consideration. The Lord President pointed out that in a question of this sort both form and substance must be considered and he pointedly referred to the fact that £3,200 and the instalments of £200 were payable whether the quantities referred to in the contract were actually deposited or not and came to the conclusion that in considering this difficult question, which was on the border line, his opinion on the whole was that the price of £3,200 whether paid in instalments or in a lump sum did not alter the character of the price as a capital outlay and that the assessee could not be entitled to say that the instalments were paid out in each year for the purpose of earning the profits of that year, in any other sense than it would be true to say that any capital outlay is made for the purpose of earning profits of the years which follow its expenditure. Lord Sands took the same view and agreed that in a matter of this kind one cannot altogether ignore the form because

"when parties contract in certain forms different results may flow according to the form of the contract however little difference there may be in substance."

Lord Blackburn took a different view and gave a dissenting opinion. He makes some pertinent observations at p. 43* :

"If the site has been depreciated in value by the deposits laid upon it, it may very well be that the landowner was fully justified in attributing each and all of the payments to be made to him as capital payments. But if the converse is the case and the value of the land remains unaltered, or possibly has appreciated for building purposes, it would hardly

(12) (1928) 14 Tax Cas. 34; (1928) S O 738; (1928) Sc. LT 476.

*Page of (1928) 14 Tax Cas.—[Ed.]

appear to be a good answer to a claim against him for income-tax on the sums of £400 received annually, to refer to the agreement as evidence that he had received them as capital payments and not as fruits of his land."

This case was recently considered in *Race Horse Betting Control Board v. Wild* (1927) 11 Tax Cas. 723 (13), is the well-known case of *Codstantinesco v. Rex* (14). The question there was as to the assessability of certain sums received by the patentee as the result of an award made in his favour by the Royal Commission on Awards to Inventors. The award was made after the user of the patent had taken place and the claim which had been settled was a claim by the assessee for successive uses of the invention. Lord Cave in giving his opinion in the House of Lords stated as one of the facts in the case that the corpus of the patent was not taken away from the assessee and having regard to a number of facts he stated:

"In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, and annual profits or gains, within the meaning of the Income Tax Act."

Rowlatt, J., who decided the case in the first instance and whose view was upheld by the Appellate Court and House of Lords gives an apposite illustration at p. 740*. Suppose a patentee demands £25,000 as a sum down and tells the licensee "use it as much as you like for a definite time or for the whole length of the patent." In such a case the decision was:

"That will clearly be a lump sum. I would not be parting with the patent...but it would be clearly a capital sum in my judgment."

The Master of the Rolls at p. 743* notices one or two cases where a capital sum is reached by an estimate derived from income, e. g., so many years' purchase for a piece of land. I will make reference to only one more case; it is needless to refer to the very large number of cases which are to be found in the English Reports in deciding whether the annual payment concerned in this case was in the nature of a capital payment or a capital receipt or was in the nature of revenue payment or revenue receipt. For instances see the Annuity cases beginning from *Foley v. Fletcher* (15), the *Tikari* case which went up to the Privy Council from this Court *Commissioner of Income-*

(13) (1938) 22 Tax Cas. 182.

(14) (1927) 11 Tax Cas. 730; 43 T L R 727.

(15) (1858) 3 H & N 769; 28 L J Ex. 100; 5 Jur (ns) 342; 7 W R 141; 33 L T (os) 11; 117 R R 987.

tax v. Gopal Saran Narain Singh (16), and *Gopaal Saran Narain Singh v. Commissioner of Income-tax, B. & O.* (17) the Railway cases of which the leading type is *Scoble's case* (18) and lastly *Minister of National Revenue v. Catherine Spooner* (19) sale of land for cash and 10 per cent. mineral oil was decided as a question of fact.

The case which I wanted to refer was the case in *Commissioners of Inland Revenue v. Thomas and Sons, Ltd.* (20) a case decided in July 1938, by the Court of Sessions Scotland. The facts of the case were that the assessee company lent a sum of money to an Indian company under an agreement which provided that interest was to be paid at 3 per cent. per annum and that on repayment of the principal sum or any part thereof there should also be paid a premium varying with the date of re-payment. The premiums prescribed by the agreement for each of the ten years of the currency of the loan are set out in the agreement, the first of them is at the rate of 2 per cent.; the second is at 4 per cent.; in each of the next five years there is an increase of $2\frac{1}{2}$ per cent. in arithmetical progression and for the last three years of the ten the rate of increase per annum is 3 per cent. The full amount of the loan was ultimately repaid to the assessee together with the accrued interest and the premiums payable under the agreement. The contention raised by the assessee was that the premiums were part of the principal sums repaid and were capital payments. The Lord President decided the question as a question posed on the particular terms of the contract. In his opinion the premiums were in the nature of annual profits or gains being part of the consideration given by the borrowers for the use of the capital lent to them, and part of the creditor's share of the profit which the borrower is presumed to make from the use of the money and observed:

"It is not irrelevant to notice that the agreement (16) 71 T O 257; 151 Ind. Cas. 477; A I R 1934 Pat. 384; 13 Pat. 661; 15 P L T 325; 7 R P 97 (S B).

(17) 8 I T O 340; 156 Ind. Cas. 856; A I R 1915 P O 143; 14 Pat. 552; 62 I A 207; 8 R P O 1; 1935 O W N 810; 16 P L T 531; (1935) M W N 606; 69 M L J 190; 42 L W 243; (1935) A L J 925; 39 O W N 1093; 37 Bom. L R 817 (P O).

(18) (1902) 4 Tax Cas. 478.

(19) (1923) A C 684; 146 Ind. Cas. 747; A I R 1933 P O 211; 102 L J P O 205; 50 T L R 11; 38 L W 621; (1933) A L J 1428; 6 R P O 29; 66 M L J 85 (P O).

(20) (1938) 22 Tax Cas. 178.

*Pages of (1927) 11 Tax Cas.—[Ed].

provides for a payment by way of premium which may be made in each year of the currency of the loan, and that, taken along with the stipulated interest, the effect of this provision is to give the lenders a return on their capital varying between 5 per cent. in the earlier years and something over 5½ per cent. in later years, a rate which can only be regarded as a reasonable return for the use of their capital and not as to any extent an accretion to it."

It was however pointed out that "the fact that the borrowers would, under the contract pay a premium only when they chose to make a capital payment does not necessarily have the effect of making the premium a capital payment any more than the lenders' waiver of their right to exact payment of interest each year as the effect of converting the payment of arrears of interest into a capital payment."

This case therefore may also be taken as deciding that each case ought to be decided by the facts and circumstances of that case. I respectfully agree with the observations made by Sir George Rankin in *Gooptu Estates, Ltd. v. Commissioner of Income-tax, Bengal* (21) where that learned and distinguished Chief Justice pointed out that it would be impossible to lay down a hard and fast rule that a *salami* can in no case be taxable but that the question would depend upon the facts and circumstances of each case. I think that the above review of some leading cases suggests this as the proper way of approach while deciding a question like the present before us. But the learned Standing Counsel wanted to rely, in support of his argument that a *salami* like the present is always taxable as an income upon the observation to be found in *Birendra Kishore v. Secretary of State* (5) where it was stated that a *salami* is a capitalised rent. But this decision was expressly overruled by a later Full Bench decision of that very Court in *Nawabzadi Meher Bano Khanum v. Secretary of State* (22). Walmsley, J., who was one of the learned Judges in the case reported in *Birendra Kishore v. Secretary of State* (5) adhered to the opinion which he expressed in that case, but he was overruled by his other learned colleagues. In a case of this Court in *Raja Shiva Prasad Singh v. Emperor* (7) this decision of the Calcutta High Court was disapproved. The Patna case dealt with a lease of a coal field for 999 years for a fixed premium at an annual rent. The learned Chief Justice pointed out that the essence of the transaction was (1) that the *salami* was really

(21) 4 I T O 146; 126 Ind. Cas. 193; A I R 1930 Cal. 1; 57 C 910; 34 O W N 327; 50 O L J 375; Ind. Rul. (1930) Cal. 689.

(22) 29 O W N 969; 89 Ind. Cas. 997; A I R 1925 Cal. 929; 53 O 34; 42 O L J 151 (F B).

in the nature of a premium paid for granting a lease, in other words it was the purchase price of a leasehold interest, and (2) that

"in so far as rent and royalty are reserved he the assessee is founding an annual increment to the income of the Raj for himself and his successors but with regard to *salami* it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but is paid in exchange for long term transferred."

With respect I agree with these observations and would hold that this applies in proprio vigore to the *salami* obtained by the permanent settlement in the present case. I notice that the Commissioner, Mr. H. D. Chatterji, was inclined to take the same view in his order of reference to this Court which is to be found at pp. 9-10 of the original paper book dated July 24, 1936, but as he thought that the period of the settlement in the document which he was considering was for three years only he came to the conclusion that the amount of *salami* was merely a rent in advance. That Commissioner expressly referred to the case in 4 Pat. 73 (7), also reported in 1 I. T. O. 384 (7) and sought to distinguish it on the ground that in the present case the lease was for three years only and did not cover a long period.

The provisions of s. 105, T. P. Act, were referred to in the course of the argument before this Court in the *Raja of Jharia's case* (7). Section 105 distinctly defines a lease in this country as a transfer of a right to enjoy immovable property for a time or in perpetuity in consideration of a price paid or for a recurring rent or annual services or both; and also mentions that "the price is called the premium." The Legislature has thus drawn the very distinction between a price and a recurring payment which the eminent Judges in England have drawn while deciding cases under Income Tax Act. In the present case there is no suggestion that the term embodied in the contract evidenced by the *chalan* and the *kabuliyats* was not a fair expression of what the parties intended. It was argued however that the amount of premium will always bear some proportion to the amount of rent which is ultimately fixed and therefore it ought to be held that the premium should be taken in law as an advance payment of rent. I think the argument is fallacious; the premium or the price will always

be fixed on taking into consideration the amount of rent the lessor will receive, and he may vary it as he does in practice with the amount of *salami* which he insists on receiving as a condition precedent for the parting with the land in favour of the lessee. It may be that in some cases the evidence might show that the parties fixed a particular *salami* as an advance payment of rent. In those cases I would not hesitate to treat that receipt as income but I am of opinion that it is not open to me to treat a premium in the nature of a *salami* as in this case as a revenue receipt. It should be noticed that the amount of Rs. 1,800 was received not because of the use of the land but before the land was put into use by the assessee. For these reasons I have no hesitation in holding that this amount of Rs. 1,800 was a capital receipt in the hands of the assessee as it was a capital payment on behalf of the lessee.

I wish to make a few observations regarding the procedure adopted by the Commissioner of Income-tax in sending up the present reference. It appears that the assessee has been considerably harassed by the manner in which the proceedings for a reference to this Court were conducted by the Commissioner. On November 16, 1937, when the reference came up for hearing before the learned Chief Justice and Agarwala, J., it was discovered that by some unfortunate slip there was an error in the statement of the case. The learned Judges in agreement with the submission on this point by the learned Advocates for the assessee and the Income-tax Department directed that the case should be sent back to the Commissioner in order that he may re-state the case with such finding of fact as may be considered necessary. The assessee was in no way to blame when the Commissioner gave his opinion regarding a document which admittedly referred to some other case. When the case went back to the Commissioner he sent up a re-statement of the case, but unfortunately without hearing the assessee. The re-stated case came up before this Court once again on November 28, 1938, when the order which we passed was that the Court was compelled to send the case back to the Commissioner once again in order that the case might be re-stated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee. The matter then went back to another Commissioner, who instead of re-stating the case, as he was ordered by this Court to do,

sent up a letter to this Court to the address of the Deputy Registrar (p. 2 of the supplementary paper-book). In that letter he says:

"I have not heard the party in regard to the opinion of the Commissioner. In any event I should not consider that I had power within s. 66 (4) to vary an opinion given under s. 66 (2) if no new facts were admitted."

In my opinion, the Commissioner was in duty bound to carry out the order of this Court. He should have re-heard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It was also open to the Commissioner to make a submission that the High Court should decide the case not upon the case which he was re-stating (as ordered) but upon the finding of fact already arrived at by the previous Commissioner on August 4, 1938. I do not agree with the view expressed by the Commissioner that the case did not stand at large, whether under s. 62 (2) or s. 66 (4). It was within the jurisdiction of the High Court to require the Commissioner to re-state the case which was not found satisfactory by this Court; and, if the Commissioner was dissatisfied with this order, he should have moved their Lordships of the Judicial Committee against the order passed by this Court. But so long as that order stood, this Court expected that it should be carried out to the very letter and in the spirit in which the order was worded. The result of the procedure adopted by the Commissioner has been that a third hearing in this Court has been inflicted upon the assessee. The further evidence which Sir Sultan Ahmed wanted us to consider was the affidavit of the Chief Manager of the Raj regarding which upon being supplied with a copy the standing Counsel agreed that this would amount to a decision on the construction of the document in favour of the assessee. I am doubtful however how this affidavit can be used to supply the meaning of the terms in this document which are in no way ambiguous, or to help us in construing the document. I have therefore ruled this affidavit out of my consideration entirely in coming to a conclusion as to the meaning to be attached to the word "*bemeyadi*" in the documents or *kabuliyats* which fall to be construed. For these reasons I agree that the answer to the question should be in the negative and I also agree to the order of costs proposed by my learned brother.

S.

Answer in negative.

CALCUTTA HIGH COURT

Application in Insolvency Suit No 88
of 1938

June 20, 1939

PANCKRIDGE, J.

In re IGUSTINS ROHDIRICK.

Presidency Towns Insolvency Act (III of 1909), ss. 7, 17, 60 (2)—S. 7, scope of—Orders to be passed under—Pension payable by Government, if property of insolvent within s. 17—Debtor arranging with creditor to pay portion of pension in liquidation of debts—Pension papers deposited with creditor—Insolvency of debtor—Insolvency Court, whether can direct creditor to return papers to insolvent—Pensions Act (XXIII of 1871), s. 12—Arrangement between pensioner and his creditor to pay portion of pension to creditor and deposit pension papers with creditor—If falls under s. 12.

Although the jurisdiction given by s. 7, Presidency Towns Insolvency Act, is extensive, only those orders can be made under the section which are necessary for the purpose of the insolvency, that is to say, for facilitating the distribution of the assets among the creditors.

A pension payable by Govt. is not 'property' of the insolvent within the meaning of s. 17, Presidency Towns Insolvency Act, which vests in the Official Assignee on the making of the order of adjudication.

A pensioner arranged with his creditor to pay a portion of his pension monthly in liquidation of his debts and deposited the pension pay order and other pension papers with the creditor. On being adjudged insolvent the debtor applied to the Insolvency Court for an order directing the creditor to return pension papers to him:

Held, that the pension was not attachable and the Insolvency Court had therefore no power under s. 60 (2) to make an order for the return of the pension papers to the insolvent.

The language of the Pensions Act is very wide, and the transaction by which a pensioner arranges with his creditor to pay a certain portion of his pension month by month in liquidation of the sum previously advanced, and to deposit with the creditor his pension pay order and pension papers is clearly one of the class of transactions which s. 12, Pensions Act is enacted to prevent.

Mr. J. N. Majumder, for the Insolvent.

Mr. S. C. Roy, for Jagannath (Creditor).

Order.—This application raises an important question with regard to the position of creditors of Govt. pensioners who have the misfortune to be adjudicated insolvents. The facts are that the insolvent was adjudicated on his own petition on July 4, 1938. He was formerly an employee of the Posts and Telegraph Department of the Govt. of India, and on his retirement he was granted a monthly pension of Rs. 308 not after deduction of income-tax. Prior to his adjudication he had admittedly borrowed money from the opposite party, Jagannath Panday, in whose favour he had executed a promissory note for Rs. 5,000.

The insolvent states in his petition that he arranged with Jagannath Panday that he should pay a certain portion of his pension month by month in liquidation of the sum previously advanced, and should deposit with Jagannath his pension pay order and pension papers. Without these documents he is unable to draw his pension from Govt.

It appears that after the adjudication order the insolvent obtained the pension papers from Jagannath, who brought criminal proceedings against him. The criminal proceedings were abortive as the Magistrate held that the matter was one which should be dealt with by a Civil Court, and the papers were returned to Jagannath in whose custody they now are. The insolvent now applies that this Court should direct Jagannath to make over the pension papers to him. The application is made on notice to the Official Assignee. The insolvent contends that the arrangement under which he made over the papers to Jagannath is invalid and illegal because it was in contravention of s. 12, Pensions Act, 1871. Under s. 11 of that Act no pension granted by Govt. on account of past services, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment, sequestration, by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court. Under s. 12, all assignments, agreements, orders, sales, and securities of every kind made by a person entitled to any pension, mentioned in s. 11, in respect of any money not payable at or before the making thereof, on account of any such pension, or for giving any future interest therein, are null and void. The insolvent argues that the pension papers in the hands of Jagannath are a security within the meaning of s. 12, that by reason of that section the deposit of them by way of security is null and void, and that he is entitled to the return of the papers.

On the other hand, Mr. S. C. Roy, who appears for Jagannath, draws a distinction between a security and a possessory lien, and argues that what he has obtained does not fall within the former category. I do not propose to decide this question, though my inclination would certainly be to agree with the view put forward by the insolvent. The language of the Pensions Act is very wide, and in my opinion the transaction with which I am dealing is clearly one

of the class of transactions which s. 12 was enacted to prevent. The difficulty in making the order for which the insolvent asks is that I consider that it is beyond my power to make it in the exercise of the insolvency jurisdiction of the Court. Under s. 7, Presidency Towns Insolvency Act, the Court has power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of the property in any such case. In my opinion, although the jurisdiction given by s. 7 is extensive, only those orders can be made under the section which are necessary for the purpose of the insolvency, that is to say, for facilitating the distribution of the assets among the creditors.

Mr. Majumdar for the insolvent does not disagree with this construction of the section, but he maintains that if I make the order asked for, it will put the Court into a position to make an order under another section of the Insolvency Act for the benefit of the creditors generally. Now, it is conceded that a pension payable by Govt. is not 'property' of the insolvent within the meaning of s. 17, Presidency Towns Insolvency Act, which vests in the Official Assignee on the making of the order of adjudication. This is in accordance with s. 2 (e) of the Act, by which 'property' includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. It is however, said that in respect of a pension such as that payable to the insolvent an order can be made for the benefit of creditors under s. 60 (2) of the Act. Section 60 (1) deals with the pay and pensions of military and naval officers and of officers employed in the Civil Service of the Crown. Sub-section (2) is as follows:

"Where an insolvent is in the receipt of a salary or income other than as aforesaid, the Court may at any time after adjudication and from time to time, make such order as it thinks just for the payment to the Official Assignee, for distribution among the creditors, of so much of such salary or income as may be liable to attachment in execution of a decree or of any portion thereof."

I think it is clear that the insolvent's pension can properly be described as "income" within the meaning of sub-s. (2) but in my opinion an insuperable difficulty is created by the words "as may be liable

to attachment in execution of a decree." Reference has been made to s. 53, Bankruptcy Act, 1883, which is now superseded by s. 51, Bankruptcy Act, 1914. In *In re Saunders* (1), the Court of Appeal had no doubt that under s. 53, Bankruptcy Act, 1883, there was power to order payment of a pension, which was made inalienable by Indian Legislation, to the trustee in bankruptcy of the pensioner but there is nothing in the English statute corresponding to the words in s. 60 (2), Presidency Towns Insolvency Act, which I have described as causing an insuperable difficulty. In my opinion it is impossible to say that the insolvent's pension is liable to attachment in the execution of a decree; and if this is so, the Court will have no jurisdiction under s. 60 (2) to order the insolvent to pay any portion of it to the Official Assignee for distribution among the creditors. Not only does s. 11, Pensions Act, exempt Govt. pensions from seizure, attachment or sequestration by process of any Court in British India at the instance of a creditor or in satisfaction of a decree or order of any such Court, but by s. 60 (1), Proviso (g), Civil P. O., stipends and gratuities allowed to pensioners of Govt. are expressly rendered not liable to attachment or sale under the section.

It is true that once a pension has been paid it loses its special character and becomes part of the assets of the pensioner, but all future instalments are clearly exempted from liability to attachment under the proviso I have mentioned, and it is precisely with regard to such instalments that it is suggested I have power to make an order on the insolvent in favour of the Official Assignee under s. 60 (2), Insolvency Act. Unless I have power to make such an order, the interests of the creditors will in no way be served by a direction on Jagannath to return the pension papers. If this is so, such a direction cannot be justified by s. 7, Insolvency Act. I come to this conclusion with some reluctance as I greatly doubt if Jagannath has any answer to a suit brought by the insolvent for the return of the pension papers. However, for the reasons I have given I have come to the conclusion that there is no power in the Insolvency Court in the circumstances to direct the return of the pension papers, and this application must be dismissed with costs.

s. Application dismissed.

(1) (1895) 2 Q B 424; 64 L J Q B 739; 14 R 567; 73 L T 172; 24 W R 30; 2 Manson 361; 59 J P 740.

PATNA HIGH COURT

Appeal from Appellate Decree No. 133
of 1938

February 7, 1940

HARRIES, C. J. AND WORT, J.
THE COMMISSIONER OF THE ARRAH—
MUNICIPALITY—DEFENDANTS—

APPELLANTS

versus

INDER CHAND—PLAINTIFF—

RESPONDENT

*Bihar and Orissa Municipal Act (VII of 1922),
s. 82, 180—Commissioner imposing tax upon plat-
forms on Municipal drains -- No consent of Local
Government—Tax, if illegal and ultra vires*

It is impossible to exempt from the provisions of
s. 82, Bihar and Orissa Muni. Act, license fees to be
imposed under s. 180 of the Act, and where the Com-
missioners purport to fix a scale of fees imposing tax
upon platforms over Municipal drains under s. 180,
the imposition without the consent of the Local Govt.
under sub-s. (2) of s. 82 is illegal and *ultra vires* the
Commissioners.

A. from a decision of the Subordinate
Judge of Arrah, dated December 22, 1937.

Messrs. Baldeva Sahay, Mahabir Prasad,
Harinandan Singh and Tarkeswar Nath,
for the Appellants.

Dr. D. N. Mitter and Messrs. D. N. Barma
and S. Sundar Sinha, for the Respondent.

Wort, J.—This appeal comes before this
Court after remand. The case was re-
manded for the purpose of deciding a ques-
tion of fact relating to a drain in Arrah.
The Municipal Commissioners, who are the
appellants, were the defendants in the trial
Court in a case in which the plaintiff claim-
ed the following reliefs :

"That on the facts and circumstances stated it be
declared that the imposition of a fee by the defend-
ants for taking license for plaintiff's keeping plat-
form is illegal and *ultra vires* and the defendants
have no right to realize the same from the plaintiff
and that the said levy of platform-tax is illegal,
ultra vires and beyond the power of defendants and
the defendants are not entitled either in law or in
equity to do the same and demand the same from the
plaintiff."

The second relief claimed was :

"That the defendants be restrained from realizing
platform-fee or taking proceedings against the
plaintiff under the Municipal Act or by-laws of the
Municipality for not taking a license or compelling
the plaintiff to remove his platform (if any) during
the pendency of the suit."

The plaintiff further claimed a refund of
the amount paid with interest.

Several questions were raised in the
Courts below, and in the lower Appellate
Court the plaintiff succeeded. The learned
Judge in the Appellate Court came to the
conclusion, contrary to the contention of
the Commissioners, that the drain was not
a Municipal drain and that, therefore, the

Municipal Commissioners had no jurisdic-
tion over it. He also decided two questions
of law in favour of the plaintiffs, which
will be indicated by the points to which I
shall refer in the judgment.

This Court, being in doubt as regards
the findings of fact, remanded the case
to the Subordinate Judge for the determi-
nation of the question whether the drain
was the Municipal drain, or whether it was
within the limits of the District Board road.
The contention of the plaintiff was that the
District Board road was 38 feet 8 inches in
breadth and that the drain in question
came within those limits. The learned
Judge in the Court below, after remand,
has come to the conclusion that the drain
is beyond the limits of the District Board
road. At the instigation of the parties, a
Commissioner was appointed and he came
to the following conclusion. "His report"
says the learned Judge

"shows that the road in front of the plaintiff's
house was 44 feet 4 inches wide from the south-east
corner of the plaintiff's house, 44 feet 4 inches wide
from the southern stairs of the plaintiff's house, and
44 feet 5 inches wide from the north-east corner of
the plaintiff's house... From the measurements made
by the Commissioner it will appear that at 20
places, where the plaintiff wanted the widths of the
road to be measured, it varied from 24 feet to 38 feet
6 inches, the average coming to 29 feet 10 inches."

The learned Judge has come to the con-
clusion accordingly, and it will be seen
therefore, that the drain is beyond the limits
of the District Board road, and on that con-
clusion it seems to be abundantly clear
that, contrary to the plaintiff's contention,
the drain is that of the Municipal Commis-
sioners and not of the District Board. How-
ever, that matter does not dispose of the
case.

Dr. Mitter on behalf of the respondent
raises several questions of law. The first
is on the construction of s. 82 of the Bihar
and Orissa Municipal Act, 1922. Section 82,
provides that

"the Commissioners may, from time to time, at a
meeting convened expressly for the purpose, of which
due notice shall have been given, subject to the pro-
visions of this Act and with the sanction of the
Local Govt., impose within the limits of the Muni-
cipality the following taxes and fees, or any of them."

Then a list of cls. (a) to (l) of the mat-
ters with regard to which fees are charge-
able under the first sub-section. It is with
regard to the second sub-section that the
question arises. The second sub-section runs
thus :

"The Commissioners may from time to time, at
a meeting convened as aforesaid, and in accordance
with a scale of fees to be approved by the Local
Govt., charge a fee in respect of the issue and re-
newal of any license which may be granted by the

Commissioners under this Act and in respect of which no fee is leviable under sub-s. (1)."

Shortly it is contended that the tax which the Commissioners here purported to impose by their Resolution of January 18, 1935, comes within the mischief of that sub-section. Section 180, which is the warrant to the Commissioners to impose the tax, is as follows :

"No platform shall be erected, re-erected or extended upon or over any public road or drain without the previous sanction of the Commissioners."

Pausing there, I may observe that one of the contentions of the plaintiff-respondent in the Courts below was that the previous sanction had been granted by the Commissioners in 1935, that a fee had been paid, and that therefore the tax which the Commissioners sought to impose was illegal. But that point apparently was given up, and certainly was not argued in this Court. Sub-section (2) of s. 180 of the Act provides :

"The owner of every platform, except platforms which are used for giving such access to the houses as the Commissioners may consider necessary, shall, if the Commissioners at a meeting so direct, take out a license for keeping the platform."

Sub-section (3), provides that such license shall remain in force for one year. Sub-section (4), provides that

"for every such license there shall be paid a fee to be fixed by the Commissioners at a rate of not less than two annas nor more than eight annas for each square foot or the superficial area of the platform except such portion thereof as is used for giving such access to a house etc."

Sub-section (5) is a penalty clause making a person who contravenes the provisions of the section liable to a fine not exceeding fifty rupees.

At first it was thought that in this case the Commissioners had acted *ad hoc* in fixing fee for the license with regard to this particular platform. But that view of the matter is clearly wrong when the Resolution of January 18, 1935, is looked into. It was passed at a meeting of the Commissioners at which the Chairman, the Vice-Chairman, and four other members were present and the resolution which was passed unanimously on that occasion was that "two annas six pies per square foot per year be levied on the platform abutting on the Municipal drains" in a certain area described in the Resolution. It was further resolved that

"fees on the platform on Municipal roads, lanes, drains or lands within the rest of the area be levied at the rate of two annas per square foot per year."

It seems to me quite clear therefore that whether the Commissioners were entitled under s. 180 of the Act to act *ad hoc* as I have described it, they certainly did

not purport to do so by the Resolution of January 18, 1935. What they were apparently doing was that they were fixing a scale of fees for the issue and renewal of any license "which might be granted by the Commissioners under this Act and in respect of which no fee was leviable under sub-s. (1)" (of s. 82). To repeat myself, it is clear that the Commissioners were fixing a scale of fees for licenses with regard to platforms erected over Municipal drains. Now, it is contended by Dr. Mitter therefore that unless they have the previous sanction of the Govt. the tax so charged was *ultra vires* of the Commissioners. It is admitted that the consent of the Local Govt. was not obtained. The words of the sub-section I shall repeat:

"The Commissioners may, from time to time, at a meeting convened as aforesaid, and in accordance with a scale of fees to be approved by the Local Govt. charge a fee in respect of the issue and renewal of any license which may be granted by the Commissioners."

I used the words "previous sanction of the Local Govt.," and although the expression may be to some extent inaccurate, it is quite clear that if the sub-section applies the imposition of the tax without the consent of the Local Govt. would be illegal; and that is the question which arises for determination in this appeal. It was contended, as I have already stated, that the commissioners could act in each case and fix a fee according to circumstances of each case, and that as the Legislature has fixed the limits within which the tax should be imposed, no consent of the Local Govt. was necessary. Sub-s. (2) of s. 82 speaks of the issue and renewal of fees for licenses charged under sub-s. (1). Instances of this are to be found in three sections.

Section 256 of the Act provides that "the Commissioners may, from time to time grant licenses to persons applying for the same." It is true that the section does not appear on the face of it to warrant the Commissioners charging any licence fee, the Act merely referring to a license to be granted by the Commissioners and the power of the Commissioners to prescribe a scale of the rates for the sale of such articles referred to in the section. But I assume that authority is given to the Commissioners that fees would be chargeable for the grant of that license.

Section 259 of the Act gives power to the Commissioners to license premises used for trades described in the various sub-clauses of the section, and sub-s. (3)

of the same section provides:

"The Commissioners at a meeting may, subject to a maximum to be fixed by the Local Govt., levy a fee in respect of any such license and the renewal thereof, and may impose such conditions upon the grant of any such license as they may think necessary."

Section 261 provides power to Commissioners to license premises occupied by cartman, livery stable keeper or keepers of vehicles, and sub-s. (2) gives them power to license places for such purpose and may levy a fee not exceeding one rupee on the issue and renewal of any such license.

It is to be noted that there is a distinction between sub-s. (2) of s. 261 and sub-s. (3) of s. 259 of the Act. Sub-section (2) of the latter makes no reference to the consent of the Local Govt., whereas under sub-s. (3) of s. 259 the Commissioners at a meeting may, subject to a maximum to be fixed by the Local Govt. levy a fee. I apprehend therefore that although the consent of the Local Govt. is to be obtained under sub-s. (3) of s. 259 it is not the consent referred to in sub-s. (2) of s. 180 (2). But the same cannot be said in my judgment with regard to s. 261 (2) which provides that

"the Commissioners may license places for such purpose, and may levy a fee not exceeding one rupee on the issue and renewal of any such license. Such license shall be renewed in the first and seventh months of each year."

The language of s. 261 and s. 180 (2) are not materially different, and it seems to me that it would be difficult, if not impossible, to contend that the license fee chargeable under s. 261 would not be subject to the consent of the Local Govt. under sub-s. (2) of s. 81. And if that argument is well-founded, it seems equally impossible to exempt from the provisions of sub-s. (2) the license fees to be imposed under s. 180 of the Act, the section with which we are dealing in this case. It is clear, as I pointed out at the commencement of my observations, that the Commissioners purported to fix a scale of fees and that would seem in any event to come specifically within the mischief of sub-s. (2) of s. 82.

I do not pretend to say that the matter is without difficulty, but in my judgment it was necessary in this case to have the approval of the Local Govt. to the scale of fees chargeable under the Resolution of January 18, 1935.

Another question of law arose, and that is that the Resolution fixed no time for which license fees would come into operation. In the circumstances of the case it is unnecessary to come to a conclusion with

regard to that matter, but I may add that in passing a Resolution of this kind the Commissioners would be well-advised to fix such a date.

The remaining point is whether the plaintiff is in the circumstances entitled to the relief which he claimed in the suit. In the second item he asked for an injunction restraining the Commissioners from taking proceedings against the plaintiff that, it is clear, is a relief to which the plaintiff is not in any circumstances entitled; but in my judgment he was entitled to a declaration that the imposition of the fee for the plaintiff's keeping the platform was *ultra vires* the Commissioners and that the plaintiff was entitled to a refund of the fees which, as I understand, were paid into the Court of the Munsif.

The appeal of the Commissioners is dismissed and the judgment of the Court below set aside, the plaintiff being entitled to a decree for the relief indicated in this judgment.

Harries, C. J.—I agree.

D.

Appeal dismissed.

NAGPUR HIGH COURT

Second Appeal No. 305 of 1936

October 6, 1938

BOSE, J.

YADEO GANESH SUBHEDAR—

APPELLANT

versus

THE SECRETARY OF STATE FOR
INDIA—RESPONDENT

Police Act (V of 1861), s. 15 (4)—"Means," how determined—Magistrate's discretion regarding means of person not illegally exercised—Cannot be attacked in Civil Court—Burden of proving that in assessing means of person under s. 15 (4) his income from outside disturbed area was taken into account is on that person.

While considering the means of a person under s. 15 (4), Police Act what the Magistrate is entitled to look to is not only the income derived by the person from the disturbed area but also the means which he had of raising the money required for the assessment.

The Magistrate is given absolute discretion in determining the means of a person under s. 15 (4). That being so, unless it is proved that the Magistrate has exercised his judgment illegally which means to say, not in accordance with that section, his decision cannot be attacked in a civil suit.

Under s. 15 (4), Police Act only the means within the disturbed area can be considered. The burden to prove that the Magistrate in making assessment under s. 15 (4) took into consideration a person's means from outside the disturbed area is on such person because the act being an official act will be presumed in the first instance to have

been regularly performed in accordance with law.

S. A. from the appellate decree of the Court of the First Additional District Judge, Wardha, dated April 18, 1936.

Mr. R. N. Padhye, for the Appellant.

Mr. W. R. Puranik, Advocate-General, for the Crown.

Judgment.—This appeal relates to the correct interpretation of s. 15 (4) of the Police Act, 1861.

The plaintiff is the proprietor of a Khel in mauza Hingani in Wardha Tahsil. Disputes occurred in this village and so punitive Police were quartered there under s. 15 (1) of the Police Act. The plaintiff was then required by the Magistrate to pay Rs. 300 towards the expenses of this additional force under s. 15 (4) of the Police Act. He states that the Magistrate has taken into consideration not only his means within the disturbed area, that is to say, within the village of Hingani, but also his means from outside sources. This he states is illegal.

I quite agree that under s. 15 (4) only the means within the disturbed area can be considered. The question therefore resolves itself into this. Did the Magistrate in making this assessment take into consideration the plaintiff's means from outside the disturbed area? The burden is on the plaintiff because the Act being an official act will be presumed in the first instance to have been regularly performed in accordance with law.

Before, however, dealing with the matter on which the plaintiff relies in proof of his case, I will examine the meaning of the word "means." It has been defined in the Oxford English Dictionary as being "the resources at one's disposal for effecting some object." According to that definition what the Magistrate had to consider then was the resources at the plaintiff's disposal within the village of Hingani for paying the Rs. 300 to which he had been assessed.

The word "means" has also been used in O. XXXIII, r. 1 of the Civil P. O., and the meaning attached to it is much the same. Mulla at p. 963 states that the words "refer to property over which the petitioner has actual control." Therefore what the Magistrate was entitled to look to was not only the income derived from this village but also the means which the plaintiff had of raising the money required for the assessment.

The next point to be observed is that the Magistrate is given absolute discretion in this matter under s. 15 (4). The section runs:

"The Magistrate of the District, after such enquiry as he may deem necessary, shall apportion such apportionment shall be made according to the Magistrate's judgment of the respective means within such area of such inhabitants."

That being so, unless it is proved that the Magistrate has exercised his judgment illegally which means to say, not in accordance with that section, his decision cannot be attacked in a civil suit.

As regards the question of fact, namely, whether the Magistrate took other resources of the plaintiff into consideration or not, the plaintiff has produced no evidence whatever except 3 documents. Two of them have no bearing on the matter before me and the third is the list of assessment which shows that the plaintiff's annual income has been estimated at Rs. 5,000 and that he has been assessed to a sum of Rs. 300.

Now as I have said the fact that the Magistrate thought that the plaintiff's annual income was Rs. 5,000 cannot be questioned here whether he was right or wrong unless it can be shown that he took into consideration the plaintiff's resources from property outside Hingani.

Nothing could have been easier for the plaintiff than to show what his income within the Hingani area actually was. He has not attempted to show that this figure was so excessively high that it could only have been derived by taking into consideration the income from outside sources. Therefore that document, Ex. p-3, does not carry us any further.

Apart from that all that he relies on is what he calls an admission or rather a want of denial by the defendant of the allegation made by the plaintiff in the plaint. The allegation is that the Magistrate took into consideration the plaintiff's means from villages other than Hingani.

The defendant's written statement is to this effect:

"It is denied that the costs apportioned on the plaintiff is not according to the means of the plaintiff within the disturbed area. The apportionment of costs was made according to the Magistrate's judgment of the respective means of the persons taxed within the area in disturbed state."

That is a clear denial of the issue raised by the plaintiff.

Another passage in a later oral statement is also relied on by the plaintiff's

learned Counsel. It is to this effect :

"So far as the *malguzars* were concerned, he fixed the amount entirely in his own discretion without reference to their means or the rents paid by them."

It is argued that the words "without reference to their means" import an admission that it was with reference to the plaintiff's means in other areas. That is clearly an impossible construction. The sentence is unhappily phrased, but the following sentence explains what is meant :

"The Magistrate thus allotted Rs. 600 to the *malguzars* and recovered the same from them considering their means within the area. Means included all sorts of income derived by the persons assessed and does not include only rents or revenues."

It is clear from this that the defendant very clearly denied the plaintiff's allegation in this behalf and pleaded that the exact directions in s. 15(4) had been faithfully observed. Therefore no support can be found for the plaintiff's case by any admission in the pleading. That being so, he was bound to adduce evidence. He has not done so. But it appears that he was not given an opportunity to do so. The case was decided on certain preliminary issues. Therefore the matter will now have to go back to the trial Court to enable the parties to adduce whatever evidence they have in respect of the question whether the District Magistrate took into consideration the means of the plaintiff outside the area in dispute or whether he confined his attention as required by the Act to the area in dispute.

Costs will abide the result.

s.

Order accordingly.

LAHORE HIGH COURT

First Appeal No. 3 of 1938

November 10, 1938

ADDISON AND RAM LALL, J.J.

SURAJ MAL—PLAINTIFF—APPELLANT

versus

CHANDER BHAN AND OTHERS

—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 58, 63, 63-A, 72—Deed of mortgage with possession providing that mortgagees should effect repairs on failure of mortgagor if property fell into ruins and mortgagees sustained loss in income of rent—Repairs not shown to be made after property fell into ruins—No loss of income proved—Repairs in nature of improvements—Mortgagees held not entitled to credit for sums spent in repairs—Civil Procedure Code (Act V of 1908), O. I, r. 1—Suit by vendee of mortgagor for redemption of two mortgaged prop-

erties—Decree for redemption as well as decree against mortgagor for another sum charged on one of mortgaged properties, if can be passed.

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary. Although a mortgage-deed provides that the principal mortgage money, as well as interest and compound interest thereon has to be paid, yet if the repairs effected came within the T. P. Act or within the document, the cost thereof would under the same principle come under the expression "principal mortgage money" and can be added to the principal mortgage money.

Under a deed of mortgage with possession repairs were to be done by the mortgagor and the only power given to the mortgagees, in the event of the mortgagor not effecting repairs was that in case the property fell into ruins or was destroyed on account of some unexpected calamity or want of repairs and the mortgagees sustained a loss in their income of rent on that account, then the mortgagees could effect repairs from their own pocket after giving the mortgagor notice and they could charge interest on these repairs. It was not claimed that any repairs were done by the mortgagees after the property had fallen into ruins or had been destroyed. There was nothing to prove any loss of income from rent and the property was never in ruins or destroyed. On the contrary the work done, was more in the nature of improvements calculated to bring in increased rent. None of them were proved to have been necessary within the meaning of s. 72 or s. 63-A, T. P. Act :

Held, that the mortgagees were not entitled to credit for the sum spent by them in effecting the repairs. 80 Ind. Cas. 820(1), referred to.

In a suit for redemption of two mortgaged properties instituted by a vendee from the mortgagor it is not possible to grant a decree for redemption to the plaintiff against the mortgagee on payment of a certain sum and to give him a decree against his vendor for another sum charged on one of the mortgaged properties. The two claims cannot be combined. [p. 710, col. 2.]

F. A. from the decree of the Sub-Judge, First Class, Delhi, dated August 30, 1937.

Messrs. J. N. Aggarwal and Asa Ram Aggarwal, for the Appellant.

Messrs. Mehr Chand Mahajan and Qabul Chand and Shamair Chand, for Respondent, Nos. 1 to 7 and 8 respectively.

Addison, J.—By a registered mortgage deed, dated October 18, 1928, the defendant Ohhunnu Lal mortgaged two properties, namely half of a *katra*, known as Dhulianwala, and a house named Diwan-khana, with Bihari Lal, deceased defendant No. 1, and defendants Nos. 2 and 3 for Rs. 1,50,000. Bihari Lal is now represented by his son Ohander Bhan and grandsons Aghar Chand, Mansuram Kumar and Mahindar Kumar. Defendants Nos. 2 and 3, Kidar Nath and Sagar Chand, transferred their rights to Bihari Lal, deceased defendant No. 1. By a sale deed, dated February 10, 1934, Ohhunnu Lal,

defendant No. 4, sold the half *katra* only to the plaintiff Suraj Mal, for Rs. 2,00,000 of which Rs. 1,72,500 were left by the mortgagor with the plaintiff to redeem the mortgage. Under this sale deed Chhannu Lal made himself liable to pay to his vendee anything over the sum of Rs. 1,72,500 which the vendee might have to pay for redemption and it was stated in the sale deed that such additional sum, if any, would form a charge on the house called Diwankhana. The plaintiff then wrote a letter to the mortgagees, offering to pay them Rs. 1,72,500 and asking them to hand over the *katra* to him on payment of that amount. This letter is dated February 20, 1934. In reply the mortgagees sent letter Ex. P-6, dated February 25, 1934. They claimed from the plaintiff :

Rs.	1,50,000	for principal,
Rs.	21,481	for interest and compound interest up to February 27, 1934,
Rs.	9,867	for costs of improvement, house-tax and other taxes, and
Rs.	4,356	for interest and compound interest on the costs of improvement, house-tax and other taxes.

Total Rs. 1,85,704

The plaintiff sent in reply a letter, Ex. P-7, dated March 11, 1934, to the mortgagees. The correctness of the mortgagees' right to claim any money for improvements, house-tax, etc., was denied and details of this item were asked for. Information was also asked for as to whether the improvements were effected with the consent of the mortgagor and if any notice was served on the mortgagor with respect thereto. It was stated further that the claim for improvements etc., was irrelevant to the matter of redemption by virtue of cl. (10) of the mortgage deed, which specifically stipulated for the redemption of the half *katra* on payment of the principal money and interest, which amounted to Rs. 1,72,500. Finally it was said that the plaintiff would be willing to pay the entire amount in order to obtain possession of the half *katra* if the mortgagees agreed to account afterwards for the excess payment over Rs. 1,72,500 and refund any amount in excess not justified under the mortgage deed. In reply the mortgagees, Bihari Lal, stated (see Ex. P-8, dated March 19, 1934), that the money spent on improvements was a charge on the mortgaged property, that the mortgagee was prepared to redeem and hand over posses-

sion of the mortgaged property on receipt of the amount due according to him and he further stated that he was willing to account later to the plaintiff and to refund any excess payment made by the plaintiff but that if a suit was necessary such a suit must be brought by the plaintiff. The plaintiff replied by Ex. P-10, dated April 2, 1934. It was stated therein that the plaintiff would pay under protest the amount claimed by Bihari Lal, provided that immediate possession of the half *katra* was given and that Bihari Lal agreed to indemnify the plaintiff against any defect in Bihari Lal's title to realize the entire mortgage amount himself, seeing that two others, Kidar Nath and Sagar Chand, were according to the mortgage deed, entitled to half, and provided that the excess payment over the amount of Rs. 1,72,500 should be accounted for later and Bihari Lal agreed to refund any amount not found legally payable. Nothing however, came of this correspondence and finally the plaintiff deposited Rs. 1,88,000 with a Notary Public (see Ex. P. W. 6-1). The Notary Public offered this amount to Bihari Lal and at the same time requested Bihari Lal to sign an agreement in the terms already mentioned, but Bihari Lal refused, claiming in addition to the sum of Rs. 1,85,704 formerly admitted by him, another sum of Rs. 1,890 paid to his Pleader. He also demanded further time up to April 29, 1934.

Accordingly, the plaintiff instituted this suit the next day, that is on April 10, 1934. He claimed redemption of the half *katra*, which alone he was entitled to redeem, on payment of Rs. 1,72,500, but it was set out that he had deposited Rs. 1,88,000 with the National Bank of India Limited, to meet any further claim made by them mortgagees. In the written reply of Bihari Lal, Rs. 1,86,757 were demanded as payable before possession of the *katra* could be given. The plaintiff applied to the Court to the effect that he was willing to pay this amount and be put in possession of the property, provided that, after the matter had been gone into by the Court, he might be given a decree against Bihari Lal for any sum paid in excess. This was accepted by Bihari Lal and Rs. 1,86,757 were paid to Bihari Lal by cheques dated April 21, 1934, on the National Bank of India Limited. These cheques were cashed and the plaintiff was put in possession of the half *katra*. The question therefore, remained how much of the additional sum

claimed was proper. The trial Judge has found that the mortgagees were entitled to the following additional sums:

	Rs.	a.	p.
Costs of repairs	4,922	0	0
Supervision charges	492	0	0
Amount of water-tax	382	12	0
	5,796	12	0

He has also allowed interest at Rs. 0-14-0 per cent. per mensem on this amount and has calculated the interest as coming to Rs. 2,520. This interest was allowed from March 1, 1930. The total additional sum allowed was thus Rs. 8,316-12-0 plus Rs. 20, further interest on the mortgage amount. He thus held that Rs. 5,920-4-0 had been paid in excess and he granted the plaintiff a decree for this amount with simple interest at 6 per cent. per annum thereon from April 21, 1934 till the date of realization. This decree is against Chander Bhan, son of Bihari Lal. It has also to be mentioned that on February 20, 1937 the plaintiff applied to amend his plaint. In this application he stated that under the terms of the deed of sale, dated February 10, 1934, Rs. 1,72,500 had been left with him by the defendant Ohhunnu Lal for payment to the mortgagees and that Ohhunnu Lal had agreed in that sale deed to reimburse him for any excess payment thereover with interest at Rs. 0-12-0 per cent. per mensem. He therefore prayed that if the mortgagees were held to be entitled to any sum in excess of Rs. 1,72,500 the plaintiff should be given a decree to that extent against Ohhunnu Lal, the mortgagor defendant, and it was also prayed that any such decree should be made a charge upon the house Diwankhana. The amendment was allowed by the trial Judge but the Judge who delivered judgment at the conclusion of the case held that this claim made the suit multifarious and could not be allowed in a redemption suit. The claim made in the amended plaint against Ohhunnu Lal was therefore dismissed. Against this decision the plaintiff has preferred this appeal, claiming Rs. 8,316-12-0 disallowed by the trial Judge as principal with interest thereon from April 21, 1934 to December 21, 1937 at 6 per cent., this sum amounting to Rs. 1,829-11-0. The total claim in the appeal was therefore Rs. 10,146-7-0. A decree against Ohhunnu Lal in terms of the amended plaint was also asked for. Cross-objections have been put in on behalf of Chander Bhan, son of Bihari Lal, to the effect that

the decree in favour of the plaintiff amounting to Rs. 5,920-4-0 with simple interest at 6 per cent. per annum should not have been passed in a redemption suit and that the Court was wrong in disallowing the full claim of the mortgagee.

The trial Judge held that under cl. (7) of the deed the mortgagor had to pay to the mortgagees house-tax, water-tax, electric tax and other taxes on the half *katra*. He did not however allow any of these taxes except water-tax on his finding that the mortgagees, who were in possession, collected the other taxes from the tenants. As regards what the trial Judge describes as repairs, he held that the defendants' books were entirely unreliable and he rejected them completely. He also found that there was no evidence of any purchases, shown in the defendants' books, as having been for the repairs of this *katra*. He found however that certain vouchers amounting to Rs. 3,500-4-9, principally for cement, had been produced. He noted that Makhan Lal who was produced as an expert by the plaintiff and was P. W. No. 7 assessed the repairs to Rs. 1,700 or so. This Makhan Lal however had not included certain repairs effected by the mortgagees, such as the costs of a *pushta* from one end of the half *katra* to the other. After hearing arguments therefore in the case he appointed a Local Commissioner to assess the repairs. This he did in spite of the fact that long before this in the course of the trial the plaintiff had applied for such a Commissioner to be appointed and the predecessor of the Judge who wrote the judgment had refused this request because the contesting mortgagee defendant did not wish Commissioner to be appointed, although the burden was on him to establish what the repairs were. The procedure adopted by the Judge was therefore not justifiable. After he found that the accounts produced by the defendant for repairs of the half *katra* were not authentic or reliable and that nothing had been established by the contesting defendant, he should have proceeded to judgment and not appointed a Commissioner, the appointment of which the defendant had already resisted.

This Local Commissioner went to the spot accompanied by the defendant's servants only and the Judge is wrong in saying that he estimated the repairs in the presence of the parties. The Commissioner's report is far from satisfactory. The work he saw seemed to him to be several years old but it was sufficiently rigid. This does

not establish when the work was done and it may be noted that Bihari Lal, the contesting defendant, had a mortgage of this *katra* in 1924, the mortgage now in suit being a fresh mortgage executed in 1928 in lieu of the prior mortgage. A part of the consideration for the present mortgage of 1928 was Rs. 2454-14-3 spent on the repairs of the *katra* prior to 1928 and it cannot therefore be said with any certainty, seeing that the defendants' books are unreliable, when the repairs estimated by this Commissioner took place. He stated that the main items of repairs were cement plaster, cement concrete *pushra* at the back of the building and cement concrete floors and roofs. There is no evidence that the *katra* had any cement flooring, etc., at the time of the mortgage and obviously the mortgagee cannot improve the property so as to get better rents by improving the state of the *katra* as compared with what it was when he took it over. The Commissioner stated that too much cement had been used in the concrete but, so far as he could, he made an estimate of what he was shown, amounting to a sum of Rs. 4,922. There is another finding by the Judge that these repairs were effected by the mortgagee with the consent of Ohhunnu Lal, mortgagor.

The learned Counsel, appearing for the plaintiff-appellant, placed his reliance principally on the terms of the mortgage deed. Here it might be at once mentioned that in the letters which passed between the parties when the plaintiff was trying to get possession of the *katra* after the sale in his favour, Bihari Lal described the additional expenditure as costs of improvement, house-tax and other taxes which he put at Rs. 9,867 (see Ex. 6 and para. 2 of Ex. p. 8 where it was said that the improvements were effected with the consent of the mortgagor, the consent being given orally). In the suit however the word 'improvements' was dropped and the word 'repairs' was used. The reason for the change is obvious. It will be necessary to set out some part of the mortgage deed at this stage. Ohhunnu Lal, the mortgagor, stated therein (see p. 45 of Vol. 2) that the half *katra* in suit was already mortgaged with possession with the three mortgagees, Bihari Lal, Kidar Nath and Sher Singh, for one lac of rupees, which was re-payable in five years, under a deed of mortgage, dated January 28, 1924, the condition in that deed also being that the rent was to counter-balance interest while the house known as Diwan-

khana was free from encumbrance. He therefore now mortgaged, on October 18, 1928, with possession the half *katra* while he effected a simple mortgage of the house Diwankhana for the sum of Rs. 1,50,000 for a term of ten years, one-half being the share of Bihari Lal and one-half the share of the other two mortgagees. Interest on Rs. 1,20,000 for which sum the half *katra* was mortgaged, was to be set off against rent; while interest on the sum of Rs. 30,000 for which the house Diwankhana was mortgaged, was to run at the rate of Re. 0-14-0 per cent. per mensem. He admitted receipt of the entire mortgage money and stated that he had put the mortgagees in possession of the half *katra*. He himself was to occupy the Diwankhana on a rental amounting to the interest. (That is why I have stated that it was in effect a simple mortgage of the Diwankhana house.) The following conditions are then set forth in the deed :

"(1) The mortgagor could not pay the whole or part of the principal mortgage money before the expiry of the first two years.

"(2) After the expiry of the first two years the mortgagor could redeem the mortgaged property on payment of the entire principal mortgage money."

(These two clauses are general.) Clause (3) is to the effect that the mortgagees were to credit rent of the half *katra* towards interest and were responsible themselves to realize the rent while the mortgagor was responsible for title and for repairs to the half *katra*. (Then comes the disputed part of the clause.)

"If, God forbid, the mortgagor does not effect repairs to the mortgaged property (referring of course to the half *katra*) and it falls into ruins on account of some unexpected calamity or want of repairs and the mortgagees sustain a loss in their income of rent thereby, they shall be at liberty to effect repairs from their own pocket after giving the mortgagor notice."

The mortgagor contracted to pay simple interest at Re. 0-14-0 per cent. per mensem on such repairs. Then come cls. (4) to (7) which apparently refer only to the house Diwankhana :

"(4) The mortgagor was to pay Rs. 3,150 annually on account of interest on the sum of Rs. 30,000 charged on the house Diwankhana, at annas 14 per cent. per mensem and obtain receipts for such payments. No payment without a receipt was to be valid.

"(5) If he did not pay interest on the sum charged on the house annually, compound interest at the same rate was to be allowed.

"(6) In default of payment of interest for two years on the sum charged on the house Diwankhana, the mortgagees were at liberty to cancel the term of the mortgage and recover the sum of Rs. 30,000, the principal mortgage money, with interest and compound interest, from the house Diwankhana as also from the person and other

property of the mortgagor, or maintain the term of the mortgage and recover the entire principal mortgage money with interest and compound interest in the lump from the mortgaged property as also from the mortgagor's person and other property.

(7) The mortgagor was responsible for repairs to the mortgaged house as he was occupying it and for all other matters in connection therewith, fall in the market value of the property, payment of house-tax, water rate, electric charges and other charges."

Then comes the last sentence of this clause:

"That is to say, till redemption of the mortgaged property I am entitled to all sorts of profit and liable for all kinds of loss in connection with it."

The Judge has held that this last sentence, as it mentions the usual words 'mortgaged property,' applies also to the half *katra* mortgaged. This interpretation is absolutely impossible and was not pressed before us. In fact the words "mortgaged property" were used in cl. (3) with reference to the half *katra*. According to this cl. (7) the mortgagor was responsible for everything in connection with the house Diwankhana, including its taxes of all kinds, but he was not made responsible for the taxes on the half *katra* mortgaged with possession, the terms relating to it being incorporated in cl. (3) already set out. This means that the sum allowed by the Judge for water-tax goes in any case. Besides, there was the same evidence for water-tax as there was about the other taxes. The Judge accepted that evidence as regards the other taxes and should have accepted it also, therefore, for the water-tax. Clauses (8) and (9) are general. Then comes cl. (10) which is also in controversy:

"If after the expiry of the first two years I want to redeem the mortgaged *katra*, I can do so on payment of rupees one lac and fifty thousand, principal mortgage money and the entire unpaid interest and compound interest in the lump; and if I want to redeem the Diwankhana after the expiry of the first two years, I can do so on payment of Rs. 30,000; principal mortgage money, and the unpaid interest and compound interest. I will not otherwise be able to redeem the house."

The clause allows the mortgagor to redeem the properties separately; by the second part thereof he can redeem the house Diwankhana on payment of Rs. 30,000 principal mortgage money and the unpaid interest and compound interest at annas 14 per cent. per mensem due thereon. If this had been done, the *katra* would have remained under mortgage with possession for the remaining sum of Rs. 1,20,000. By the first part of cl. (10) permission was given to redeem the *katra*

alone on the terms that the whole principal mortgage money of Rs. 1,50,000 and the entire unpaid interest and compound interest on the Rs. 30,000 charged on the house were paid. This really means that the *katra* could only be redeemed by also redeeming the house Diwankhana. The plaintiff, having purchased the half *katra*, by reason of the first part of cl. (10) is entitled to redeem it but, in doing so, he virtually redeems the whole property.

It was argued on behalf of the plaintiff that, under this redemption clause, no question of the costs of improvement or repairs arose and that all that had to be paid in order to redeem was the principal sum of Rs. 1,50,000, and interest and compound interest, amounting to Rs. 22,500 on Rs. 30,000. In this connection numerous rulings have been referred to most of which appear to me not to be very helpful. Under s. 58 (a), T. P. Act, the mortgage money consists of the principal money and interest. Under s. 58 (d) the mortgagee is entitled to possession until payment of the mortgage money. Under s. 60 after the principal money has become due the mortgagor has a right, on payment or tender of the mortgage money, to redeem the property. Under s. 63 the mortgagor is liable, in the case of an acquisition necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper costs thereof as an addition to the principal money. Such costs therefore would come under the term 'principal money' if the acquisition were made for the purposes set out. Under s. 63-A of the Act, where mortgaged property in possession of the mortgagee has been improved, the mortgagor upon redemption shall in the absence of a contract to the contrary be entitled to the improvement, but by sub-cl (2) of this section, where any such improvement was necessary to preserve the property from destruction or deterioration, etc., the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper costs thereof as an addition to the principal money. Lastly, by s. 72 (b), a mortgagee may spend such money as is necessary for the preservation of the mortgaged property from destruction, forfeiture or sale and may, in the absence of a contract to the contrary, add such money to the principal money. It seems therefore that the words 'principal mortgage money' in cl. (10) can be made to include the necessary payments allowed under the sections

quoted, provided that there is no contract to the contrary.

The case law need not be discussed in detail, as it seems that their Lordships of the Privy Council have in *Ganga Ram v. Natha Singh* (1), set this question at rest. Their Lordships merely distinguished *Aulia Khan v. Kanshi Ram* (2). But in fact that ruling as well as cases such as *Jawala Singh v. Teja Singh* (3), must be taken to be no longer good law. It was held by their Lordships that a mortgagee was entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary, and that, in a suit to redeem two simple mortgages, which provided for the annual payment of interest and that the mortgagor could redeem upon payment of the "mortgage money" which expression the documents used referring to the sums advanced, the general rule was not displaced and the interest was a charge upon the property and payable, upon redemption. In the present appeal 'mortgage money' is used in the document as meaning 'the sum advanced.' This is clear from the last part of the document. Further, it was provided that the principal mortgage money, as well as interest and compound interest thereon had to be paid; so that the case is not exactly the same as that before their Lordships of the Privy Council. But if the repairs effected came within the T. P. Act, or within cl. (3) of the document, the cost thereof would under the same principle come under the expression "principal mortgage money" and could be added to the principal mortgage money.

Clause (3) of the mortgage deed has therefore to be considered. Under it repairs were to be done by the mortgagor and the only power given to the mortgagees, in the event of the mortgagor not effecting repairs was that in case the property fell into ruins or was destroyed on account of some unexpected calamity or want of repairs and the mortgagees sustained a loss in their income of rent on that account, then the mortgagees could effect repairs from their own pocket after giving the mortgagor notice and they could charge interest on

(1) 5 L 425; 20 Ind. Cas. 820; A I R 1924 P O 183; 51 I A 377; 11 O L J 534; 2 Pat. L R 257; 20 L W 101; 26 Bom. L R 750; 22 A L J 688; 47 M L J 64; 10 O & A L R 771; 35 M L T 141; (1924) M W N 599; 6 L L J 551; 1 L C 446; L R 5 A P O 133; 6 P L T 97; 1 O W N 469; 29 O W N 558 P O).

(2) 45 P R 1913; 17 Ind. Cas. 677; 145 P L R 1913; 25 P W R 1913.

(3) A I R 1924 Lah. 273; 71 Ind. Cas. 801.

these repairs at Re. 0-14-0 per cent. per mensem. The words used are therefore not very different from the words employed in ss. 63-A (2) and 72, T. P. Act. But such repairs were only possible if the half *katra* fell into ruins or was destroyed. The vernacular word used in the deed means "destroyed" or "fallen." It cannot be, and has not been claimed in the present case, that any repairs were done by the mortgagees after the property had fallen into ruins or had been destroyed. According to cl. (3) therefore there was no power in the mortgagees to effect any repairs. Further, in my opinion there is no evidence which would have justified the mortgagees in spending money for the preservation of the mortgaged property from destruction within the meaning of s. 72, T. P. Act, nor does s. 63-A (2) apply, as the improvements effected have not been proved to have been necessary to preserve the property from destruction or deterioration, or to prevent the security from becoming insufficient. Again, on the evidence the repairs which were carried out are distinct improvements. (The judgment then discussed the evidence and proceeded.) As regards (iii), it is perfectly clear that cl. (3) only gives the mortgagee power to execute repairs after giving notice to the mortgagor, if the property fell into ruins or was destroyed by reason of some calamity or by reason of the mortgagor not effecting repairs, and loss had accrued to the mortgagee on this account in his rent income. There is nothing to prove any loss of income from rent and the property was never in ruins or destroyed. On the contrary the work done, as already stated, was more in the nature of improvements calculated to bring in increased rent. None of them are proved to have been necessary within the meaning of s. 72 or s. 63-A, T. P. Act.

The only other point argued was that the plaintiff-appellant was entitled to a decree against Chhunnu Lal, the mortgagor, for any amount in excess of Rs. 1,72,500 which he might be held liable to pay to the mortgagee. I am in agreement with the finding of the trial Court that this claim could not be made in the present suit. It is only after this suit is decided that the amount can be ascertained. Besides, it would be impossible in a redemption suit to grant a decree for redemption to the plaintiff against the mortgagee on payment of a certain sum and to give him a decree against his vendor for another sum charged

on the house Diwankhana. The two claims cannot be combined. It does not matter whether it is said that the suit is multifarious, or that it is premature with respect to the claim against Ohhunnu Lal. The appeal of the plaintiff therefore against Ohhunnu Lal mortgagor must fail. It may be noted that no court-fee was paid on this part of the claim either in the trial Court or in this Court and that is another reason why the claim cannot succeed. In fact, the claim could not be valued. As it so turns out, no decree can be given against Ohhunnu Lal, the mortgagor, as the plaintiff's appeal in other respects against the mortgagee has been accepted.

For the reasons given therefore I would accept the appeal and give the plaintiff an additional decree for Rs. 8,316-12-0 with simple interest at 6 per cent. per annum thereon from April 21, 1934, to date of realization. The plaintiff will have his full costs in the trial Court and in this Court to be paid by Chander Bhan, son of Bihari Lal. The appeal is dismissed so far as Ohhunnu Lal mortgagor is concerned and the plaintiff-appellant will pay his costs in this Court. The cross-objections are dismissed but no order as to costs is made in them.

Ram Lal, J.—I agree and have nothing to add.

B.

Order accordingly.

RANGOON HIGH COURT

Civil Suit No. 184 of 1938

June 2, 1939

Ba U, J.

MA SAN MYINT—PLAINTIFF

versus

U TUN SEIN—DEFENDANT

Civil Procedure Code (Act V of 1908), O. XXIII, rr. 1 and 2, scope of—Plaintiff granted leave to withdraw suit with permission to bring fresh one on the same cause of action, on condition of paying costs to defendant on or before certain date or before institution of fresh suit—Condition not fulfilled—Fresh suit is void ab initio.

Under r. 1, O. XXIII, Civil P. C., a plaintiff can withdraw a suit as a matter of right without the permission of the Court; but if he does it he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to r. 2. Under the said Rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on "such terms as it thinks fit" The terms may be of any kind. They might be, (1) That the plaintiff shall pay the costs before a certain date specified in

the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment. If the terms imposed are as in illus. (1) or (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing.

Where, therefore, leave to bring a fresh suit on the same cause of action is granted on condition of payment of costs on or before a specified date or before the institution of a fresh suit, payment must be made before the specified date or before the institution of a fresh suit. If no payment is made, the second suit is void *ab initio*. The payment of costs is a condition precedent to the institution of a fresh suit.

[Case-law discussed.]

Mr. U E Maung, for the Plaintiff.

Mr. U Ze Ya, for the Defendant.

Judgment.—This is a suit for a declaration that the plaintiff is the wife of the defendant and for partition and payment of her share out of the properties acquired by the defendant. The plaintiff asked for a similar declaration against the defendant in Civil Regular No. 192 of 1937 of this Court; but subsequently her Advocate asked for permission to withdraw the suit with liberty to file a fresh suit. In granting her the permission to withdraw the suit Sharpe, J., passed the following order.

"I dismiss the suit with costs, as being withdrawn and give the plaintiff liberty to institute a fresh suit if he (she) is so advised. I fix the Advocate's fee at seven gold *mohurs*; and I also make it a condition for the institution of a fresh suit that all the costs of the present suit must be paid to the defendant before the plaintiff is allowed to file a fresh suit."

U E Maung on behalf of the plaintiff admits that the costs were not paid before the institution of the fresh suit and in fact, according to U E Maung, the costs have not been paid up to date. Because of this one of the pleas now taken in defence is that the suit is void *ab initio*. There is a conflict of decisions on this point. The Calcutta, Lahore and Patna High Courts hold one view, while the Madras, Bombay and Allahabad High Courts take another view. In *Abdul Aziz Molla v. Ebrahim Molla* (1), Geidt and Mookerjee, JJ. said:

"We may take it that the payment of costs was meant by the order to be a condition precedent to the bringing of a fresh suit. But then the question arises, does that necessarily make the suit void *ab initio*, and will not the subsequent payment of the defendant's costs cure the undoubted irregularity. There is no express provision by the Indian Legislature as to the consequences of such a course of conduct. But we have referred to the rules of the Supreme Court, 1883. Order XXVI, r. 4 runs as follows: 'if any subsequent action shall

(1) 31 O.965.

be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action the Court or a Judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid.' We think that the rule there laid down would be a fair rule for the Courts in this country to follow, in the absence of any statutory enactment in the matter and that though a Court would be warranted in refusing to proceed with a suit like this when the facts are brought to its notice that the plaintiff had not complied with the order requiring payment of costs, yet there is nothing in the law to show that a suit instituted under such circumstances is bad *ab initio* and must *ipso facto* be dismissed; if the payment ordered is made after its institution."

The decision in this case was supported by Sir Lawrence Jenkins, C. J., in *Shital Prasad v. Gaya Prasad* (2), but on different grounds. The learned Chief Justice said ;

"Though I agree with the result of the ruling in *Abdul Aziz Molla v. Ebrahim Molla* (1), I would base my decision in this case on somewhat different though not antagonistic reasons. The withdrawal was under s. 373 of the Code of 1882, which provides that 'if at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff that the suit must fail by reason of some formal defect or that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit. If the plaintiff withdraws from the suit without such permission he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh suit for the same matter.' Here permission was given. Therefore, the last paragraph that I have read has no application, for it cannot be said that the plaintiff withdrew without such permission. He withdrew with the permission and the permission is under the section to withdraw from the suit with liberty to bring a fresh suit, that is to say a permission with a sequel attached to it. The condition of such permission in this case was the payment of costs. Until the costs were paid the permission was not operative, and so there was no withdrawal with liberty to bring a fresh suit. The result was that until there was such withdrawal the former suit was still pending. This appears to me to be the literal meaning of the words of s. 373 which is now reproduced in effect under O. XXIII, and is in accordance with the view of the English authorities on a cognate provision, for in *Edginton v. Proudman* (3), it was decided that where the plaintiff instead of paying costs went on with the original suit and obtained a verdict, the Court refused to set aside the verdict. When a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once, for until they are paid there is no withdrawal with the permission of the Court. In that view when the case came before the Munsif he was not entitled to dismiss it. All he could do was to regard s. 10 as a bar to his proceeding with the trial of the suit."

This decision was followed by the Patna and Lahore High Courts in *Muhammad* (2) 19 O L J 529; 23 Ind. Cas. 210; A I R 1914 Cal. 207.

(3) (1832) 1 Dowl 152.

Afzal v. Lachman Singh (4) and *Nazir Hussain v. Nathu* (5). The point now under discussion came up for decision by the Madras High Court for the first time in *Robert Fischer v. Nagappa Mudaly* (6). At that time the only authority that was apparently available was the case in *Abdul Aziz Molla v. Ebrahim Molla* (1). Though they did not dissent from that decision, White C. J. and Krishnaswami Ayyar, J., observed that where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs on or before the specified date and he failed to do so, he was precluded from bringing a second suit and if such a suit was brought, it would be dismissed. In a subsequent case, *Seshayya v. Subbayya* (7), Phillips, J., reviewing the cases cited above said :

"These cases all assume that the permission granted by the Court is not only permission to bring a fresh suit but also permission to withdraw the first suit, and that consequently until the condition is fulfilled the first suit is pending. This seems to me to overlook the provisions of O. XXIII, r. 1 (1) which gives a plaintiff power to withdraw his suit at any time without the permission of that Court. Consequently, I think that we must read the latter part of cl 2 (b) as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions."

The view thus taken by the Madras High Court was followed by the Bombay and Allahabad High Courts in *Shidramappa Mutappa v. Mallappa Ramchandrappe* (8) and *Rachhpal Singh v. Sheo Ratan Singh*, 118 Ind. Cas. 584 (9). In the first case Patkar, J. said :

"I am inclined to agree with the view of the Madras High Court, and most respectfully dissent from the view of the Calcutta High Court. When once a suit has been withdrawn, it is no longer pending and the permission given by the Court relates to the bringing of the fresh suit..."

The conditions attached to the permission to bring a fresh suit after the withdrawal of the first suit may fall under different categories according to decided cases, (1) that the plaintiff shall pay the costs before a certain date specified in the order,

(4) 5 Pat. 306; 96 Ind. Cas. 942; A I R 1926 Pat. 409; 7 P L T 491.

(5) A I R 1927 Lah. 159; 99 Ind. Cas. 420.

(6) 33 M 258; 6 Ind. Cas. 288; 7 M L T 226.

(7) 47 M L J 646; 82 Ind. Cas. 499; A I R 1924 Mad. 877; 20 L W 642; (1924) M W N 887; 35 M L T 62.

(8) 55 B 206; 133 Ind. Cas. 256; A I R 1931 Bom 257; 33 Bom. L R 278; Ind. Rul. (1931) Bom. 368.

(9) 118 Ind. Cas. 584; A I R 1929 All. 692; Ind. Rul. (1929) All. 188.

(3) that the plaintiff shall pay the costs before the institution of the second suit; and (3) that the plaintiff shall pay the costs without specifying the time of the payment. The present case falls under the second category as the condition imposed by the permission allowing the bringing of the second suit after the withdrawal of the first was to pay the costs before the institution of the second suit."

In the same case Baker, J., said :

"Under O. XXIII, r. 1, cl. (1), the plaintiff has an absolute right to withdraw his suit if he likes, and the permission granted under O. XXIII, r. 1, cl. (2), relates not to the withdrawal but to the right to bring a fresh suit. With respect, I am unable to follow the reasoning in *Shital Prasad v. Gaya Prasad* (2). I do not see how where permission is given to withdraw from the suit with liberty to bring a suit on condition of payment of costs, the former suit can be held to be pending until the costs are paid. In my opinion, the permission relates not to the withdrawal but to the bringing of the fresh suit, and with respect I agree with the view of the Madras High Court in *Seshayya v. Subbayya* (7), that the latter part of O. XXIII, r. 1, cl. (2) (b) must be read as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. In my opinion, it would be inconvenient to consider a suit which has been withdrawn as still pending, and with respect, the reasoning in the Madras cases commends itself to me rather than the reasoning in the Calcutta case."

In the second case Boys, J., said :

"Once a plaintiff who has applied for the withdrawal of his suit has accepted the terms imposed by the Court, the case is withdrawn and is no longer pending and the plaintiff cannot institute a fresh suit without strictly complying with those terms."

With respect I am of opinion that the view taken by the Madras, Bombay and Allahabad High Courts is the correct view of the law. As pointed out by Baker, J., under r. 1, O. XXIII, a plaintiff can withdraw a suit as a matter of right without the permission of the Court; but if he does it, he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to r. 2. Under the said rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on "such terms as it thinks fit." The terms may be of any kind. They might be as pointed out by Patkar, J. :

"(1) That the plaintiff shall pay the costs before a certain date specified in the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall

pay the costs without specifying the time of the payment."

If the terms imposed are as in illustrations (1) or (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing. If in spite of the permission to withdraw being granted the suit were to be regarded as still pending, the position would be intolerable. The plaintiff would be able to keep the case pending as long as he likes and use it to the annoyance and prejudice of the defendant, and the defendant would be simply helpless. This, I do not think, could have been the intention of the Legislature in enacting r. 2, O. XXIII. The terms imposed in illustrations (1) and (2) are somewhat analogous to what cl. 10 of our Letters Patent and cl. 12 of the Letters Patent of the Calcutta, Madras and Bombay High Courts, say. Where a part of the cause of action arises within the local limits of the ordinary original jurisdiction of any of the said High Courts, leave to institute a suit must first be obtained. Where leave is not first obtained and a suit is instituted, the suit is void. Leave to sue is a condition precedent to jurisdiction: *De Souza v. Coles* (10). Where therefore leave to bring a fresh suit on the same cause of action as in the first case is granted on payment of costs on or before a specified date or before the institution of a fresh suit, payment must be made before the specified date or before the institution of a fresh suit. If no payment is made, the second suit is void *ab initio*. The payment of costs is a condition precedent to the institution of a fresh suit. Where no time is fixed for payment of costs then different considerations may arise. In the present case the order of Sharpe, J., definitely stated that the costs of the plaintiff should be paid before the institution of the second suit and as no costs were paid before the institution, the present suit is, in my opinion, void. For these reasons I dismiss the suit.

Suit dismissed.

D.

(10) 3 M H O R 384.

SIND JUDICIAL COMMISSIONER'S COURT

First Appeal No. 31 of 193

December 4, 1939

DAVIS, J. O. AND WESTON, J.

PROVINCE OF SIND—APPELLANT

versus

HARKRISHINDAS GULABRAI—

—RESPONDENT

Land Acquisition Act (I of 1894), ss. 23, 4, 6, 3—Part of property ceasing to exist between notifications under ss. 4 and 6—Value of that part, if can be considered when making award—"Land" includes buildings, trees and standing crops.

No interest in favour of Govt. arises from the notification under s. 4, Land Acquisition Act. The identity of the property acquired is determined only by the notification under s. 6. If in the period between the two notifications a part of the property has ceased to exist, whether by act of the owner or by accident, the value of that part has not to be taken into consideration when making the award.

For the purposes of the Land Acquisition Act land includes buildings and also trees and standing crops. The definition is wider than that of immovable property under the T. P. Act.

F. A. against the order of the Assistant Judge, Hyderabad.

Mr. Partabrai D. Punwani, Advocate-General for the Appellant.

Mr. Khanchand Gopaldas, for the Respondent.

Weston, J.—This is an appeal under s. 54, Land Acquisition Act. The acquisition was of two small plots of land bearing Nos. 1363 and 1364 of areas 173 and 100 square feet respectively in the Ohodki Bazar, Hyderabad, and as the notification under s. 4 of the Act dated March 5, 1928, shows the purpose of the acquisition was the widening by the Hyderabad Municipality of the bazar and adjoining lanes. The two plots which adjoin were owned by opponent in the present appeal. At the time of the notification under s. 4 each plot contained a shop. Above the shop in No. 1364 was a room reached by an outside staircase, while above the shop in No. 1363 were outhouses forming appurtenances to the room over the first shop. The declaration under s. 6 of the Act was published on May 22, 1930, and some time in the year 1929 a fire took place in the premises, as a result of which the shop in No. 1363 with the outhouses over it was wholly destroyed except for two girders of the roof, while the shop in No. 1361 and the room over it suffered only slight damage, except that the staircase was destroyed. After the fire opponent applied to the Municipality under the Municipal Act for

permission to reconstruct, but this permission was refused evidently because of the impending acquisition. When making his award the Land Acquisition Officer came to the conclusion that the normal rent realized from the property before the fire was Rs. 33 a month but he refused to value the property on this basis. He considered the fire to be an act of God for which the Municipality could not be held responsible, and that opponent was entitled only to the market value of the bare land and to the value of the materials upon it. From a comparison of sales of neighbouring plots, he estimated the value of the land of the two plots at Rs. 11-8-0 per square foot, and he awarded compensation at this rate. He made no estimate of the value of the materials. The amount of compensation allowed by him was Rs. 3,140 plus the statutory 15 per cent, or Rs. 3,611.

Opponent had claimed an amount of Rs. 12,500 as compensation and also loss of rent due to the refusal of the Municipality to permit him to reconstruct the buildings destroyed, and he claimed a reference to the District Court under s. 18, Land Acquisition Act. The Assistant Judge before whom the reference came held that under s. 23 of the Act, compensation was to be awarded on the market value of the land as it was on the date of the notification under s. 4, and that any loss accruing after this date was to be borne by the Municipality. He accepted the figure of rental value Rs. 33 per month given by the Land Acquisition Officer, and made a valuation on this basis and awarded a sum of Rs. 4,395 plus the statutory 15 per cent.

The present appeal filed by the Advocate-General purports to be filed on behalf of the Land Acquisition Officer, and a preliminary point is taken by the learned Advocate for the opponent that the appeal is not in proper form, as under s. 79, Civil P. C., an appeal can be filed only on behalf of the Province of Sind. But, in our view, the title of the appeal is not more than a clerical mistake, for para. 1 of the memorandum of appeal shows that it is an appeal filed on behalf of the Local Govt. sanctioned by formal resolution; and we have allowed a formal amendment of the title of the memorandum of appeal whereby "the Province of Sind" has been substituted for "the Land Acquisition Officer." The figure of Rs. 33 as normal rent of the properties before the fire, and the mode of calculation

adopted by the Assistant Judge have not been challenged before us. But it is claimed by the learned Advocate-General that Govt. or the Municipality is not bound to pay for the property destroyed between the dates of the notifications under ss. 4 and 6, and this argument raises a question which, so far as we have been able to ascertain, has not been the subject of a reported decision by any of the High Courts in India.

Land is defined in s. 3 of the Act as including benefits to arise from land, and things attached to the earth or permanently fastened to anything attached to the earth. For the purposes of the Act therefore land includes buildings and also trees and standing crops. The definition is wider than that of immovable property under the T. P. Act. The scheme of the Land Acquisition Act may be described briefly as follows: There is first a notification under s. 4, published in the *Official Gazette* and at places in the locality, which announces that land in the locality is needed or is likely to be needed for a public purpose. It is usual in this notification to particularize the land needed or likely to be needed, but more than a general description does not appear essential. Following this publication, it is lawful for any officer authorized in this behalf to enter upon any land in this locality, to investigate the adaptability of the land for the public purpose, and to survey and set out the boundaries of the land proposed to be taken. If necessary for these investigations standing crops and fences may be removed, but all damage caused must be paid for promptly. It is open to persons interested in land notified under s. 4 to raise objections to the proposed acquisition, and objections so raised must be considered by the Collector and decided by the Local Govt.

If Govt. decide to proceed with the acquisition a notification or declaration is published under s. 6 that particular land is required for the public purpose, and the Local Govt. is empowered to acquire only after publication of this declaration. The Collector is then directed to take order for the acquisition, and, after causing the land to be marked out, if this has not already been done, the Collector issues public notice under s. 9 that claims to compensation may be made to him. This notice must contain particulars of the land required, and must be served upon the occupants of the land if any and upon

all persons known or believed to be interested therein. Under s. 11 inquiry is made into any objections made to the measurement effected under s. 8, and the value of the land at the date of publication of the notification under s. 4, and an award is made declaring the true area of the land, the compensation which should be allowed and the persons entitled to receive it. Following the award under s. 11 the Collector may take possession, and upon his taking possession the land vests in Govt. free from all encumbrances.

Sections 23 and 24 lay down the lines upon which compensation is to be determined both by the Collector under s. 11 and by the Court on reference being made. Section 23 requires that the following shall be taken into consideration: (1) the market value of the land at the date of the notification under s. 4; (2) damage sustained by reason of the taking of any standing crop or trees at the time of the Collector's taking possession; (3), (4) and (5) damage sustained at the time of the Collector's taking possession by reason of severance of the land taken from other land of the person interested, injury to other property or expense incurred by forced change of residence, etc.; (6) *bona fide* damage resulting from diminution of profits of the land between the time of publication of the declaration under s. 6 and the time of the Collector's taking possession of the land.

Section 24 provides that certain circumstances shall not be taken into consideration. Of these it is only necessary to note; (4) any damage likely to be caused to the land acquired, after the date of the publication of the declaration under s. 6, by or in consequence of the use to which it will be put; and (7) any outlay or improvements on, or disposal of, the land acquired, commenced, made or effected without the sanction of the Collector after the date of the publication of the notification under s. 4. It has been urged for the opponent that in accordance with the Privy Council decision in *Atmaram v. Collector of Nagpur* (1) an owner of land is entitled to the value of the property at the time of expropriation, and it is claimed that expropriation therefore takes place at the time of the notification under s. 4. But the acquisition in this Nagpur case [*Atmaram v. Collector of Nagpur*] (1) was

(1) A I R 1929 P C 92; 114 Ind. Cas. 587; 25 N L R 68; 33 O W N 458; 29 L W 496; 6 O W N 417; 49 O L J 398; 57 M L J 81; 31 Bom. L R 728; (1929) A L J 249 (P C).

made in the year 1919 and at that time the Act provided that compensation was to be assessed on the value at the time of the declaration under s. 6 and not at the time of the notification under s. 4. We do not think this latter notification is analogous to the notice to treat given under the English Land Clauses Act, which is almost equivalent to a contract for sale; see Halsbury, Vol. 6, Edn. 2, at p. 84. Apart from the fact that in India an agreement for sale by itself creates no interest, we think it is clear from the sections of the Land Acquisition Act already set out, that no interest in favour of Govt. arises from the notification under s. 4. The identity of the property acquired is determined only on the declaration under s. 6 being made. It is not necessary that the property acquired should include all the property appearing in the notification under s. 4. Damage caused during the preliminary investigation following this notification has to be paid for immediately and has nothing to do with the award. Standing crops, trees and fences are land for the purposes of the Act, and if those existing at the time of the notification under s. 4 were necessarily to be included in the award, an owner would receive double payment if they were removed or damaged in the preliminary investigation. There is nothing in the Act which prevents the owner from removing crops after the notification under s. 4. Section 23 (6) shows that the owner is entitled to receive profits even up to the date when the Collector takes possession, and he is entitled to compensation for any diminution in these profits only after the date of the declaration under s. 6. In the present case if the owner had obtained the permission of the Municipality and had restored the buildings to their former condition before the declaration under s. 6, we are not able to understand how he could claim to recover his outlay from Govt. or the Municipality.

To take another example, if by flood an appreciable part of land notified under s. 4 was swept away before the declaration under s. 6, but it was considered necessary to proceed with the acquisition of the remainder, the description of the property in the two notifications might be in the same or similar terms. But Govt. would not be bound by any statement of area contained in the first notification, and would have to pay only for such property as was declared to be required by the notification under s. 6. We think, therefore, that

although the date of the notification under s. 4 is the date at which values are to be considered, the identity of the property is determined by the notification under s. 6. If in the period between the two notifications a part of the property has ceased to exist, whether by act of the owner or by accident, the value of that part has not to be taken into consideration when making the award. In the present case the two notifications were identical in terms. Neither contained mention of the constructions on the land. But the property described as Survey Nos. 1363 and 1364 was very different in the year 1930 from that property as it existed in 1928. In 1928 there were two shops, an upper room and outhouses. In 1930 there were one shop and one upper room without a staircase.

On our conclusion that the proper compensation to be awarded is the value in 1928 of the property existing in 1930, this compensation will be something between the valuation of the Land Acquisition Officer and that of the Assistant Judge. The difference between these is Rs. 1,255 only, which supports the statement of the Land Acquisition Officer made in his award that the main value of the property lies in the land. We think it may be taken that roughly half the structures were destroyed. Although it was the larger shop which was burnt, on the first floor only outhouses and the staircase suffered, while the upper room remained. On this basis about Rs. 600 or half the difference of the two valuations would represent the value of the structure destroyed. Mr. Khanchand for opponent has very fairly conceded that Rs. 600 is a reasonable estimate of the cost of renewals necessary to bring the property to its condition before the fire, and we think that this may be taken as correct. The total compensation allowed by the Assistant Judge therefore must be reduced by Rs. 600 together with the statutory 15 per cent. on this amount, that is to say, by Rs. 690 and we modify the order of the learned Assistant Judge by reducing the amount allowed by this sum. As the appellant has only partly succeeded we make no order as to costs.

s.

Order modified.

BOMBAY HIGH COURT

Second Appeal No 465 of 1937

October 9, 1939

DIVATIA, J.

BAI RATANGAVRI AND OTHERS—
PLAINTIFFS—APPELLANTS

versus

MANILAL MAHIPATRAM MEHTA—

DEFENDANT—RESPONDENT

Easement—Light and air—Wall existing between two houses from beginning—Ancient apertures in it before other house is built, if can be closed—Agreement to treat lower part of wall as joint—If would extinguish easement of light and air through widows in upper wall.

The party, who wants the whole wall to be treated as a joint wall, must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built they cannot be blocked up unless there is an agreement to close them when the other house is raised, and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already acquired easement of light and air through the windows in the upper wall. 87 Ind. Cas. 977 (1) and 97 Ind. Cas. 691 (2), explained.

S. A. against the decision of the District Judge, Ahmedabad, in Appeal No. 190 of 1935.

Messrs. G. N. Thakor and V. N. Chhatrapati, for the Appellants.

Mr. P. A. Dhruva, for the Respondent.

Judgment.—This is a plaintiffs' appeal in a suit for declaration that the upper part of the wall of their house containing two apertures was of their exclusive ownership and for injunction restraining the defendant from blocking them up. The houses of the parties are situated adjacent to each other in Ahmedabad. The plaintiffs' father purchased their house in the year 1889, the sale deed of which contains a recital that the western wall of that house (the wall in dispute) was a joint wall only up to the roof of the house of Harilal, who was the defendant's predecessor-in-title, and above the height of the defendant's house it belonged exclusively to the plaintiffs' house. The defendant purchased his house in 1908, and it is recited in his sale deed that the eastern wall, which is the same as the western wall of the plaintiffs' house, was joint up to the roof of the house with the plaintiffs' house, but it is silent about the ownership of the upper part of the wall. It is material to note that the two apertures in the upper part of the wall in dispute were in existence before 1908,

but there is no evidence of the particular time when they were put up. It is also material to note that there is no evidence that the height of the wall in dispute was originally only to the roof of the defendant's house and that it was subsequently raised by the plaintiffs or their predecessors. We have the fact that in 1889 when the plaintiffs' father purchased this house, the whole of the western wall was in existence as it is to-day.

The defendant intended to raise the height of his house and the plaintiffs apprehended that they would be deprived of the light and air which they had enjoyed through the two apertures in the upper part of their wall on account of the defendant raising his house. They, therefore, brought the present suit for the declaration and injunction as stated above. The defendant's case was that the whole wall to the west of the plaintiffs' house was joint wall, and that the plaintiffs therefore could not acquire any easement of light and air through any apertures in that joint wall.

Both the lower Courts have dismissed the plaintiffs' suit relying on the decision of this Court in *Imambhai v. Rahimbhai* (1). The main ground on which the decision of the lower Appellate Court is based is that it was probable that the upper part of the wall was constructed by the plaintiffs' father at his own expense and was also subsequently repaired by him, that in the absence of any agreement between the owners of the two houses that a part only was to be treated as joint and the rest exclusive, it must be taken on the principle of the decision in *Imambhai v. Rahimbhai* (1) that the whole was a joint wall, because where one of the two neighbouring owners raises a party wall, the other owner giving his consent or acquiescence, the raised portion of the wall assumes the same character as the old party wall on which it stands, and that neither party has a right to commit a trespass on the party wall so raised in height by opening windows in it.

It is true that the decision in *Imambhai v. Rahimbhai* (1), lays down the proposition that where a joint wall is raised by one co-owner with the consent or acquiescence of the other co-owner, the whole wall becomes joint. But I think that decision is to be applied where it is proved that the joint wall had been raised by one co-owner and that it had been raised with the consent or acquiescence of the other co-owner.

(1) 27 Bom. L.R. 503; 87 Ind. Cas. 977; A I R 1925 Bom. 373; 49 B 586.

Where these two facts are not proved, I do not think that that decision would have any application. It is conceivable that the whole wall might be in existence before the house of the other co-owner was built and when the latter began to build his house by the side of that wall, there might have been an agreement between the owners of the two houses to treat the lower part of the wall in so far as it extends to the roof of the new house as joint, so that both the co-owners might treat that part of the wall as a common wall and the remaining upper part of wall might be allowed to remain the exclusive property of the owner of the house of which it is a part. Such an agreement is possible in thickly populated cities where party walls are very common. The ground of the decision in *Imambhai v. Rahimbhai* (1), is that the wall must have been raised with the consent or acquiescence of the other co-owner. But there is no question of the consent or acquiescence of the other co-owner where there is no raising of the wall at all, and therefore the legal inference of the whole wall becoming joint would not arise in a case where there is no raising of a party wall but a part of the wall is to be treated as joint by agreement. The lower Court has recognized the possibility of such an agreement because it says: "Nor is there evidence of any agreement between the two owners relating to any part of the wall." The fact that the defendant's sale deed is silent about the ownership of the upper part of the wall although it does recite that the lower part was joint is more consistent with an agreement to treat the lower part only as joint than to treat the whole wall as joint. The party, who wants, the whole wall to be treated as a joint wall, must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built they cannot be blocked up unless there is an agreement to close them when the other house is raised, and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already acquired easement of light and air through the windows in the upper wall. The decision in *Rajubhai v. Lalbhai* (2), that easement of light and air through windows opened in a joint

(2) 28 Bom. L.R. 1000; 97 Ind. Cas. 691; A.I.R. 1926 Bom. 545.

wall cannot be acquired by prescription would not therefore apply to the present case where the upper wall is not proved to be joint.

I think therefore, that the decree of the lower Appellate Court should be reversed and the appeal allowed with costs throughout. The plaintiffs are entitled to the declaration and injunction as prayed for in respect of the easement of light and air.

D.

Appeal allowed.

CALCUTTA HIGH COURT

Appeal No. 818 of 1938

July 6, 1939

B. K. MUKHERJEA AND ROXBURGH, JJ.

JAIKARANDAS AGARWALLA AND
ANOTHER—DEFENDANTS—APPELLANTS

versus

PROTAPSING AGARWALLA—PLAINTIFF
AND ANOTHER—RESPONDENTS

Evidence Act (I of 1872), ss. 68, 71—S. 71 is exception to rule in s. 68—"Execution," in both sections, meaning of—Mortgage deed—Attesting witness turning hostile—Mortgagees can give evidence to prove attestation by others.

Section 71, Evi. Act, is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in s. 68, Evi. Act. The Rule in s. 68 is stringent rule and it cannot be relaxed except under circumstances provided for in the Act itself. One of such exceptional circumstances is to be found in s. 71.

The same meaning must be given to the word 'execution' in s. 71 as in s. 68, Evi. Act. In the case of a document which is not valid without attestation 'execution' not only means signing by the executant but it means and includes attestation as well which is the last of the series of acts necessary to give completeness and formal validity to the deed. Hence it would be necessary to call an attesting witness under s. 68 not merely to prove the signature of the executant but to prove attestation as well and if such witness turns hostile or refuses to prove execution or attestation other witnesses may be called for the same purpose. 70 Ind. Cas. 532 (1) and *Hari Nath Ghose v. Nepal Chandra Rai* (2), relied on.

A mortgagee being grantee of the instrument cannot witness the execution of the document made to himself nor can he take its acknowledgment, but when the attesting witnesses turns hostile he is certainly competent to give evidence not as an attesting witness but as a witness to prove attestation by others. The Legislature, has not left the fate of attested documents completely at the mercy of the attesting witnesses. The plaintiff's duty is at an end as soon as he calls one of the attesting witnesses under the provisions of s. 68, Evi. Act. If the witnesses turn hostile the plaintiff is not helpless and he is entitled to adduce other evidence as laid down in s. 71. This other evidence, would include his own evidence as well. 7 Ind. Cas. 735 (5), relied on. *Seal v. Claridge* (3) and 5 Ind. Cas. 539 (4), distinguished.

A. from the appellate decree of the District Judge, Jalpaiguri, dated February 10, 1938.

Messrs. Bireswar Bagchi and Bijali Bhushan Sanyal, for the Appellants.

Messrs. Gunada Charan Sen and Amiya Prosad Maitra, for the Respondents.

B. K. Mukherjee, J—This is an appeal on behalf of defendants Nos. 2 and 3 and it arises out of a suit commenced by the plaintiff for enforcement of a mortgage bond. The facts lie within a short compass and are, for the most part, undisputed. The defendant No. 1 executed a mortgage bond in favour of the plaintiff on January 15, 1935 to secure a loan of Rs. 2,500. Shortly after this defendants Nos. 2 and 3 obtained a money decree against defendant No. 1 for a sum of about Rs. 1,299 in the Court of the Munsif at Jalpaiguri. The date of the decree is February 7, 1935. The decree was executed in money execution Case No. 58 of 1935 and the properties included in the mortgage bond were attached on February 22, 1935. The plaintiff mortgages preferred a claim but it was dismissed for default as he did not appear at the date of hearing. In the result the attached properties were sold and they were purchased by defendants Nos. 2 and 3 for a sum of about Rs. 300 only. The plaintiff has now instituted the present suit and has prayed for sale of the mortgaged property and also for setting aside the order of dismissal for default passed in the claim proceeding. The suit was contested by defendants Nos. 2 and 3 only and their contentions substantially were of a three-fold character. In the first place, it was contended that the mortgage bond was not executed and attested according to law. In the second place, it was pleaded that the bond was a collusive and a *benami* affair and that it was executed in order to defraud the creditors of defendant No. 1 and was not supported by any consideration. The third ground raised was that the mortgaged property was a co-parcenary property belonging to a Mitakshara family of which defendant No. 1 was only one of the members. It was said that he had no authority to mortgage it and the transfer was totally void in law. All these defences were overruled by the trial Court which gave the plaintiff a decree. On appeal by defendants Nos. 2 and 3 the lower Appellate Court reduced the amount of interest from 18 per cent. to 10 per cent. per annum but

on all other points affirmed the decision of the trial Judge. It is against this decision of the District Judge of Jalpaiguri that the present second appeal has been preferred.

Mr. Bagchi who appears for the appellants has argued before us in the first place that no mortgage decree could be given to the plaintiff inasmuch as the mortgage bond failed for want of proof of attestation. It appears that there were two witnesses to the mortgage bond both of whom were examined by the plaintiff. The attesting witnesses however turned hostile and although they admitted their signatures on the bond, they denied having seen the executant signing the deed or obtaining any acknowledgment from him. The Courts below were of the opinion that these witnesses were gained over by the present appellants and relying on the evidence of the plaintiff on the point of execution and attestation they decreed the plaintiff's suit. Mr. Bagchi argues that under s. 71, Evi. Act, when the attesting witnesses denied the execution of the document, attestation could not be proved by any other evidence and he has further argued in this connection that, at any rate, the plaintiff himself was an incompetent witness to speak to attestation.

As regards the first branch of the appellant's contention it may be pointed out that s. 71 is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in s. 68, Evi. Act. That section requires that execution of a document compulsorily attestable must be proved at least by one attesting witness if he is alive and subject to the processes of the Court. This is a stringent rule and whether it is based on the ground that the attester's testimony is the most desirable and trustworthy evidence, or that he being the witness agreed upon between the parties cannot be dispensed with, there is no doubt that the rule is mandatory and it cannot be relaxed except under circumstances provided for in the Act itself. One of such exceptional circumstances is to be found in s. 71, Evi. Act, which lays down that if the attesting witness who is called, denies execution or refuses to prove the document or turns hostile the execution may be proved by other evidence. Mr. Bagchi contends that under this section other evidence may be let in only to prove execution but not to prove attestation. This contention, in my opinion, is manifestly untenable. The same meaning must

be given to the word 'execution' in s. 71 as in s. 68, Evi. Act. It has been held in several cases that in the case of a document which is not valid without attestation execution not only means signing by the executant but it means and includes attestation as well which is the last of the series of acts necessary to give completeness and formal validity to the deed. *Arjun Chandra v. Kailas Chandra* (1) and *Hari Nath Ghose v. Nepal Chandra Rai* (2). In this view it would be necessary to call an attesting witness under s. 68 not merely to prove the signature of the executant but to prove attestation as well and if such witness turns hostile or refuses to prove execution or attestation other witnesses may be called for the same purpose. If, on the other hand, we accept the view of Mr. Bagchi that execution does not include attestation the result, in my opinion, would be exactly the same. In that case s. 68 would not make it compulsory on the plaintiff to examine any attesting witness at all for the purpose of proving attestation and there would be no necessity to invoke s. 71 in case the attesting witness proves hostile. The first branch of Mr. Bagchi's contention therefore must fail.

In support of the other branch of contention Mr. Bagchi has relied upon certain decisions of this Court as well as of English Courts, namely *Seal v. Claridge* (3), *Sarur Jigar Begum v. Barada Kanta* (4) and *Peari Mohan Maiti v. Sreenath Chandra Maiti* (5). The proposition of law which has been enunciated in these cases cannot, in my opinion, be disputed but I think it does not support the present contention of Mr. Bagchi. It was laid down by Lord Selborne in *Seal v. Claridge* (3), referred to above, that :

"A person who is a party to the deed cannot be regarded as an attesting witness on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation namely the prevention of fraudulent malpractice, may be completely defeated."

Following this principle it has been held in *Sarur Jigar Begum v. Barada Kanta* (4), that when a document or a bond is executed by two persons in the presence of each it could not be said that each executant

(1) 36 O L J 373; 70 Ind. Cas. 532; A I R 1923 Cal. 149; 27 O W N 263.

(2) 41 O W N 306; I L R (1937) 1 Cal. 507.

(3) (1881) 7 Q B D 516; 50 L J Q B 316; 44 L T 501; 29 W R 598.

(4) 37 O 526; 5 Ind. Cas. 539; 14 O W N 974; 11 O L J 563.

(5) 14 O W N 1046; 7 Ind. Cas. 735.

was an attesting witness in respect of the signature of the other. In *Peari Mohan Maiti v. Sreenath Chandra Maiti* (5), the document which was a mortgage bond, was attested by four persons none of whom was called as a witness and execution was sought to be proved by the evidence of defendant No. 2 alone who was one of the mortgagors and was also a scribe of the document. It was rightly held by this Court that defendant No. 2 could not under the law be brought within the category of an attesting witness even though he might have been present at the execution of the bond. Nor was his evidence the evidence of an attesting witness. It was pertinently pointed out by the learned Judge who decided that case that it was the duty of the plaintiff to examine at least one of the attesting witnesses under s. 68, Evi. Act. But if no such attesting witness was available it was then and then only that the evidence of defendant No. 2 could be received in proof of the execution and attestation of the bond. In my opinion, the same principle applies in its entirety to the facts and circumstances of the present case. The plaintiff was not certainly an attesting witness in the proper sense of the word and he was not competent to attest the deed. Being, grantee of the instrument he could not, I think, witness the execution of the document made to himself nor could he take its acknowledgment, but the attesting witnesses having turned hostile he was certainly competent to give evidence not as an attesting witness but as a witness to prove attestation by others. The Legislature, it seems, has not left the fate of attested documents completely at the mercy of the attesting witnesses. The plaintiff's duty is at an end as soon as he calls one of the attesting witnesses under the provisions of s. 68, Evi. Act. If the witnesses turn hostile the plaintiff is not helpless and he is entitled to adduce other evidence as laid down in s. 71. This other evidence, in my opinion, would include his own evidence as well. This branch of Mr. Bagchi's contention therefore must also be overruled. I agree with the Courts below in holding that the plaintiff's evidence does establish that the document was executed and attested.

The second point that was raised by Mr. Bagchi is to the effect that the Court of appeal below did not properly consider the case which the appellants wanted to make under s. 53, T. P. Act. I do not think there is any substance in this contention,

It is true that it was stated generally in the written statement that the mortgage was a *benami* affair the object of which was to defraud the creditors of defendant No. 1 but defendants Nos. 2 and 3 did not certainly attempt to make any case under s. 53, T. P. Act, and it is very doubtful whether they were competent in law to make any such case in this form. The point was not set out specifically in the pleadings nor made the subject-matter of an issue and the question was not raised in either of the Courts below. In these circumstances this contention must also fail. The third ground put forward by Mr. Bagchi relates to the question as to whether the property mortgaged belonged to defendant No. 1 or it was a co-parcenary property belonging to a Mitakshara family of which defendant No. 1 was only a member. This contention, in my opinion, has been concluded by the findings of fact concurrently arrived at by both the Courts below that the other co-parcener whose claims were set up passed out of the family by adoption and the property did belong exclusively to defendant No. 1.

The last ground of the appellants relates to the rate of interest. The stipulation in the bond undoubtedly was for interest at the rate of 18 per cent. compound per annum. The lower Appellate Court in exercise of its powers under the Ben. Money-lenders Act reduced it to 10 per cent. compound. We think that having regard to the circumstances of this case it will meet the ends of justice if we allow the plaintiff mortgagee interest at the rate of 8 per cent. simple up to the date of the preliminary decree and then at the rate of 6 per cent. simple from that date up to the date of the expiry of the period of grace and also for the subsequent period till the mortgage money is realized. Subject to the modification as regards interest as mentioned above the appeal is dismissed with costs.

Roxburgh, J.—I agree.

s.

Appeal dismissed.

PATNA HIGH COURT

Criminal Revision Application No. 436
of 1939

September 21, 1939

AGARWALA, J.

SHEODENI PATTAK—PETITIONER

versus

BUDHESHWAR DUBEY—OPPOSITE PARTY
Penal Code (Act XLV of 1860), s. 499—Defama-

187—91 & 92

tion—Possibility that accused might have some defence, is ground for dismissal.

A complaint under s. 499, I. P. O., which is made on oath cannot be dismissed on the ground that there is a possibility that the accused might have some defence to the complaint, if true. The Magistrate should direct his attention to ascertain whether there is any reason for disbelieving the complaint.

Or. R. App. against an order of the Sessions Judge, Arrah, dated June 10, 1939.

Mr. A. B. N. Sinha, for the Petitioner.

Messrs. Raj Kishore Prasad and S. R. Ghosal, for the Opposite Party.

Order.—This is an application against an order of the Sessions Judge of Shahabad declining to interfere with an order of the Sub-Divisional Magistrate of Buxar refusing to prosecute one Budheshwar Dubey on a charge of defamation. It appears that prior to the present proceedings there was a report by the Police with regard to allegations made by Budheshwar Dubey against the present complainant. The Magistrate then observed that Budheshwar's allegations appeared to be in the nature of blackmail but that he would not take criminal proceedings but merely issue a warning to Budheshwar not to commit the offence again. The complainant's allegation is that Budheshwar had persisted in repeating the defamatory allegations of which he complained and should therefore be prosecuted. Among other reasons for not prosecuting Budheshwar the Magistrate has stated that it is possible that Budheshwar will be able to shelter himself behind two of the explanations to s. 499, I. P. O. Whether he will be successful in that is immaterial. In the present case all that the Magistrate should have directed his attention to was to ascertain whether there was any reason for disbelieving the complaint which was made on oath and not whether there was some possibility that the petitioner might have some defence to the complaint if true. I will therefore set aside the order of the Sub-Divisional Magistrate dismissing the complaint and direct him to summon the accused person and to proceed with the trial.

D.

Order set aside.

CALCUTTA HIGH COURT

Reference No. 1 of 1938

July 21, 1938

DERBYSHIRE, C. J. AND COSTELLO, J.

In re OHOUTHMAL GOLAPCHAND—

Income Tax Act (XI of 1922), s. 24 (1)—Firm of partners dealing in shares holding opening stock of shares valued at certain amount, at beginning of accounting year—Stocks and shares always valued at cost—Firm dissolved at end of accounting year and shares allotted to partners at market value on date of dissolution—Difference between opening stock valuation at cost and valuation at market rate on dissolution of firm held could not be claimed as loss.

A business firm which is liable to be assessed to income-tax is under an obligation to maintain a system of accounts with regularity and it is not permitted to change the system except upon a proper application being made to the income-tax authorities in that behalf. So also every tax year is a self-contained period and the profits earned or the loss sustained either before that year or after that year are not at all relevant for the purpose of an assessment relating to a particular year. 137 Ind. Cas. 772 (2), relied on.

The assessee a firm of partners were doing business in shares and held at the beginning of the accounting year an opening stock of shares valued at certain cost. Their stock of shares had always been valued at cost. During the year there had been no transaction in shares. At the end of the accounting year their partnership was dissolved and shares were allotted to the partners at the valuation based on the market value of the shares on the date of the allotment. The assessee in the year of assessment claimed to deduct the difference between the opening stock valuation at cost and the valuation at market rate on the date of allotment of shares to the partners, as loss.

Held, that the assessee was not entitled to do so because, as the stock was at all previous times valued at cost price and was brought into the balance sheet at the beginning of the year at its cost price, then, when it was taken out of the assets of the company, it also should be valued in the same way at the cost price. The system of valuation which the assessee contended for had the effect of bringing into the accounts of the year a loss in respect of this stock which had not occurred during the year. *In re Tata Industrial Bank Ltd.* (4), referred to.

Facts.—The assessment in question is for the year 1936-37 and was made on the income of the accounting year 1922 Ram Navami which ended on March 30, 1936. During the accounting year the assessee, Messrs. Ohouthmal Golapchand, were a firm of four partners with equal shares constituted under a partnership deed, dated May 1, 1933. By a deed of agreement, dated January 8, 1936 the partners agreed to dissolve the firm on and from March 30, 1936, (*Chait Sudi 8, 1933*) "and in the meantime to partition assets of the partnership in so far as they are collected in equal shares and complete the partition." A copy of this

agreement is attached as annexure A. (It is dated January 8, 1935 but this is admitted to be a mistake for January 8, 1936.) The partition was completed on March 29, 1936.

For the 1936-37 assessment, the assessee, who had business in piece-goods, jute, money-lending, silver and shares and had also income from interest on securities and dividends returned against the head "business, trade, etc.," loss of Rs. 16,285-6-3, and against the head dividends from companies, income of Rs. 1,389-12-0 thus returning a total loss of Rs. 14,895-10-3. The loss shown against the head "business" included an alleged loss of Rs. 33,365 in the share account. The facts regarding this share account are that the assessee were doing business in shares and held at the beginning of the accounting year an opening stock of shares valued at cost Rs. 85,331. Their stock of shares had always been valued at cost. During the year there had been no transaction in shares. On March 9, 1936, in the course of the partition above-mentioned the shares were allotted to the four partners at a valuation agreed upon by the partners. The allotment was as follows: (Small amounts of cash were paid to make up the differences in the allotment):

	Rs.
Raughlal Sohanlal	... 13,415
Sujanmull Punamchand	... 12,904
Hazarimull Sumermull	... 12,964
Melapchand Jatanlal	... 12,683

Total Rs. 51,966

Rupees 33,365 which was the difference between this figure and the opening stock valuation, Rs. 85,331, was claimed as a loss in the assessment. The Income-tax Officer refused the claim on the ground that if there were any loss it was a capital loss in distribution of assets. A copy of the assessment order is attached as annexure B. The status of the assessee for assessment purposes was also in question. Hitherto they had been assessed as a registered firm (s. 26-A, Income Tax Act), and they applied orally for renewal of the registration for this assessment. The Income-tax Officer when making the assessment on December 9, 1936 refused to renew the registration on the ground that the partnership constituted by the deed of May 1, 1933 had been dissolved and no fresh deed had been executed. He made the assessment

on an unregistered firm. On appeal the Assistant Commissioner upheld both the disallowance of the claim for loss in shares and the rejection of the application for renewal of registration. Copies of these appellate orders are attached as annexures O-1 and O-2. Being dissatisfied with these orders the assessee has asked me to refer two questions (attached as annexure 'D') to the High Court. I refer the following questions: (a) whether on the facts of this case the assessee was entitled to claim a loss in shares by valuing the shares at their market price on the date on which they were divided up amongst the partners? (b) whether the Income-tax Officer was justified in refusing to renew the registration of the firm?

With regard to the first question, the transaction was merely a distribution of assets and not a transaction in the course of business from which a revenue profit or loss could result. And the figure of loss arrived at is purely fictitious and arises from a change in the assessee's method of accounting which they are not entitled to make. No loss was in fact incurred on these shares and according to the assessee's method of accounting there could be no loss until the shares were sold. The division of the shares amongst the partners was certainly not a sale. In my opinion therefore the first question should be answered in the negative. With regard to the question of registration, Income-tax r. 6 requires an application for renewal of registration to be accompanied by a certificate that the constitution of the firm as specified in the instrument of partnership remains unaltered. No such certificate was filed in this case nor could it have been since the firm was dissolved at the time of the oral application for registration. And the Income-tax Officer could not renew the registration of a firm which had ceased to exist. In my opinion, therefore, the second question should be answered in the affirmative. I append to this statement of case copies of the following in addition to those already referred to in the body of the statement: (1) Grounds of appeal in respect of the assessment—Annexure E. (2) Ground of appeal in respect of the question of registration—Annexure 'F'. (3) Application under s. 66 (2) in respect of the assessment—Annexure 'G'. (4) Application under s. 66 (2) in respect of the question of registration—Annexure 'H'.

Mr. Bose, for the Assessee.

Mr. R. B. Pal, for the Commissioner.

Derbyshire, C. J.—The facts in this case are set out in the case and in annexure A, dated January 8, 1936. The first question is whether on the facts of this case the assessee was entitled to claim a loss on shares by valuing the shares at their market price on the date on which they were divided up amongst the partners? It has been contended by the assessee that these shares were sold by the partnership to the outgoing partners, and not partitioned as the case states. The case, in my opinion, is in accordance with the facts and is conclusive on that point. The shares in question were acquired sometime previous to the beginning of the accounting year—we are not told how long previous. It is common ground that they were acquired at a price higher than the price ruling on March 8, or March 30, 1936. They had been shown in the books of the partnership and carried forward from year to year at the cost price. The assessee says that there was properly a loss on the disposal of those shares and that that loss was the difference between the cost price and the price at which they were taken over which is alleged to be the market price on March 8, 1936. The assessee says that that loss they are entitled to set off against gains on other parts of the business during the accounting year.

We are not told what the market value of these shares was at the beginning of the accounting year in question. It is only the loss during the year that can be set off against other gains during the year. We do not know what loss, if any, occurred on these shares during the accounting year in question. It was pointed out by Lord Buckmaster in *Commissioner of Income-tax, Bombay Presidency v. Allahabad New Cotton Mills Co., Ltd.* (1) at p. 23 where the question of the valuation of stocks in relation to the ascertainment of the profits of a business for a particular year was discussed that

"Section 13, Income Tax Act, 1922, says: 'income, profits and gains shall be computed for the purposes of ss. 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee.'"

(1) 57 I A 21, (23); 121 Ind. Cas. 543; A I R 1930 P C 56; 54 B 213; Ind. Rul. (1930) P C 79; (1930) A L J 76; 31 L W 297; 34 C W N 292; 32 Bom. L R 352; 51 O L J 128; 58 M L J 204; (1930) M W N 313 (P O).

He also says :

"The method of introducing stock into each side of a profit and loss account for the purpose of determining the annual profits is a method well understood in commercial circles and does not necessarily depend upon exact trade valuations being given to each article of stock that is so introduced. The one thing that is essential is that there should be a definite method of valuation adopted which should be carried through from year to year, so that in case of any deviation from strict market values in the entry of the stock at the close of one year it will be rectified by the accounts in the next year."

In my opinion, as this stock was at all previous times valued at cost price and was brought into the balance sheet at the beginning of the year at its cost price, then, when it was taken out of the assets of the company, it also should be valued in the same way at the cost price. The system of valuation which the assessee contend for would, it appears to me, have the effect of bringing into the accounts of the year a loss in respect of this stock which had not occurred during the year. For these reasons I am of the opinion, that Question (a) should be answered in the negative. As to Question (b) the partnership in question had come to an end on March 30, 1936, by virtue of the deed of dissolution. The deed provides that the partnership agreement shall cease on that date and "shall not continue for any reason whatsoever." Therefore, on December 9, 1936, when the Income-tax Officer refused to renew registration of the firm, the firm no longer existed in any way and could not be deemed to use the words of the deed, to "continue for any reason whatsoever": that includes continuation for purposes of registration under the Income Tax Act. In my opinion, Question (b) must be answered in the affirmative. The Commissioner is entitled to the taxed costs of this Court including the fees of two Advocates.

Costello, J.—The assessment with which we are concerned was made on December 9, 1936 the year of assessment being 1936-37 that is to say it was made in respect of the period from March 31, 1935, to March 30, 1936, which is the Ram Navami year of the firm. The assessee are described as an unregistered firm and there were four partners each of them having one-fourth share in the firm. The assessment was made under s. 23 (3) read with s. 25 (3). The assessee had submitted a return in response to notices under s. 23 (2) and s. 22 (4). In that return in respect of their share business or as it was called in the assessment "shares account" they have claimed

to be allowed to deduct a loss of Rs. 33,365 said to have been incurred in respect of the sale of certain shares which constituted part of their stock-in-trade. It has been argued before us that the matter has to be determined with reference to s. 24 (1), Income Tax Act, which says:

"Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in s. 6, he shall be entitled to have the amount of loss set off against his income, profits or gains under any other head in that year."

The contention put forward on behalf of the assessee was that the shares in question had originally cost Rs. 85,331 and that was the figure which had appeared in their accounts apparently on more than one occasion, and certainly at the opening of the accounting year—the tax year 1932. It was then said that upon the dissolution or rather, in contemplation of a dissolution of the partnership as provided for in an agreement dated January 8, 1936, these shares were disposed of (for the moment I use a neutral word) and had produced the sum of Rs. 51,966 showing the difference between that sum and the cost price—a sum of Rs. 33,365 which I have mentioned. The case as originally put forward by the assessee is to be found set forth in the decision—the appellate order and ground of decision as it is called—of the Assistant Commissioner given on February 12, 1937, in which he said :

"The learned Pleader has tried to argue that there was an actual sale of the shares as between the partners. I am afraid that I cannot accept this contention, for, as a matter of fact the books show that the partners' accounts were debited with the value of the shares allocated to each of them and that there was a payment of small amount of ready cash to make up the small difference which arose from the distribution of the shares."

The learned Assistant Commissioner further said :

"The reason for the Income-tax Officer not allowing the loss on shares, I find, was due to the fact that he found that there were no actual sales of shares in the year of account, and that the business having been discontinued, the assets were distributed among the partners who received an allocation of shares which were priced at the ruling market rate."

Apparently, the assessee endeavoured to induce the Commissioner of Income-tax to put a question of law before this Court in a form which would suggest that there had actually been a sale of the shares in question, because we find that the question of law dated April 26, 1937, as formulated by the assessee was as follows :

"Where the partners of an assessee firm having share business agreed on January 8, 1936, to dissolve the firm on March 30, 1936, and in the meantime realize the assets thereof and divide the pro-

ceeds amongst themselves and where for that purpose the stock of shares was sold by the firm at market rate resulting in a loss of Rs. 33,365 as the market rate was much lower than the cost price, whether in assessing the firm the Income tax Officer is competent in law to disallow such loss as capital loss only arising out of alleged allocation of shares as stranger buyers having not been obtained on suitable terms for depressed market the shares were sold to the four new firms of the families of the partners started after the said date January 8, 1936:

This seems to indicate to my mind that the assesseees in some way anticipated that they would find themselves in difficulties if they came before this Court in the position of having to found an argument upon a set of facts which included in it a statement that the shares were actually divided up or shared out or distributed amongst the four persons who originally composed the partnership. It is obvious, to my mind, that the question formulated by the assesseees was intended to suggest, and in fact did suggest, that there had been an actual sale of the shares to third parties in the shape of new firms and that the old partners had then distributed amongst themselves the proceeds of that sale. We find however that even as far back as the assessment to which I have already referred, the Income tax Officer himself took an entirely different view and he said commenting on the shares account:

"There was no sale in the year of account. The business has been closed and assets have been transferred to the partners at alleged market price. Shares were purchased at a time when prices were rather high and the assessee has all along valued his closing stocks at cost price. Due to over-valuation of the opening stock for the same reason the assessee is claiming losses as above. It is due entirely to depreciation in the capital value of shares held and as there was no sale I disallow the claim."

When the assesseees had succeeded in persuading the Commissioner of Income-tax to put the matter before this Court, in the case which the Commissioner put forward we find it stated:

"The facts regarding this share account are that the assesseees were doing business in shares and held at the beginning of the accounting year an opening stock of shares valued at cost Rs. 85,331. Their stock of shares had always been valued at cost. During the year there had been no transaction in shares. On March 9, 1936 in the course of the partition above mentioned the shares were allotted to the four partners at a valuation agreed upon by the partners."

Then he sets out the values assigned to the shares and explains that small amounts of cash are paid to make up the differences in the allotment. He had previously stated that the partition was completed on March 29, 1936. It may be said at the outset

that there can be no doubt that a business firm which is liable to be assessed to income-tax is under an obligation to maintain a system of accounts with regularity and it is not permitted to change the system except upon a proper application being made to the income-tax authorities in that behalf. We find it laid down in para. 51 (ii) of the Income-tax Manual as follows:

"The cases in which an assessee desires to change his accounting system should be rare and where such a request is made, the Income-tax Officer in considering it should, as in the similar case of a demand for a change in the 'previous year,' if he is prepared to allow the change, take steps to secure that no profits escape taxation on account of the change. While s. 13 leaves it to the discretion of the Income-tax Officer to decide whether a particular system of accounting should be accepted or whether a change in the system of accounting should be allowed, the discretion of the Income-tax Officer in this matter can be questioned in the course of an appeal against an assessment under s. 30, that is, it may be made one of the grounds of appeal in contesting the assessment of the profits."

In the case now before us no application was made to change the accounting system and, in fact, no change was made. We find, as I have already stated, that at the beginning of the tax year 1932 (Ramnavami) the value of these shares was put in the accounts of the firm as at the cost price. There is another rule which is of great importance in a matter of this kind and that is that every tax year is a self-contained period and the profits earned or the loss sustained either before that year or after that year are not at all relevant for the purpose of an assessment relating to a particular year. In that connection I must briefly call attention to the case in *Commissioner of Income-tax, Central Provinces and Berar v. Sir S. M. Chitnavis* (2), in which at p. 296 Lord Russell of Killowen, delivering the opinion of the Board, said:

"Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable. What are chargeable to income-tax in respect of a business are the profits and gains of a year; and in assessing the amount of the profits and gains of a year account must necessarily be taken of all losses incurred, otherwise you would not arrive at the true profits and gains. But the losses must be losses incurred in that year. You may not, when setting out to ascertain the profits and gains of one year, deduct a loss which had, in fact, been incurred before the commencement of that year. If you did you would not arrive at the true profits and gains."

(2) 59 I A 290, (296); 137 Ind. Cas. 772; A I R 1932 P O 178; 28 N L R 205; Ind. Rul. (1932) P O 211; 36 O W N 797; (1932) A L J 647; 34 Bom. L R 1071; 55 O L J 575; 36 L W 49; (1932) M W N 782; 9 O W N 737; 63 M L J 361; 15 N L J 54 (P O).

of the year. For the purpose of computing yearly profits and gains each year is a separate self-contained period of time in regard to which profits earned or losses sustained before its commencement are irrelevant."

Then in a subsequent paragraph at page 297* Lord Russell said:

"Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact to be decided in the event of dispute by the appropriate tribunal, and not by the *ipse dixit* of any one else."

Lastly at p. 299* the noble and learned Lord said:

"In their Lordships' opinion the question which was referred to the Court in relation to bad debts should have been answered as follows: the assessee has no 'option' of declaring debts bad. Whether a debt is bad, and when it became bad, are questions of fact to be determined in case of dispute not by the assessee or by the exercise of any 'option' on his part, but by the appropriate tribunal upon a consideration of all relevant and admissible evidence....."

In the same way, in my opinion, it follows that it is not open to an assessee by his own *ipse dixit* to decide that a particular transaction entails loss of a kind which may be set off against profits or gains made in respect of other transactions. In this particular instance these assesseees were asking the Court to hold that because the shares in question were bought at one price and then dealt with on the basis of another and lower price, that was necessarily a business loss of the kind contemplated by s. 24. As it was the practice of this firm, or apparently was the practice to put in the value of that part of their stock-in-trade which consisted of shares, equally with the rest of their stock-in-trade at cost price at the end of one accounting year and at the opening of the next, it follows from what I have already said, and the authority to which I have referred, that the cost price of the shares must be taken as the starting point or, as I called it in the course of argument, the datum line for the purpose of ascertaining whether or not there has been an increase or a decrease in the value of the shares in question.

It is quite certain and, indeed, it is clear law that if a trader puts into his accounts one value at the end of any accounting year, he must start his next year's accounts with precisely the same value. In this connection I would mention the case in *Commissioner of Income-tax, Madras v. Chengalvaraya Chetty* (3). Having put in the value of these shares as at cost and being in the position

(3) 2 I T O 14; 21 Ind. Cas. 137; A I R 1925 Mad 1242; 48 M 836; 49 M L J 425.

* Pages of 59 I A—[Ed.]

that they were not able, and in fact did not seek to change the system of accounting in this particular case, we must take the cost price of these shares as the starting point. It seems to me therefore that if there had been any real sale of these shares in the course of the year 1992 (Ramnavami), it might have been open to the assesseees to say that it was between the cost and the sale price that there was this difference of Rs. 33,665. But there never was a sale. It is quite obvious, and in any event we must accept the statement of facts put before us by the learned Commissioner, that there was no sale, but what was loosely called a 'partition'. I say loosely because 'partition' in this country is a technical expression which has in it implicit number of legal ideas and legal consequences which are not applicable in a case of the kind we are now considering. Therefore, I prefer to say that there was a division of these shares and that division took place, as the learned Commissioner states, on March 9, 1936. The partners for their own purposes chose to say that they would take over the shares or rather their portion of the shares. What they said as regards a loss seems to me to be definitely an *ipse dixit*. They have sought to take credit to themselves—credit in its commercial sense—for the difference between the buying and the selling price based upon a valuation which they themselves had chosen to put upon these shares and in regard to which, as far as one can see, there was no evidence as to its accuracy. In those circumstances, the matter seems to me to fall well within the ambit of the decision in *In re Tata Industrial Bank Ltd.* (4), the head-note of which runs as follows:

"A banking concern having been assessed for income-tax on profits amounting to Rs. 12,54,130 it claimed to deduct from the taxable profits a sum of Rs. 2,98,000 being the amount of depreciation on war bonds and securities belonging to the bank arrived at by comparing the market rates with the valuations in the books of the bank."

That seems to me very much the same kind of operation as was performed or was sought to be performed by the assesseees in the present instance. In the course of his judgment Macleod, C. J., discussed the case on which Mr. Bose relied in his argument before us, namely that in *In re Spanish Prospecting Co., Ltd* (5), where at p. 98 Fletcher-Moulton L. J. said:

"The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides

(4) (1921) 1 I T O 152.

(5) (1911) 1 Ch. 92, (98) 80 L J Ch. 210; 103 L T 609; 18 Manson 191; 55 S J 63; 27 T L R 76.

with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. 'Profits' implies a comparison between the state of a business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates."

At p. 99* the learned Lord Justice said:

"We start, therefore, with this fundamental definition of profits, namely if the total assets of the business at the two dates be compared, the increase which they show at the later date as compared with the earlier date (due allowance of course being made for any capital introduced into or taken out of the business in the meanwhile) represents in strictness the profits of the business during the period in question."

Now, Mr. Bose at the opening of his argument invited our attention to that definition. It seems to me that in the present instance the assesses have overlooked the fact that they were taxed in respect of trading operations for the period beginning on March 31, 1935 and ending on March 30, 1936. The "self-contained period" referred to by Lord Russell in the passage which I quoted earlier in this judgment was the period between those particular dates. In other words, before the Ramnavami year 1992 had come to an end, part of the assets of the business had been taken out of the business, namely these particular shares which, as we have seen, were distributed amongst the four partners on March 9, 1936. That is one way of looking at it and upon that view of the matter there could be no question of loss, because you cannot compare anything that happened when the shares were disposed of as against the cost price of those shares as appearing in the opening stock account at the beginning of the Ramnavami year 1992. I entirely agree with the view put forward by my Lord the Chief Justice with regard to that.

Looking at the matter from the other aspect which I have discussed, it seems to me that the assesses were not entitled to say "we have shown the value of these shares year after year as cost price: we now propose to show the value of them as at the market price." To state the matter succinctly, I agree that if these shares were put into the accounts of cost they ought to have been taken out of the accounts at cost. It follows therefore that the first question propounded for the consideration of this Court should be answered in the negative. I need say very little with regard to the

second question. In my opinion, merely to state that the application was made in December and the partnership had been dissolved, and irrevocably dissolved, as on March 30, 1936 is quite sufficient to indicate that the answer to that question should be in the affirmative.

A. Answered accordingly.

PATNA HIGH COURT

Letters Patent Appeal No. 15 of 1939

September 7, 1939

HARRIES, C. J. AND FAZL ALI, J.

MANGTU LAL BAGARIA—PLAINTIFF

—APPELLANT

versus

SECRETARY OF STATE—DEFENDANT—

RESPONDENT

Bengal Cess Act (IX of 1880), s. 45—"Recovered," meaning explained—Decision by Revenue Court that cess was recoverable and claim made for its recovery was within limitation—Decision, if can be set aside by Civil Court—Practice—New plea—Appeal.

The word "recovered" which is in s. 45, Ben. Cess Act means "sued for" or "recovered by means of an action."

The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. The question whether cess was recoverable in a case under s. 45 of the Act is one to be decided by the Revenue Court which issued the certificate, and if that Court has decided rightly or wrongly that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction and not because the decision pronounced by the Court is not correct.

The plaintiff cannot be allowed to abandon the case put forward by him before the lower Courts and set up a new case in the High Court.

L. P. A. from the decision of Mr. Justice Verma, dated January 23, 1939.

Mr. S. K. Mitra, for the Appellant.

The Govt. Pleader, for the Respondent.

Fazl Ali, J.—This is an appeal under the Letters Patent from a decision of Varma, J., in a second appeal. It appears that plaintiff is the Receiver of an estate which owns certain coal-mines in Dhanbad. In 1929-30 a certificate was issued under the Public Demands Recovery Act to recover certain arrears of cess payable by the estate and a sum of Rs. 52 was realized in May, 1930. In 1934-35 a fresh proceeding was started to realize the balance, and the plaintiff was obliged to deposit a sum of Rs. 438-23. Thereafter, he brought the present suit to recover this amount on the allegation that the assessment of cess was wholly illegal

and the proceedings by which the sum of Rs. 438-2-3 was realized from him was without jurisdiction.

The suit was resisted by the Secretary of State on various grounds and the trial Court as well as the first Court of Appeal held that the suit could not succeed. The plaintiff thereupon preferred a second appeal which was heard by Varma, J. In this appeal the points raised by him were, first, that the proceedings of 1934-35 were without jurisdiction inasmuch as two certificates could not be issued in respect of the same demand; and, secondly, that the certificate Court could not under s. 45, Cess Act, recover the said amount more than three years after it became due. Both these points have been decided against the plaintiff by Varma, J., and hence this appeal under the Letters Patent. As to the point that two certificates were issued in regard to the same demand, Varma, J. observed as follows:

"Now, with regard to the first part of the argument I must say at once that in spite of the strenuous efforts of Mr. Mitra he has not been able to refer to any materials on the record which could satisfy me that two certificates were actually issued, and although I agree with the proposition of law that two certificates could not be issued for the same period, on the question of fact this part of his contention must fail."

Notwithstanding these observations, it was contended on behalf of the appellant that in fact two certificates were issued, and learned Counsel for the appellant pressed us to allow him an opportunity to produce certain papers as additional evidence to establish his contention. Now, the judgments of the first two Courts clearly show that the contention raised on behalf of the appellant is an entirely new one. From the judgment of the learned Munsif it appears that one of the issues framed in the suit was "whether the certificate proceedings of 1934-35 were illegal, without jurisdiction and barred by limitation. In discussing this suit, the learned Munsif has set out the case put forward before him on behalf of the plaintiff in these words:

"His next contention is that there was certificate of non-payment issued against him which was put into execution in certificate execution case No. 107-R. O. 1929-30, that that case was struck off in 1930 and then more than three years after, in 1934 a fresh execution for recovery of the unpaid amount was instituted by the certificate officer of Dhanbad against him under case No. 171-R. O. of 1934-35; that this latter case was clearly time-barred...."

From this it is quite clear that what the appellant contended before the Munsif was not that a second certificate had been issued in 1934-35 but that the execution proceed-

ings of that year were time-barred inasmuch as they were instituted more than three years after the first execution proceeding. The learned District Judge also states in his judgment that the proceedings of 1934-35 were attacked before him on the ground that they were time-barred and the plea of limitation was

"based on an assertion of fact viz. that the previous certificate case of 1929-30 was struck off in May 1930, so that more than three years elapsed between the disposal of that certificate case and the filing of the next."

Thus, it seems to me that neither before the Munsif nor before the District Judge it was seriously contended by the plaintiff that there were two successive certificates for the same dues. On the other hand, it appears that one of the main points urged on behalf of the plaintiff was that the proceedings of 1934-35 were execution proceedings and they were barred by limitation inasmuch as they were started more than three years after the termination of the first execution proceedings. In my view, the plaintiff cannot be allowed to abandon the case put forward by him before the Munsif and the District Judge and set up a new case in this Court. I am also of the opinion, that the plaintiff cannot be allowed to produce any additional evidence at this stage. The power of this Court to admit additional evidence is limited by the provisions of O. XXI. r. 27, Civil P. C. This rule provides, amongst other things, first, that additional evidence shall be allowed only when the Appellate Court requires any such evidence to be produced to enable it to pronounce judgment, or for any other substantial cause; and secondly, that additional evidence shall not be allowed to be adduced unless the party who wishes to adduce it satisfies the Appellate Court that such evidence, notwithstanding exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made. The present case does not satisfy any of these conditions. On the other hand it appears to me that the plaintiff could have very well produced the documents which he is trying to produce now in the Courts which had to deal with the facts of the case. It is not the case of the plaintiff that these documents, notwithstanding exercise of due diligence, were not within his knowledge or could not be produced by him when the matter was before the trial Court or the lower Appellate Court. The first point raised by the appellant must fail. The next point urged on behalf of the appellant is

that the proceeding of 1934-35 was without jurisdiction inasmuch as under s. 45, Cess Act, the arrears of cess cannot be recovered more than three years after they became due. Section 45, Cess Act, runs as follows :

"If any instalment of local cess or part thereof payable to the Collector shall not be paid within fifteen days from the date on which the same becomes due, amount of such instalment or part thereof may be recovered at any time within three years after it became due, with interest, &c...."

I entirely agree with the view expressed by Varma, J. that the word "recovered" which is in the section means "sued for" or "recovered by means of an action." In my opinion, this is the only readable meaning which can be attributed to the expression. The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. If the meaning attributed by the plaintiff to the expression is the meaning which the expression was intended to convey, it follows that in many cases cess will become irrecoverable, because the proceedings instituted to recover it may be delayed for reasons beyond the control of the plaintiff. In my opinion, it would be wholly unreasonable to construe the expression in the manner in which the plaintiff asks us to construe it. There is also a further answer to the plaintiff's contention. The question whether cess was recoverable in this case under s. 45 of the Act was one to be decided by the Revenue Court which issued the certificate, and if that Court has decided rightly or wrongly that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction and not because the decision pronounced by the Court is not correct. In my opinion, no question of jurisdiction arises in this case and the plaintiff's suit was rightly dismissed. I would therefore uphold the decision under appeal and dismiss the plaintiff's appeal with costs.

Harrles, C. J.—I agree.

D.

Appeal dismissed.

ODUH CHIEF COURT

Miscellaneous Appeal No. 46 of 1937

March 21, 1940

THOMAS, C. J. AND YORKE, J.

RAM NATH—APPELLANT

versus

GOBIND PRASAD, CENTRAL

NAZIR, RECEIVER—RESPONDENT

*Provincial Insolvency Act (V. of 1920, s. 37 (1)—
Insolvency annulled—Court, if can proceed to distribute assets of insolvent among creditors—Proper procedure*

Section 37 (1), Prov. Insol. Act does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency, and by annulling the insolvency it means that the Court will not proceed with the insolvency. Therefore, the course open to the Court is either to return the property to the insolvent on condition that he furnishes security which will make it available to the creditors or for some other reason the Court may direct the property of the insolvent in the hands of the Receiver to vest in a certain person. The words "to vest in such person" do not mean distribution of assets among the creditors. 145 Ind. Cas. 320 (1) and 134 Ind. Cas. 848 (2), followed, 141 Ind. Cas. 836 (3) and 153 Ind. Cas. 993 (4), not followed.

Misc. A. against the order of the District Judge, Bara Banki, dated March 1, 1937.

Mr. D. K. Seth, for the Appellant.

Mr. Karta Krishna for Mr. G. D. Khare, for the Respondent.

Judgment.—This miscellaneous civil appeal arises out of an order dated March 1, 1937, passed by the learned District Judge of Bara Banki.

Ram Nath was adjudicated an insolvent on May 13, 1933, and the Court fixed one year from the date of the order of adjudication as the period within which he should apply for his discharge. The insolvent did not apply for his discharge within the time fixed, and he was served with a notice to show cause why the order of adjudication should not be annulled. This was served on him on December 14, 1936, but he did not appear, and the learned District Judge passed the following order:

"I direct that the order of adjudication shall be annulled. Certain sale proceeds are with the Receiver. These shall vest in the Receiver."

The Receiver on February 19, 1937, reported to the learned District Judge that he had no sale proceeds with him. The learned Judge then passed another order to the effect that certain property was declared by him and the Hon'ble Chief Court in appeal to be the property of the insolvent, that the insolvent's trans-

fer of the same in favour of his wife having been set aside on the application of the Receiver the property should vest in the Receiver, for the benefit of the creditors. He further directed that the Receiver should proceed to realise the property which was formerly that of the insolvent and distribute the same in accordance with the provisions of the Insol. Act subject always to the direction of the Insolvency Court. This order was passed on March 1, 1937, and this is the order which is under appeal before us.

The contention on behalf of the appellant is that the order was illegal and *ultra vires* because the Court could not have ordered the Receiver after annulling the adjudication to distribute the assets among the creditors. Reliance was placed on two cases, *Jaing Bir Singh v. P. K. Banerjee*, (I. L. R. 11 Rangoon, 287) (1) and *Panna Lal v. Official Receiver*, (I. L. R. 53 Allahabad 313) (2).

In the Rangoon case it was held that on an order of annulment being passed under the s. 43 of the Prov. Insol. Act the Court ceases to have jurisdiction to entertain, hear or determine an application by the Receiver to have a transfer of property set aside under s. 53 or s. 54 of the Act, whether such application was presented before or after the order of annulment and that in making a vesting order under s. 37 the Court may impose conditions relating to the property of the debtor but not of any other person. In vesting the property of the debtor in any appointee, the Court cannot order that he should continue the liquidation of the debtor's assets on the same terms and conditions as those on which the Receiver in insolvency would have been entitled to carry out the liquidation of his estate if the insolvency had still been subsisting.

In the Allahabad case it was held that s. 37 of the Prov. Insol. Act does not allow an Insolvency Court, on annulling an insolvency, to proceed to distribute the assets of the insolvent among any of the creditors. The course open to the Court is either to return the property to the debtor on condition that he furnishes security which will make it available to the creditors to take their remedy under the ordinary civil law; or pending such security or for some other reason the Court

may direct the property of the insolvent in the hands of the Receiver to vest in a certain person. Such vesting is only for the purpose, apparently, of making the property available to creditors to proceed through the Civil Court.

The above decisions no doubt support the contention of the learned Counsel.

On the other hand the Counsel for the respondent relies on the case of *Chouhmal Bhagirath v. Jokhiram Surajmal*, (I. L. R. 12 Patna 163) (3) and on the case of *Balla Mal v. Mst. Fatma Bibi*, (I. L. R. 15 Lahore, 698) (4).

In the Patna case it was held that where the Court annulled an adjudication and by a subsequent order directed the debtor's property to vest in the Receiver appointed by the Court, after that order of annulment the Court did not cease to have jurisdiction in the matter and that the vesting order was valid and operative.

The Lahore case more or less takes the same view.

Section 37 (1) of the Prov. Insol. Act lays down that

"where an adjudication is annulled, all sales and dispositions of property and payments duly made, and all acts therefore done, by the Court or Receiver, shall be valid; but, subject as aforesaid, the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or in default of any such appointment, shall revert to the extent of his right or interest therein on such conditions as the Court may, by order in writing, declare."

It is thus clear from the section that where an adjudication is annulled the property of the debtor who was adjudged insolvent shall vest in such person as the Court may appoint, or, in default of any such appointment, shall revert to the debtor. In our opinion the section does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency, and by annulling the insolvency it means that the Court will not proceed with the insolvency. Therefore in our opinion the course open to the Court is either to return the property to the insolvent on condition that he furnishes security which will make it available to the creditors or for some other reason the Court may direct the property of the insolvent in the hands of the Receiver to vest in a certain person. The words "to vest in such person" in our

(1) 11 R 287; 145 Ind. Cas. 320; A I R 1933 Rang. 223; 6 R Rang. 33 (F B).

(2) 53 A 313; 134 Ind. Cas. 848; A I R 1931 All. 71; (1931) A L J 18; Ind. Rul. (1931) All. 864.

(3) 12 Pat. 163; 141 Ind. Cas. 836; 13 P L T 775; Ind. Rul. (1933) Pat. 98; A I R 1933 Pat. 84.

(4) 15 L 698; 153 Ind. Cas. 993; A I R 1934 Lah. 468; 36 P L R 499; 7 R L 489.

opinion do not mean distribution of assets among the creditors. We are, therefore, of opinion that the order of the learned District Judge was *ultra vires* and illegal.

We therefore set aside the order and allow the appeal to this extent that we order that the property shall vest in the Receiver and it will be available to the creditors when they have taken their remedy under the ordinary civil law. In the peculiar circumstances of the case we direct that the parties will bear their own costs in this Court.

D.

Appeal allowed.

MADRAS HIGH COURT

Civil Miscellaneous Petition No. 5450 of
1938

March 31, 1939

LEACH, C. J. AND SOMAYYA, J.
KUPPAINETHU GURUVAPPA
NAICKER—PETITIONER

versus

M. MOUNAGURUSWAMI NAICKER—
RESPONDENT

Civil Procedure Code (Act V of 1908), [s. 110 (2)]
—Value of property involved in proceedings less
than Rs. 10,000—Decision of High Court affecting
party's whole property worth more than Rs. 10,000
—Certificate under s. 110 (2) held could be granted.

P and R were co-owners of a village owning one-third and two-thirds of the property respectively. Through the village lands ran two water channels, A and B. P brought under wet cultivation by means of channel B an additional area which resulted in a suit being filed against him by R. The suit was compromised, whereby P was restrained from cultivating any further area by using the channel. P, however, subsequently brought under cultivation more area by use of the water from channel B. This resulted in execution application being filed by R in which the High Court ultimately held that P was not entitled to draw further water from either channel. P applied for leave to appeal to the Privy Council. The value of the additional land brought under cultivation which resulted in the execution proceedings was under Rs. 10,000 but the value of the land affected by the decree was of the value of more than Rs. 10,000:

Held, that as the decision of the High Court prohibiting P from bringing any further portion of his land under wet cultivation affected his interest in the village which was of far greater value than Rs. 10,000, the certificate under s. 110 (2), Civil P. C., could, therefore, be granted. 74 Ind. Cas. 584 (1) and *Aliman v. Hasiba* (2), relied on.

O. Misc. P. for leave to appeal to His Majesty in Council against the order of the High Court in C. M. A. No. 460 of 1936.

Messrs. T. R. Venkatarama Sastry and T. M. Krishnaswamy Ayyar, for the Petitioner.

Messrs. K. Rajah Ayyar and V. Ramaswamy Ayyar, for the Respondent.

Order.—This is an application for a certificate permitting an appeal to His Majesty in Council. The facts as stated at the Bar are shortly these. The petitioner and the respondent are co-owners of a village in the Madura District, the petitioner owning one-third and the respondent two-thirds of the property. Through the village lands run two water channels, which have been referred to as A and B. Originally the wet cultivation of the village lands covered 200 *kulis*, roughly 110 acres. Of the 200 *kulis*, the petitioner had 50 *kulis* and the respondent 150 *kulis*. In 1908, the petitioner brought under wet cultivation by means of channel B an additional 14 *kulis*, which resulted in a suit being filed against him by the respondent for an injunction restraining him from using the channel for this purpose. The suit was compromised and the agreement arrived at was embodied in the decree. Under the decree the petitioner was allowed to cultivate the 14 *kulis*, but according to the respondent he was to be restrained from cultivating any further area. The petitioner subsequently brought under wet cultivation a further 5 *kulis* obtaining the water from stream A. This resulted in an application being filed by the respondent in execution proceedings to restrain him. The contention was that by reason of the injunction which had been granted the petitioner was not entitled to bring under wet cultivation any additional land, either by means of the water from channel A or from channel B. The reply was that the injunction which had been granted only referred to channel B. The District Judge of Madura dismissed the petition, being of the opinion that the petitioner was entitled to use the water from channel A, notwithstanding the decree. An appeal followed to this Court. The appeal was allowed, this Court holding that the petitioner was not entitled to draw further water from either channel. The petitioner desires to appeal to His Majesty in Council against this decision.

The application for leave is opposed on the ground that the subject-matter is not of the value of Rs. 10,000. The application came before this Court in the first instance on February 9, 1939 and a report on the value of the property was called for from the District Judge. Before the District Judge it was conceded by the respondent that the value of the land belonging

to the petitioner which is affected by the judgment of this Court is far more than Rs. 10,000. The value of the additional 5 *kulis* which the petitioner brought under cultivation and which resulted in the present proceeding is admittedly under Rs. 10,000. The petitioner says that inasmuch as the property affected by the decree is of the value of Rs. 10,000 he is entitled to the certificate under the second clause of s. 110, Civil P. O. We consider that this contention is well founded. In *Radha-krishna Iyer v. Sundarswamy Iyer* (1) the Judicial Committee observed:

"In the first place, the sum of money actually at stake may not represent the true value. The proceedings may in many cases, such as a suit for an instalment of rent or under a contract, raise the entire question of the contract relations between the parties and that question may, settled one way or the other, affect a much greater value, and its determination may govern rights and liabilities of a value beyond the limit."

That is the position here. This is not a case of a person claiming a right in a property where the value of the property is over Rs. 10,000 and the value of the right is less than that amount. It is the construction of the agreement embodied in the compromise decree which is in dispute. If the decision of this Court stands, it will mean that the petitioner will not be able to bring any further portion of his land under wet cultivation and his interest in the village is of far greater value than Rs. 10,000. The case reported in *Aliman v. Hasiba* (2), is directly in point. The application will be allowed on the usual conditions. The costs of this application will be made costs in the appeal.

N.-s.

Application allowed.

(1) 45 M 475; 74 Ind. Gas. 584; A I R 1922 P O 257; 49 I A 211; 36 O L J 450; 16 L W 18; 31 M L T 31; 43 M L J 323; 27 O W N 1; 20 A L J 937 (P O).

(2) 1 O W N (S N) 93.

OUDH CHIEF COURT.

Second Civil Appeal No. 60 of 1937

April 4, 1940.

ZIA-UL HASAN AND YORKE JJ.

SAT NARAIN—PLAINTIFF—

APPELLANT

versus

CO-OPERATIVE SOCIETY, SARAI SHAHZADI, DISTRICT LUCKNOW.

AND ANOTHER—DEFENDANTS—RESPONDENTS

U. P. Land Revenue Act (III of 1901), s. 233 (m)
—Sale of minor's property—Minor not applying under s. 173—Sale in contravention of ss. 163 and

164—Suit for declaration that sale was void, if maintainable.

The general presumption is against an intention to disturb the established state of the law, or to interfere with the vested rights of subjects, and there is a strong leaning against so construing a statute as thereby to oust or restrict the jurisdiction of the Civil Courts. In the provision that 'no person shall institute a suit' in s. 233 (m), U. P. Land Revenue Act the Legislature had in contemplation the class of persons to whom the Act in its general bearing is applicable, that is, to share-holders liable to pay Govt. Revenue and not to strangers outside this body. It was not intended to protect the Govt. against claims in respect of illegal acts done to the detriment of persons who are under no liability to pay Govt. Revenue. It was merely intended to protect the Govt. against claims of members of the revenue paying class.

A Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record and as against such persons, the decrees or sales under them are void without any proceedings to set them aside. It would be a travesty of justice to hold that a minor whose property is being wrongly sold by the revenue authorities has no remedy left to him if he does not apply to the Commissioner under s. 173 of the Land Revenue Act, specially when the sale was conducted with material irregularity and in complete disregard of the provisions of ss. 163 and 164 of the Land Revenue Act. A suit therefore, for declaration that the property sold belongs to him and that the sale is consequently void and ineffective is not barred by the provisions of s. 233 (m). *Tulsa Kunwar v. Jageshwar Prasad* (5), followed, 151 Ind. Cas. 414 (4); distinguished *Secretary of State for India in Council v. Mahadevi* (1), 101 Ind. Cas. 628 (2) and 155 Ind. Cas. 92 (3), not followed, *Khairajmal v. Daim* (6), relied on.

S. C. A. against the decree of the Additional Civil Judge, Lucknow, dated October 21, 1936.

Messrs. R. B. Lal, Sri Ram and M. M. Lal, for the Appellant.

Mr. Mohd. Jafar Husain, for the Respondents.

Radha Krishna, J.—(October 16, 1939).—

The learned Counsel for the plaintiff-appellant in this case has argued the following points among others:—

(1) That Sat Narain was not the legal representative of the deceased Ram Prasad and the resolution of the Co-operative Society, Sarai Shahzadi, District Lucknow, to the effect that they could proceed for the realisation of the debt of the deceased against Sat Narain was *ultra vires*.

(2) That in any case the personal property of Sat Narain was not liable and s. 233 (m) is no bar to a suit in a Civil Court because in the proceeding for sale there was no proper party representing the deceased.

(3) That the provisions of ss. 163, 164, 173

and 183 as well as s. 233 (m) of the U. P. Land Revenue Act would operate only where the defaulter himself or his legal representative is a party to the proceedings for realisation of the debt and not to a case like the present.

These grounds have not been specifically taken in the memorandum of appeal but they are grounds of law and I have allowed them to be raised.

I have heard the learned Counsel for the parties at length on the above questions and I consider that they involve the determination of the scope and the interpretation of the sections mentioned above of the U. P. Land Revenue Act. As the questions involved in the decision of this case are very important, I refer this case for decision by a Bench of two Hon'ble Judges under s. 14 (2) of the Oudh Courts Act.

Zia-ul Hasan, J. (March 21, 1940).—This is a plaintiff's second appeal against a decree of the learned Additional Civil Judge of Lucknow dismissing his suit for a declaration in respect of some property. Sat Narain, plaintiff-appellant is the grandson of Gaya Din brother of one Ram Prasad. Ram Prasad was a member of the Co-operative Society of Sarai Shahzadi. The appellant was nominated by Ram Prasad as his heir though his wife Sukhedi, defendant No. 2 is still living. Ram Prasad appears to have died in or about 1935. The Society held a decree against him and on November 8, 1935, they passed a resolution that Sat Narain's name should be substituted in the decree in place of Ram Prasad, deceased. On December 12, 1935, a warrant of attachment was issued in respect of the appellant's property, movable and immovable. On December 13, 1935, a sale proclamation was issued fixing January 5, 1936, for sale. It was not however served on the appellant as required by law. On January 5, 1936, the attached immovable property was sold and on February 1, 1936, the suit which has given rise to this appeal was brought by the appellant against the Co-operative Society concerned and *Mst. Sukhedi*, widow of Ram Prasad, for a declaration that the property sold belongs to him and that the sale is consequently void and ineffective.

Both the Courts have held that Ram Prasad and his brother Gaya Din were separate and that the property in suit is the property of the appellant but both have dismissed the suit holding that it was barred by s. 233 (m) of the Land Revenue Act. The plaintiff therefore appeals.

Section 233 (m) bars the jurisdiction of the Civil Courts with respect to,

"claims connected with or arising out of the collection of revenue (other than claims under s. 183) or any process enforced on account of an arrears of revenue or on account of any sum which is by this or any other Act realizable as revenue."

The wording of this clause is no doubt very wide and it is because of this that suits of various kinds both against private individuals as well as Govt. have been held to be barred by this clause. For instance, in *Secretary of State for India in Council v. Madader* (I. L. R. 19 All. 121) (1), in which in satisfaction of an arrear of revenue by certain defaulters some cattle belonging to the plaintiff who had no concern with the land in respect of which the arrear was due, were sold and the suit was brought against the Secretary of State, the defaulters and the purchaser of the cattle, it was held that the remedy of the owner of the cattle lay entirely in the Courts of Revenue and that no suit would lie in a Civil Court respecting the sale. Similarly in *Abdullah v. Secretary of State for India in Council* (I. L. R. 49 All. 101) (2), the property of the plaintiffs had been attached by the Collector at the request of the liquidator of a Co-operative Society on account of a debt due by a member of the Society, the plaintiff's objection to attachment was rejected and the plaintiff got the property released on the security of a third person. Subsequently a suit was brought by the plaintiffs and the surety against the Secretary of State, the liquidator and the defaulter member. It was held that s. 233 (m) of the Land Revenue Act barred the claim. In this Court also the same view was taken in *Khud Mukhtar Bank Utrawan v. Bhagwanain* (A. I. R. 1935 Oudh 325) (3) in which a Co-operative Bank had obtained a decree against a member of the Bank and in execution attached a house and a *gondah*. The father of the judgment-debtor filed an objection claiming the property to be his but his objection was disallowed. He then brought a regular suit for a declaration that the house and the *gondah* belonged to him. The trial Court decreed the suit in part and the Bank's appeal was dismissed by the lower Appellate Court. This Court dismissed the suit *in toto* and held that it was barred by s. 233 (m) of the Land Revenue Act.

(1) 19 A 127; A W N 1896, 199.

(2) 49 A 701; 101 Ind. Cas. 626; 25 A L J 521; L R 8 A 183 Rev.; A I R 1927 All. 532.

(3) A I R 1935 Oudh 325; 155 Ind. Cas. 92; 1935 O W N 487; (1935) R D 238; I R O 552.

The learned Counsel for the respondent has also relied on the case of the *Co-operative Society v. Qadir* (1934 O. W. N. 1060) (1), but the judgment in that case shows that though s. 233 (m) of the Land Revenue Act was also considered, the judgment was actually based on cl. 6 of s. 42 of the Co-operative Societies Act.

In *Tulsa Kunwar v. Jageshar Prasad* (I. L. R. 28 All. 563) (5), however, in which the plaintiff sued in the Civil Court to recover money from the defendants on the allegation that certain property belonging to her having been wrongfully attached in order to realize arrears of Govt. Revenue due from the defendants, the plaintiff had, in order to save her own property, paid the arrears of revenue due from the defendants to Govt. It was held that the jurisdiction of the Civil Courts to entertain the suit was not ousted by the provisions of the U. P. Land Revenue Act, ss. 163 and 233 (m). Stanley, O. J., remarked in his judgment :—

"There is no doubt that the claim of the plaintiff is in a sense connected with the collection of revenue but had the Legislature when it enacted this clause in contemplation any other claims than claims which might be advanced by parties liable to pay revenue? I think not. The Act is one which regulates the relations of the Govt. on one side and a limited class of persons, namely sharers in revenue paying *mahals* on the other. General words admit of restriction according to the subject to which they relate and the scope and object of the enactment. If the Legislature intended so important an innovation as is contended for, it would I think have manifested its intention in clear and explicit terms. The general presumption is against an intention to disturb the established state of the law, or to interfere with the vested rights of subjects, and there is a strong leaning against so construing a statute as thereby to oust or restrict the jurisdiction of the Civil Courts. In the provision that 'no person shall institute a suit' it seems to me that the Legislature had in contemplation the class of persons to whom the Act in its general bearing is applicable, that is, to share-holders liable to pay Govt. Revenue and not to strangers outside this body. I do not think it was intended to protect the Govt. against claims in respect of illegal acts done to the detriment of persons who are under no liability to pay Govt. Revenue. It was merely intended to protect the Govt. against claims of members of the revenue paying class."

Banerji, J., who concurred with the judgment of the learned Chief Justice said:

"I also concur in holding that s. 233, cl. (m) does not bar the suit. The language of the section is no doubt very wide; but as the learned Chief Justice has pointed out, the Legislature could not have intended that except a suit under

s. 183 (which in our opinion can only be brought by the defaulter) no other suit of any description could be instituted by any one in connection with the 'collection of revenue or any process enforced on account of an arrears of revenue.' It seems to me that the section forbids a suit by the defaulter against the Govt. or possibly by any other person against the Govt.; but it does not I think preclude a person in the position of the plaintiff from maintaining a suit like the present. Were we to accept the contention of the respondent, the plaintiff would be wholly without remedy."

As remarked by Banerji, J., the language of the section is undoubtedly very wide but this is to my mind pre-eminently a case in which the view adopted by Stanley, O. J., and Banerji, J., should be followed. The plaintiff was a minor when his property was sold. It is also conceded that the sale was conducted with material irregularity. It was held only twenty-three days after the issue of the proclamation of sale in complete disregard of the provisions of s. 163 of the Land Revenue Act. It is also admitted that no notice of the sale was given to the plaintiff as was required by s. 164 of the Act. It would in my opinion be a travesty of justice to hold that a minor whose property is being wrongly sold by the revenue authorities has no remedy left to him if he does not apply to the Commissioner under s. 173 of the Land Revenue Act. Their Lordships of the Judicial Committee have clearly laid down in *Khizarajmal v. Daim* (I. L. R. 32 Cal. 296) (6) that a Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record and that as against such persons, the decrees or sales under them were void without any proceedings to set them aside.

In view of what I have said above, I would follow the view of their Lordships Stanley, O. J., and Banerji, J., in *Tulsa Kunwar v. Jageshar Prasad* (I. L. R. 28 All. 563) (5), and allowing the appeal would decree the appellant's suit with costs.

Yorke, J.—(April 3, 1940.)—I am in strong sympathy with the view taken by my learned brother in this case but I was at first inclined to think that in view of the current of decision in *The Secretary of State for India in Council v. Mahadei* (I. L. R. 19 All. 127) (1), *Abdullah v. Secretary of State for India in Council* (I. L. R. 49 All. 701) (2) and *Khud Mukhtar Bank, Utrawan v. Bhagwan Din* (A. I. R. 1935 Oudh 325) (3), it would not be

(4) (1934) O W N 1060; 151 Ind. Cas. 414; 7 R O, 120; 18 R D 444; A I R 1934 Oudh 431.

(5) 28 A 563; 3 A L J 372; A W N 1906, 114.

(6) 32 O 296; 32 I A 23; 9 O W N 201; 2 A L 71; 7 Bom. L R 1; 1 O L J 584; 8 Sar. 734 (P O.)

proper to follow the decision in *Tulsa Kunwar v. Jageshar Prasad* (I. L. R. 28 All. 563) (5). On further consideration I am with the greatest respect of opinion that s. 233 (m) of the U. P. Land Revenue Act is rightly interpreted in this latter ruling and that although that section bars a suit against the Secretary of State it cannot bar a suit to recover compensation from a third person by whose action the plaintiff has been put to loss. I would therefore agree with the order proposed by my learned brother.

By the Court :—We allow the appeal and decree the appellant's suit with costs throughout.

D.

Appeal allowed.

MADRAS HIGH COURT

Appeals Nos. 235 of 1934, 312 of 1935
and
Civil Miscellaneous Petition No. 4443
of 1938

October 24, 1938

PANDRANG ROW AND KRISHNASWAMI

[Ayyangar, J.J.]

NACHIMUTHU GOUNDAN AND OTHERS

—APPELLANTS

versus

BALASUBRAMANIA GOUNDAN—

RESPONDENT

Hindu Law—Debts—Antecedent—Word “rina,” interpretation of—Unascertained liability of partner, whether debt, according to Hindu Law—Alienation—Father—Antecedent debts—Distinction between mortgage for antecedent debt and for new debt—Effect of—Object of restriction on father's right of alienation—Property in hands of father or manager, if trust for family.

The significance of the sanskrit word *rina* for apportioning rights or liabilities, must not be determined by reference to its English equivalent but by the original sanskrit word itself, giving to it just the meaning in which it is used or understood in the parent language in its literal or even colloquial sense. The word ‘debt’ is not the exact equivalent of *rina* in sanskrit at any rate with all the technical import that that word carries. The words *dhana* and *rina* coupled together in the texts, are used in a comprehensive sense, for describing all varieties of divisible assets and liabilities. As *dhana* includes in its connotation all varieties of property and assets, there is no reason why *rina* should not be held to include all varieties of obligations and debts as well.

Hence, the unascertained liability of a partner in partnership is a debt according to Hindu Law although until the settlement of partnership accounts the relationship of debtor and creditor does not exist.

[Case-law referred to.]

Although at first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred for the first time when the mortgage is executed, yet, if the distinction is observed, it will

tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property.

[Case-law referred to.]

The underlying object of the restriction upon the father's power to alienate joint family property is the conservation of the family substance for the benefit of the existing and future members of the family. In a loose, though not in a strict legal sense, the family property in the hands of the father or the manager may perhaps be termed a trust for the family itself conceived as a continuing unit. 39 Ind. Cas. 280 (2) and 178 Ind. Cas. 220 (3), relied on.

As. and C. Misc. P. against the decree of the Sub-Judge, Coimbatore, in O. S. No. 183 of 1932.

Messrs. K. Rajah Ayyar and M. Krishna Bharathi, for the Appellants.

Messrs. T. R. Venkatarama Sastri and N. Somasundaram, for the Respondent.

Krishnaswamy Ayyangar, J.—The question for decision in this appeal is whether the mortgage sued on is binding on the undivided sons of the mortgagors. The argument against it is that there was neither an antecedent debt nor a justifying necessity and in its absence the father had no authority to bind by his act the interest of his sons in the joint property. No new principle of law is therefore involved in the decision of this appeal; for the doctrine of antecedent debt is at least as old as *Suraj Bansi v. Sheo Prasad Singh* (1), if not older still, and has now been finally and authoritatively declared by the Privy Council. Though the rule itself in this form does not find express mention in the texts of Hindu Law or the commentaries, there can be no doubt that it is but the logical outcome of the fundamental principle stated in the *Mitakshara*, Ch. I, ss. 27 and 28. The author says:

“Therefore it is a settled point that property in the paternal estate is by birth, although the father has independent power in the disposal of effects other than immovables, for indispensable acts of duty and for purposes prescribed by texts of law as gifts through affection, support of the family, relief from distress and so forth, but he is subject to the control of his sons and the rest in regard to immovable estate, whether acquired by himself or inherited from his father or other predecessor; since it is ordained that though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made, without convening all the sons. They who are born and they who are yet unbegotten and they who are yet still in the womb require the means of support; no gift or sale should therefore be made. Even a single individual may conclude a donation, mortgage or sale of immovable property during a

(1) 5 O 148; 6 I A 88; 4 O L R 226; 4 Sar. 1 (P O).

season of distress for the sake of the family, and especially for pious purposes."

The underlying object of the restriction is plain enough, namely the conservation of the family substance for the benefit of the existing and future members of the family. In a loose, though not in a strict legal sense, the family property in the hands of the father or the manager may perhaps be termed a trust for the family itself conceived as a continuing unit. It was in this sense that in *Sahu Ram Chandra v. Bhup Singh* (2), at pp. 447, 448, Lord Shaw observed as follows:

"In short, it may be said that the rule of this part of the Mitakshara Law is that the joint family estate is in this position; under his management he (the father) can neither obtain money for his own purposes for it nor can he obtain money for his own purposes upon it. To permit him to do so would enable him to sacrifice those rights which he was bound to conserve. This would be equivalent to sanctioning a plain, and it might be a deliberate breach of trust. The Mitakshara Law does not warrant or legalize any such transaction."

Once it is realized that it is a kind of trust, that lies at the foundation of the restriction, (see also *Patel Khana Venkataramaswami v. Imperial Bank of India, Rajahmundry* (3), at p. 466), it will be easy to understand its scope as well as its applicability. At first sight, it may look as if there is very little purpose in requiring that there should not only be a debt but that it must also be an antecedent one. According to Hindu Law it is equally the pious obligation of the son to discharge the father's debt, whether it had been antecedently or was concurrently incurred. Both have to be met from out of the family estate, and there is no escape from either except by the practice of fraud or dishonesty. If accordingly the family property is the fund out of which both classes of debt have to be met, no rational distinction could be made between the two and this indeed was the view of such eminent Hindu Judges as Sir V. Bhashyam Ayyangar, J., in *Chidambaram Muthu v. Koothaperumal* (4), and Banerji, J., in *Chandra Deo Singh v. Mataprasad* (5); and it was not till the Privy Council finally pronounced against it that the true basis of the principle emerged into view:

(2) 39 A 437; (447, 448), 39 Ind. Cas. 280; A I R 1917 P O 61; 44 I A 126; 21 O W N 698; 1 P L W 557; 15 A L J 437; 19 Bom. L R 498; 26 O L J 1; 33 M L J 14; (1917) M W N 439; 22 M L T 22; 6 L W 213 (P O).

(3) (1938) 2 M L J 461, (466); 178 Ind. Cas. 220; A I R 1938 Mad. 889; 48 L W 401; (1938) M W N 913; 11 R M 418; 1 L R (1939) Mad. 7, (F B).

(4) 27 M 326.

(5) 31 A 76; 1 Ind. Cas. 479; 6 A L J 263.

Sahu Ram Chandra v. Bhup Singh (2), *Brij Narain Rai v. Mangla Prasad* (6), *Venkataramanaya Pantulu v. Venkataramana Doss Pantulu* (7) and *Arumugam Chetti v. Muthu Koundan* (8). What appears to be a cogent explanation is given by Aikman, J., in *Chandra Deo Singh v. Mataprasad* (5), where he has observed as follows:

"At first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred for the first time when the mortgage is executed. But if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property."

In other words, the creditor will have one more hurdle to jump and the family will have a little more time to avert the threatened danger. At this time of day it is perhaps pointless to enter into a discussion of the reason of the rule for the rule itself has now been clearly and unequivocally settled by the decisions of the highest tribunal. It is with the application of that rule rather the meaning of the word "debt" in the phrase "antecedent debt" that we are concerned in this appeal remembering that the corresponding term in the Sanskrit text is *rina*. The facts of this case lie in a narrow compass. Two brothers who had themselves started a mill business and carried it on for some years, presumably with the aid of family funds, were obliged in April 1925 to take a new partner whose contribution by way of capital enabled them to meet the debts then owing and to continue the business itself. The new partner was plaintiff's father who paid a sum of Rs. 20,000 towards his share of the capital, an equal sum represented by the value of the business premises and the plant and machinery therein belonging to the brothers being treated as their contribution. The partnership was to run for a period of five years and the profits and losses were to be shared equally between the plaintiff's father on the one hand and the two brothers together on the other. Clause 4 of the partnership deed, which is the only relevant clause, is as

(6) 46 A 95; 77 Ind. Cas. 689; A I R 1924 P O 50; 51 I A 129; 21 A L J 934; 46 M L J 23; 5 P L T 1; 28 O W N 253; (1924) M W N 68; 19 L W 72; 2 Pat. L R 41; 10 O & A L R 82; 33 M L T 457; 26 Bom. L R 500; 11 O L J 107; 1 O W N 48; 41 O L J 232 (P O).

(7) 29 M 200; 16 M L J 69 (F B).

(8) 42 M 711; 52 Ind. Cas. 525; A I R 1919 Mad 75; 37 M L J 166; 9 L W 565; (1919) M W N 409; 26 M L T 96.

follows:

"It was agreed that we should conduct the business up to the said period and, at the end of the period, compare the purchase, etc., and all accounts duly maintained and divide the net profit and/or loss in equal shares, one-half for the individual No. 1 (the plaintiff's father) and the other half for the individual Nos. 2 and 3 (the two brothers). So, if any of us is willing to separate himself from us before the due date, such person should forfeit the profit relating to his share and receive the balance of principal after deducting his loss therefrom after the expiry of the period of the partnership."

Long before the period expired, and indeed within four months after a new partnership, the plaintiff's father died, and the partnership became dissolved. The plaintiff being a minor, his mother wisely decided not to continue the partnership any longer and desired that the partnership accounts should be taken, the share of the deceased partner ascertained and paid over to her. The accounts were accordingly taken with the assistance of certain mediators and a sum of Rs. 30,294-13-4 was found due. For a portion of that amount, namely Rs. 14,732-13-4, outstandings of the business, were assigned to her and for the balance of Rs. 15,562 the suit mortgage was executed. The assignment is Ex. B dated September 1, 1925 and the mortgage, Ex. A, dated August 30, 1925. Both these documents were in fact parts of one transaction and were brought into existence close upon the settlement of the partnership accounts and in order to implement. Subsequent to the mortgage one of the brothers, Krishnaswami Goundan, died within a few months leaving four sons, defendants Nos. 2 to 5, and a grandson, defendant No. 7. The other brother Velai Goundan, is defendant No. 1 and his son is defendant No. 6. The main defence to the suit was that pleaded by these sons and grandson, namely that the mortgage, as such could not affect their shares in the mortgaged property as until the settlement of the partnership accounts which was practically simultaneous with the mortgage, there was no debt as such in law, but merely a duty to account. It was accordingly urged that the requisite conditions of antecedent debt were not present in this case as the mortgage was not really or sufficiently disconnected from the precedent debt in point of fact or time. In the Court below, it appears to have also been urged that the business in question was in the nature of a speculative trade, that a debt incurred in it, even regarding the deceased partner's interest in the partnership assets as a debt,

should be held to be of an immoral or illegal nature. But this contention was rightly and summarily overruled, and has not been repeated before us.

The only question then is whether the consideration for the mortgage was an antecedent debt in the sense in which that expression is understood in Hindu Law. The argument for the appellant is that until the accounts are taken and the liability ascertained, it is impossible to posit that there is or will be a debt due by one partner to the others or *vice versa*. The liability to account of a partner or partners in a running or even a dissolved partnership does not, it was argued, amount in law to a debt in being, but was merely the possibility or contingency of a debt to arise in the future. Till it is known how the accounts stood, it was urged there could be no debt and no partner liable for it. The appellant's learned Advocate was not prepared to go the length of saying that in no case of unsettled accounts could there be a debt in law even if there remained nothing more than a pure arithmetical calculation to arrive at the correct figure. What he did urged was that so long as there was no debtor and creditor relationship established, no debt could come into existence and that in a partnership there is no such relationship until the business is dissolved and until the liability of the partners *inter se* is ascertained by the taking of the usual accounts. There may be some support for this argument if one confines one's attention to the meaning of the words 'debt' according to its common law acceptance. Jenks' definition is that it is

"a definite sum of money recoverable from one person (the 'debtor') by another person (the 'creditor') by means of a common law action; whether payment can be claimed immediately or not"; Jenks' Digest of English Civil Law, Book III. Title II, s. 1620.

The action of debt lay according to Anson, Anson's Law of Contract, Edition 17, p. 53, Pollock's Principles of Contract, Edition 10, pp. 135, 136,

"for liquidated or ascertained claims arising either from breach of covenant, or from non-payment of a sum certain due for goods supplied, work done, or money lent."

The qualification that the claim in respect of a debt so called, should be definite, ascertained or liquidated has its roots in the old common law action of debt which was proprietary in character, and was in fact a claim for the recovery of money by way of restitution, rather than the enforcement of an obligation arising out

of contract: Pollock and Maitland's History of English Law, Edition 2, Vol. II, pp. 203 to 207. Its supersession by *assumpsit* or the *indebitatus* count, the practical abolition by the Common Law Procedure Act, 1852, of the distinction between debt and *assumpsit*, and the doing away altogether with the formal pleadings of the Common Law Courts by the Judicature Act, 1873, are familiar knowledge to the student of English legal history (Holdsworth's History of English Law, Vol. II, pp. 366, 367 and III, pp. 420, 421, 442 and 443, Anson's Law of Contract, Edn. 17, p. 44). The distinction between debt and damages, the former relating to a liquidated claim, and the latter generally to an unliquidated demand still clings to English legal phraseology and still exerts a limited nonetheless real influence on modern English jurisprudence. With that technical narrow meaning of the word we are not here concerned. For we are not considering a proposition of English Law or the provisions of a statute based on that law. We have on the contrary to deal with a totally different subject and a totally different system of law. We have in fact to assign a meaning to the word *rina* according to the sense in which that word has been used in the texts of Hindu Law. To such a word and in such a context are we to apply the English Common Law meaning of the word or are we to go back to those texts themselves and to the language in which they have been clothed, in order to ascertain the true meaning of the word *rina* indifferently rendered as debt in English and occurring in the modern text-books and in the decisions of the Courts when defining the obligation of a Hindu son to relieve his father from the sin of the undischarged debt?

The narrower interpretation will at once lead to obvious and startling consequences. The larger and more numerous obligations arising out of contracts and quasi-contracts, trusts and other fiduciary relationships though leading to monetary liability and without the slightest taint of immorality or illegality in any of them, will fall outside the pious duty. And yet we find the texts full of passages, *Sanyasayya v. Murthamma* (9) at p. 3, and the reports full of cases, in which obligations which are far removed from debt in the narrow sense have been clearly recognized. Brihaspati in describing the fate of a

(9) 9 L W 1, (3); 48 Ind. Cas. 740; A I R 1919 Mad. 943; 35 M L J 661-25 M L T 86.

debtor who dies without having discharged a debt refers to him as one who received a sum lent or the like (Colebrooke's Digest I, 228, attributed also to Katyayana). According to Katyayana, the son is bound to carry out what an ancestor has promised for religious purposes (Colebrooke's Digest I, 206). Usanas obviously understands *rina* in the wider sense, though of course he excludes certain categories as falling outside the limits of the obligation being *avyavaharika* in nature or origin. According to the texts, a surety debt, commercial tolls, debts due for spirituous liquors, for lustful pleasures, gambling debts, unpaid fines, promises without consideration, had in terms to be excluded as otherwise, being *rinās* the sons would be bound to discharge them by reason of their pious obligation; see the texts collected in *Chakouri Mahton v. Ganga Proshad* (10). The words *dhana* and *rina* (Manu: *rine dhanecha*) *riktha* and *rina* (Yagnavalkya, Chap. II, 119, *rikthamrinam*) coupled together in the texts, seem to have been so used in a comprehensive sense, for describing all varieties of divisible assets and liabilities. Otherwise, obligations other than debts strictly so called would bind only the man who incurred them while he is alive and will die with him when he dies and though alive or dead, the family assets in his hands will be divisible among the sons while the liabilities will be left unprovided for. Such an absurdity could not have been in the contemplation of the authors of the texts and we at any rate do not feel justified in attributing it to them; in the absence of clear and definite words to the contrary. If *dhana* includes in its connotation all varieties of property and assets, we see no reason why *rina* should not be held to include all varieties of obligations and debts as well. Apart from the texts of Hindu Law, the word has been frequently used in the wider sense in Sanskrit literature. Witness for instance the well known Vedic text referring to the triple debt which attaches to a Brahmin at birth. (*Jayamano wai brahmanastribhi rinaih rinawan jayate | brahmcharyenashirbhyah. yaanyena dewebhyah prajaya pitrubhyah.* ||) Other instances could be easily multiplied.

Coming to the decided cases on the point, *Sanyasayya v. Murthamma* (9) at p. 3*, the sons were held liable for the unaccounted

(10) 39 O 862; 12 Ind. Cas. 609; 15 O L J 226; 16 O W N 519.

*Page of 9 L. W.—[Ed.]

collections made by a father out of the trust estate under his charge and the learned Judges, Wallis, C. J., and Seshagiri Ayyar, J., refused to recognize the subtle distinction, as they called it, between accountability and debt. In a later case, *Ramasubramania Pillai v. Sivakami Ammal* (11) in which the point was more directly raised, the learned Judges considered the question of the liability of the son to pay mesne profits decreed against the father and held that their pious obligation extended to it. The case is instructive for the collection of cases in which the liability was established against the sons in respect of a variety of causes of action far removed from debt in the limited sense. In none of them, it is noteworthy, was it disputed that there was a debt but only that the debt was not of a nature which would bind the son's interest. Venkatasubba Rao, J., explained the position in these words :

"It was contended that the obligation to pay mesne profits is not in the nature of a debt, that it is not in fact *rina* which means strictly 'what is taken under a promise to repay.' We agree with Mukerjee J., see *Chakouri Mahlon v. Ganga Proshad* (10) at p. 877*, that the word *rina* as used in the texts has a much wider application than a mere debt or loan. I am prepared to go further than merely hold that at any rate, a judgment debt comes within the expression *rina* for, if this narrow construction be adopted, a son can be held liable only after a decree is passed against the father; whereas, if he is originally impleaded in the suit for damages, he can resist it on the ground that there has been no debt, as there has not been a judgment. This would be a clear anomaly."

The other learned Judge Madhavan Nair, J., was also of the same opinion : *Ramasubramania Pillai v. Sivakami Ammal* (11) at p. 630†; see also *Natesayyen v. Punnuswami* (12) at p. 104. Quite recently a Bench of the Allahabad High Court has expressed a definite preference for the wider interpretation of the word as including a liability for unliquidated damages arising on a breach of contract by the father. We are in entire agreement with the observations of the learned Judges who declined to accept the stricter meaning of the word *rina*. They said :

"If we carry it to its logical conclusion, the liability of a son to pay the antecedent debts of his father would not extend to any liability incurred otherwise than by the advancing of a sum in cash to the father. We cannot believe that this was the intention of the author of the text (Brihaspati, Vol. 33, Max Muller's Sacred Books of the East,

(11) 21 L W 606; 90 Ind. Cas. 165; A I R 1925 Mad 841; (1925) M W N 371.

(12) 16 M 99, (104); 3 M L J 1.

*Page of 39 C.—[Ed.]

†Page of 21 L W.—[Ed.]

p. 319). We cannot believe, for instance, that a son would not be liable to pay the unpaid price of a commodity which had been bought by his father or to pay rent due by his father as a tenant. (According to English Law an action of debt lay at Common Law). We think that the son is bound to pay any sum which is lawfully due from the father provided that the father's liability is not in any way tainted with immorality; *Chatar Sen v. Raja Ram* (13) at pp. 61 and 62."

These authorities are sufficient to negative the appellant's contention. It may however be observed that even if the word *rina* in Sanskrit is to be understood as meaning a debt, there is no warrant for importing into it the technical sense in which it has become wrapped up by the peculiarities of the old English Common Law and Procedure. Almost every English Dictionary includes 'obligation' among the meanings of the word 'debt' though ordinarily the word does mean that which is due from one person to another or what is owed. We even speak, metaphorically perhaps, of owing a debt of gratitude. But whatever may be the meaning which a layman or a lawyer speaking the English language may attach to it, we are unable to say that the word 'debt' is the exact equivalent or *rina* in Sanskrit at any rate with all the technical import that that word carries. Moreover, the word *rina* has passed into colloquial use in the wider sense in most of the vernaculars of the presidency. It is not capable of being fully or definitely expressed in any single English word. Like the words, *satya* or *dharma* which are but imperfectly translated as truth or duty, the word *rina* also is often rendered, though loosely, as debt, though such a rendering is sufficient enough for practical purposes. But when it becomes necessary to ascertain its significance for apportioning rights or liabilities, we must determine it not by reference to its English equivalent but by the original Sanskrit word itself, giving to it just the meaning in which it is used or understood in the parent language in its literal or even colloquial sense. What we cannot agree to is the attempt first to regard debt as a perfect synonym and then to understand it in the archaic sense in which the word was understood in the now obsolete old forms of Common Law actions. We must accordingly hold that the unascertained liability of the two brothers was a debt according to Hindu Law incurred by them in favour of the plaintiff's father from the

(13) I L R (1938) All. 58, (61, 62); 173 Ind. Cas. 916; A I R 1938 All. 44; (1937) A L J 1160; 10 R A 519; 1938 A L R 207.

time when the latter brought into the partnership the sum of Rs. 20,000 subject to its being returned with a reduction in case of loss or an addition on account of profit. It was thus both antecedent in time and independent in origin from the mortgage which, it is plain, could not have been in the contemplation of the parties when the capital was brought in. What was in fact contemplated was, as appears from the partnership deed, something totally different from what actually led to the execution of the mortgage. The test must therefore be held fully satisfied, antecedency in time and dissociation in fact being thus established.

It was urged that the word 'debt' has been defined in some Indian cases in such a way as to exclude a liability for an amount to be yet ascertained by the taking of accounts. Two cases were cited both of which proceeded on the meaning of the word as used in two different statutes and it was held that such a liability cannot be regarded as a debt within the meaning, in one case, of s. 4 (1) (a), Succession Certificate Act, (VII of 1889) and in the other, within s. 25, Contract Act, (IX of 1872). In *Sabju Sahib v. Noordin Sahib* (14). Subramania Iyer, J., to whom the case was referred on a difference of opinion between Shephard, Offg. C. J., and Benson, J., held relying on *Johnson v. Diamond* (15), that the liability arising from such an obligation could not be held to be a debt in the accepted legal sense of the term for the obvious reason that the liability was not in respect of a liquidated sum. It is not without interest that Benson, J., who took what may be called a common sense view of the matter, dissented, holding that when the accounts are taken and the sum due is ascertained, that sum while yet it remained unascertained was a debt within the Act. In *Doraisami Padayachi v. Vaithilinga Padayachi* (16), a promise to pay the amount which may be found due by an arbitrator on the taking of accounts between the parties was held not to amount to a promise to pay a debt within the meaning of s. 25, Contract Act, the amount not being a liquidated sum. These decisions, whatever their value may be in the construction of statutes which have employed the English legal terminology, have no bearing on the meaning to be given to the expression in a different con-

(14) 22 M 139.
(15) (1855) 11 Ex. Rep. 73; 156 E R 750; 24 L J Ex. 217; 1 Jur. (Ns) 938; 25 L T (Os) 85; 3 W R 407; 105 R R 399.

(16) 40 M 31; 39 Ind. Cas. 220; A I R 1918 Mad. 1145; 32 M L J 422; (1917) M W N 353 (F B).

text, in a different language and for a principle of law altogether alien to the English system. The decision in *Thirunavukarasu Chetty v. Muthukrishna* (17), is however directly in point, and is not to be distinguished in this way though it was sought to distinguish it from the present case on the facts. The mortgage in that case was given by one partner to the other in a running partnership for the amount due on an investigation of the accounts necessitated by the bad faith of the mortgagor. The learned Judges who decided the case held that until the settlement of the partnership account as such was arrived at, the relationship of creditor and debtor did not exist between the parties, and there could not be said to have been any debt existing antecedently to the mortgage. With respect we find ourselves unable to accept this dictum as a correct statement of the Hindu Law on the point. Their attention does not appear to have been called to the meaning of the word *rina* as explained in the cases cited above, nor was the rule of the Hindu Law on this point put specifically before them. We therefore feel that we are at liberty to come to an independent conclusion for ourselves on a consideration of the relevant material which we may observe had not been placed before them, and we think that our interpretation is more consistent with the texts and the principles of the Hindu Law.

A word about the distinction that was sought to be made on behalf of the respondent. It was urged that whether or not the liability of some partners to the other or others in an undissolved partnership is a debt, the moment a dissolution takes place there arises in law a debt properly so called, as there could be no more fluctuation and uncertainty about the rights of partners, as by reason of the dissolution all further transactions necessarily stop. Reliance was placed on s. 43 of the English Partnership Act, 1890, which runs as follows:

"Subject to any agreement between the partners, the amount due from surviving or continuing partner or partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

It was argued that this statutory provision is merely a declaration of the common law on the point, and hence in the case on hand, unlike the case referred to above, the partnership became dissolved on the death of the plaintiff's father, an event which

(17) (1931) M W N 467.

took place an appreciable time before the mortgage. We may observe that no such provision is found in the Indian Act and even according to English Law, it would seem that partners stand in a fiduciary relation to each other (Lewin on Trusts, 13th Edn., p. 253) whether or not they are trustees in the full and proper sense of the word: see *Knox v. Gye* (18), at p. 675, per Lord Westbury: cf. observations of Lord Hatherley at p. 678: see also s. 29 of the English Partnership Act, 1890; *Vyse v. Foster* (19). Out of this relation arises in favour of the representative of a deceased partner not necessarily a debt, but a right which consists in having an account of the property, of its collection and application, and on receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. The representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner. Whether the effect of s. 43 of the English Act is anything more than the putting to an end of all difficulties in the way of the application of the rule of limitation to such a cause of action, it is not easy to determine. It is however not necessary to pursue the matter, as in our view there was in this case an antecedent debt according to Hindu Law, and the mortgage was executed to discharge it. The appeal accordingly fails and is dismissed with costs subject to the decision of the lower Court on the petition presented by the appellants under Madras Act IV of 1938, which will be sent to the lower Court for disposal. The court-fee on the memorandum of appeal must be paid by the appellants. In the connected C. M. A. No. 312 of 1935, it is stated that in view of the dismissal of the main appeal no orders are necessary. It is also accordingly dismissed, but without costs.

N-S.

*Appeal and
application dismissed.*

(18) (1873) 5 H L 656, (675); 42 L J Ch. 234.

(19) (1875) 7 H L 318; 41 L J Ch. 37; 31 L T 177;
23 W R 355.

ALLAHABAD HIGH COURT

Second Appeal No. 1564 of 1936

December 18, 1939

IQBAL AHMAD AND BAJPAL, JJ.

KANJESHWAR NATH AND OTHERS—

PLAINTIFFS—APPELLANTS

versus

BENARES BANK, LTD., SAHARANPUR

AND OTHERS—DEFENDANTS—RESPONDENTS

Hindu Law—Debts—Son's liability—Surety debt by father—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Decree on basis of hundi—Security bond creating mortgage for satisfying decree—Decree-holder, if precluded from executing decree by O. XXXIV, r. 14.

Under the Hindu Law of the Mitakshara School a son is liable for the debts of his father on account of suretyship for the payment of money.

Where the decree obtained is on the basis of a hundi and a mortgage is created by a security bond for the purpose of satisfying decree, the decree-holder is not precluded from executing the decree by O. XXXIV, r. 14. 33 Ind. Cas. 922 (1) and 149 Ind. Cas. 1104 (2), relied on.

S. A. from the decision of the Second Sub-Judge, Saharanpur, dated September 2, 1936.

Sir Syed Wazir Hasan and Mr. B. N. Misra, for the Appellant

Mr. S. N. Seth, for the Respondents.

Bajpal, J.—The plaintiffs are the appellants before us. The facts giving rise to the suit out of which this appeal arises may be briefly stated. It appears that there were three brothers. Onkar Prasad, defendant No. 2 Piarey Lal, defendant No. 3, and Lachmi Narain who is not a party to the present suit. Lachmi Narain had certain dealings with the Benares Bank Ltd., Saharanpur, defendant No. 1, and Onkar Prasad and Piarey Lal, his two brothers, had given a letter of guarantee to the Bank guaranteeing the payment of such sums as might be due by Lachmi Narain to the Bank. There was a settlement of accounts and on July 22, 1926, a 'hundi' was drawn up. Lachmi Narain was the drawer of the 'hundi.' Onkar Prasad and Piarey Lal were the drawees of the 'hundi' and the Benares Bank was the payee. Suit No. 164 of 1927 was brought by the Bank on the basis of this hundi against Onkar Prasad and Piarey Lal and a decree was obtained. The decree was put in execution and then a security bond was drawn up by Onkar Prasad and Piarey Lal. This was on February 20, 1930, and execution was stayed. The decretal amount not having been paid up the Benares Bank sought to sell the property mentioned in the security bond and then the present suit was instituted by the plaintiffs who are the sons of

Onkar Prasad and Piarey Lal, plaintiffs Nos. 1 to 3 being the sons of Onkar Prasad and plaintiff No. 4 being the son of Piarey Lal. The suit was for a declaration that the property in dispute was not liable to be attached and sold in execution of the decree in Suit No. 164 of 1927. The Courts below have dismissed the plaintiffs' suit and hence this second appeal by them before us.

Three points were agitated before the lower Appellate Court and the same three points are urged before us. In the first instance it is submitted that the sons of Onkar Prasad and Piarey Lal are not liable to pay the amount of the decree inasmuch as there was no consideration for the 'hundi.' There is no substance in this plea inasmuch as the 'hundi' was drawn up in pursuance of the contract of guarantee by which Onkar Prasad and Piarey Lal had promised to reimburse the Bank for such sums as might be found due to the Bank from Lachmi Narain. The advance of moneys to Lachmi Narain was a sufficient consideration so far as Onkar Prasad and Piarey Lal were concerned. Under the Hindu Law of the Mitakshara School a son is liable for the debts of his father on account of suretyship for the payment of money and there is no force in the contention that the son is not liable for such suretyship debts. In the Mayne's Treatise on Hindu Law and Usage, Edn. 10, the following passage occurs :

"According to Brihaspati, there are four different classes of sureties : (1) for appearance, (2) for confidence or honesty, (3) for payment of money lent, and (4) for delivery of goods or articles of the debtor. Yajnavalkya recognizes the first three classes alone. It is now settled that the obligation in regard to the first two classes is purely personal to the sureties and that the sons are not liable. But in the case of sureties for payment of money or for the delivery of the debtor's assets or goods, the sons are also liable."

A number of cases are cited in support of the proposition that in the case of suretyship for payment of money the sons are also liable. There is thus no force in the contention that the present plaintiffs are not liable for the suretyship debts of their fathers. The next contention is that the decree which is sought to be executed must be deemed to be satisfied by the execution of the security bond. We have the security bond before us and after having considered it carefully we have come to the conclusion that the security bond did not satisfy the decree, rather it was for the satisfaction of the decree that the security bond was executed. The

words *digreedar ne matalba digree maskur ke liye zamanat talab kiya hai*, and the words *matalba digree haza men bataur zamanat makful kardi*, and again the words *matalba digree mai kharcha wa sood sarah maskoor bazariye nilam* clearly show that the decree was meant to be kept alive and the security bond was not executed in satisfaction of the decree, but in order to secure the payment of the decree which remained intact.

The third contention is that the property in dispute cannot be attached and sold in execution of the decree in Suit No. 164 of 1927, but that another suit should be instituted on the basis of the security bond and proceedings in execution are barred under O. XXXIV, r. 14, Civil P. O. This contention also seems to be without force in view of the decision of this Court in *Mukta Prasad v. Mahadeo Prasad* (1) and *Mool Chand v. Lalta Prasad* (2). No decree in the present case has been obtained for the payment of money in satisfaction of a claim arising under a mortgage. From what we have said above it would appear that the decree that has been obtained in the present case and which is sought to be executed was on the basis of a 'hundi' and the mortgage was created for the purpose of satisfying this simple money decree and the two cases mentioned above go to show that O. XXXIV, r. 14, Civil P. C., does not stand in the way of the defendant Bank. On the whole in our judgment there is no force in this appeal and we dismiss it with costs.

D.

Appeal dismissed.

(1) 38 A 327; 33 Ind. Cas. 982; A I R 1916 All. 57; 14 A L J 385.

(2) A I R 1934 All. 524; 149 Ind. Cas. 1101; 1934 A L J 865; 6 R A 1015 (2).

LAHORE HIGH COURT

First Appeal No. 427 of 1938

May 10, 1939

ADDISION AND RAM LALL, JJ.

DISTRICT BOARD, FEROPPORE—

DEFENDANT—APPELLANT

versus

BALWANT RAI AND ANOTHER—

PLAINTIFFS—RESPONDENTS

Contract Act (IX of 1872), s. 65—Money paid under void contract repaid to vendee—Suit by him for damages for breach of contract—Claim for interest on ground of negligence of vendor—Article of Limitation Act applicable—Interest from date of payment of money to date of suit, if can be granted in absence of proof that money earned interest during such period—Limitation Act (IX of 1908), Arts. 36, 37, 62.

The second part of s. 65, Contract Act, namely "or to make compensation for it," only comes into play when the advantage cannot be restored. Interest on sum paid under void contract would only be payable after the advantage has been refused to be restored.

The claim for interest on the ground of negligence on the part of the vendor in overlooking the provisions of the law, cannot be granted as it is equally the vendee's duty to know the law. For this reason also the claim for interest is not sustainable. Further, the claim for interest based on negligence of the vendor is governed by Art. 36, Lim. Act and not by Arts. 97 or 62. 184 Ind. Cas. 130 (2), relied on.

Where a contract of sale is found to be void and the amount paid under it is repaid by the vendor to the vendee, the vendee is not entitled to any interest on the amount from the date of its payment to the date of the institution of the suit for damages by the vendor for breach of contract if it is not proved that the amount had earned any interest in the hands of the vendor. 71 Ind. Cas. 629 (1), relied on.

F. A. from the decree of the Sub-Judge, First Class, Ferozapore, dated August 29, 1938.

Malik Barkat Ali and Mr. Sant Lal, for the Appellants.

Messrs. Jagan Nath Aggarwal and Jiwan Lal Kapur, for the Respondents.

Addison, J. — The plaintiffs sued for recovery of Rs. 10,000 on account of breach of contract due to the negligence and misfeasance of the defendant, the District Board of Ferozapore. The Board invited offers in 1934 for the purchase of its Rest House at Moga. On April 15, 1934, the plaintiffs submitted a tender, offering to buy the Rest House for Rs. 35,100. The District Board confirmed the sale on September 24, 1934. Thereafter the plaintiffs paid Rs. 5,000 on October 1, 1934 and Rs. 30,100 on October 5, 1934. On April 16, 1935 the Commissioner of Jullundur Division refused to sanction the transaction, and it is not disputed that his sanction was essential before the contract could be entered into. On August 19, 1935 the plaintiffs were requested to take their money back but they did not do so till April 14, 1936. Thereafter, on August 26, 1937, they instituted this suit. The Board pleaded that there could be no contract of sale without the Commissioner's sanction and that no mis-statement had been made by it to the plaintiffs. It was further stated that the plaintiff had suffered no damage and that their money had been returned to them. Finally, it was said that the suit, being based on tort, was time-barred.

The trial Judge held that there was no contract and that the defendant was bound to restore the advantage it had obtained

under s. 65, Contract Act. It was further held that plaintiffs had sustained damages by reason of the negligence of the Board in overlooking the imperative provisions of law which made the Commissioner's sanction essential; while the plaintiffs were not in fault. For this reason the trial Judge allowed the plaintiffs as damages for this negligence interest at six per cent. per annum from the date of the receipt of the money by the defendant up to April 14, 1936, the plaintiffs took the money back. This amounted to Rs. 3,211-10-0 which sum has been decreed. Against this decision the defendant has preferred this appeal while the plaintiffs have put in cross-objections, claiming a further sum of Rs. 6,788-10-0.

It was not disputed before us that there was no contract as it could not be entered into without the Commissioner's sanction. It was the duty of both parties to know the law. The defendant was however under the provision of s. 65, Contract Act, bound to restore any advantage it had obtained under the agreement, and this has been done. Section 65, Contract Act, is to the effect that when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. It is admitted that the defendant has restored the full amount, which was the only advantage it obtained under the agreement. It has not been proved that this money earned any interest in the hands of the defendant. The second part of s. 65, namely "or to make compensation for it," only comes into play when the advantage cannot be restored. In this view no interest was allowable to the plaintiffs. In a similar case, namely *Har Nath Kuer v. Indar Bahadur Singh* (1) their Lordships of the Privy Council only allowed interest on the sum found to have been paid from the date of the institution of the suit and not from the date when the money was paid. In the present case, the money was repaid before the suit was instituted and notice was given to the plaintiffs to take it after the Commissioner had refused his sanction. This decision supports the principle that interest would only be payable after the advantage has been refused to be restored.

(1) 45 A.179; 71 Ind. Cas. 629; A.I.R. 1922 P.O. 403; 50 I.A. 69; 26 O.O. 223; 9 O & A L.R. 270; 9 O.L.J. 652; 44 M.L.J. 489; 37 C.L.J. 346; 27 C.W.N. 949; 18 L.W. 383; 33 M.L.T. 216; 5 P.L.T. 281; 2 Pat. L.R. 237 (P.O.).

The claim for interest has been decreed on the ground of negligence on the part of the Board in overlooking the provisions of the law, but it was equally the plaintiffs' duty to know the law. For this reason also the claim for interest is not sustainable. Further, the claim for interest being based on negligence of the Board is time-barred under Art. 36, Lim. Act, which allows two years from the date of the malfeasance, misfeasance or non-feasance for a suit for compensation for such malfeasance etc., "independent of contract and not herein specially provided for." Article 97 has obviously no application and this finding of the trial Court was not supported by the learned Counsel appearing on behalf of the plaintiffs. Their case before us was that Art. 62 applied. This Article gives three years' limitation for a suit for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use. Obviously also that Article has no application. In *Ghulam Haider v. Iqbal Nath* (2). Article 36 was applied. For the reasons given, we accept the appeal and dismiss the plaintiffs' suit. The cross-objection are also dismissed. The parties will have to bear their own costs throughout.

s.

Appeal allowed.

(2) A I R. 1939 Lah 118; 184 Ind. Cas. 130; 12 R. L. 167.

RANGOON HIGH COURT

Criminal Revision No. 393-B of 1939

October 12, 1939

MACKNEY, J.

MA PU—APPLICANT

versus

MAUNG TUN PE AND ANOTHER—

—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 250—Complainant to pay compensation to each of several accused—Proper order for imprisonment in default—Accusation must not only be false but also frivolous or vexatious.

Where a complainant has to pay compensation to each of several accused the imprisonment which the Magistrate orders in default of payment should be ordered in respect of default of payment to each of the accused.

It is only when the Magistrate is of opinion that the accusation against the accused was not only false but also either frivolous or vexatious that he can act under s. 250, Criminal P. O. The reason is that this section is not to be applied except in cases which are frivolous or vexatious. It is not intended to be applied in serious cases which are to be dealt with under the provisions of s. 211, I. P. O. It is for this reason that a Magistrate must find that the case is

frivolous or vexatious before he has jurisdiction to deal with the matter under s. 250.

Or. R. for the review of the order of the Township Magistrate, Kyaunggon, dated July 3, 1939.

Order.—The applicant Ma Pu was ordered by the Township Magistrate of Kyaunggon under s. 250, Criminal P. O., to pay compensation of Rs. 10 to each of the two respondents Maung Tun Pe and Maung Tun Saing. The order of the Magistrate was that she was to pay compensation of Rs. 10 each to the two accused, in default she was to suffer 30 days' simple imprisonment. Where a complainant has to pay compensation to each of several accused the imprisonment which the Magistrate orders in default of payment should be ordered in respect of default of payment to each of the accused. Consequently the order in this case should have read "I direct Ma Pu to pay compensation of Rs. 10 to each of the two accused Maung Tun Pe and Maung Tun Saing under s. 250, Criminal P. O., in default of payment in each case she will suffer 30 days' simple imprisonment."

The complaint of Ma Pu was that she had loaned her two bullocks to Tun Saing for 55 baskets of paddy to be payable when the paddy sheaves were collected on the threshing floor, when the bullocks were to be returned. On December 26, 1938 she went to Tun Saing's farm in company with Maung So Pe and demanded the return of the bullocks. The two bullocks were apparently in the kwin close by. She says that Tun Saing permitted her to take them away and that she and So Pe each taking a bullock proceeded to move away. They were immediately followed by Tun Pe, Tun Saing and Tun Saing's two coolies, Kala and Leik Khun, who proceeded forcibly to remove the leading strings of the bullocks from their hands and to take them away. Tun Saing said that he would not return the bullocks unless debt was paid.

Tun Sain's defence was that the two bullocks had been pledged to him as security for debt of Rs. 63 and that it had been agreed that if the money were not returned by the harvest the bullock would become the property of Tun Saing. The Magistrate believed the evidence offered by Tun Saing to prove this allegation and he held therefore that the case of Ma Pu had been shown to be a false one. He acquitted Tun Pe and Tun Saing (having previously discharged Kala and Leik Khun as there was no evidence against them), and in his

order of acquittal he directed that the complainant Ma Pu should show cause why she should not be punished under s. 250, Criminal P. O. Ma Pu furnished a written explanation. The Magistrate then recorded the following further order :

"I have read the written explanation of Ma Pu and find it unsatisfactory. I therefore direct that the accused Ma Pu do pay compensation of Rs. 10, etc."

It is obvious that the Magistrate did not comply with the provisions of s. 250, Criminal P. O. It is only when the Magistrate is of opinion that the accusation against the accused was not only false but also either frivolous or vexatious that he can act under s. 250, Criminal P. O. The reason is that this section is not to be applied except in case which are frivolous or vexatious. It is not intended to be applied in serious cases which are to be dealt with under the provisions of s. 211, I. P. O. It is for this reason that a Magistrate must find that the case is frivolous or vexatious before he has jurisdiction to deal with the matter under s. 250. In the present case the Magistrate has merely found that the case was a false one. Next, the Magistrate in directing that compensation should be paid must record his reasons. Here the Magistrate has merely said that the written explanation of Ma Pu (which he has not considered in any way) was unsatisfactory—and he does not explain in what way it is unsatisfactory. Nor does he explain why he thought that this was a case in which compensation ought to be awarded to the accused. For these reasons alone the order of the Magistrate must be held to be invalid.

Apart from this, however, it is clear that the Magistrate did not have sufficient reason for holding that the case was a frivolous or vexatious one. Although several witnesses were offered in the defence, only two witnesses spoke to the actual episode and they are Kala and Leik Khun, the two coolies of Tun Saing who had themselves been co-accused. The Magistrate himself has said that it is hard to believe their evidence. We are left therefore with the story of Ma Pu and her witness So Pe. So Pe is not a relation of Ma Pu and there is absolutely no reason why his evidence should be disbelieved. From this it is quite clear that the story that Ma Pu and So Pe went to Tun Saing's farm and took the two bullocks away but in so doing were restrained by Tun Saing and his friends who removed the bullocks from their custody is a true one. They say that Tun Saing gave permission to them to take the bullocks away and

that evidence has not really been rebutted. Certain of the defence witnesses, namely Chan E and Maung Tin, say that they had asked Tun Saing to come along with them for a certain purpose, but as they were about to leave somebody shouted to him to come back. He went away for a time and on his return told them that Ma Pu had asked for the return of her bullocks but that he had told her that he could not return them. Of course this evidence is of no assistance to the defence. It therefore appears to be no more than the truth that the bullocks were forcibly removed from Ma Pu and So Pe's possession.

I have no doubt that the trouble has arisen because Ma Pu on the one side and Tun Saing on the other regard the transaction in regard to the bullocks in different lights. Ma Pu seems to think that she has merely loaned the bullocks to Tun Saing for a certain period for a certain amount of paddy. On the other hand Tun Saing considers that he has given Ma Pu a loan and is entitled to keep the bullocks as security. Possibly the money representing the hire of the bullocks was paid at an early date in advance. Ma Pu chooses to regard the payment merely as the amount of hire and Tun Saing chooses to regard it as a loan. Which is the truth of the matter I do not know. At any rate it is quite clear that Ma Pu's complaint can be deemed to be neither frivolous nor vexatious, for she appears genuinely to have thought that she was entitled to the custody of her bullocks, and Tun Saing, so far as the evidence goes, appears at first to have thought that she was entitled to their custody. Possibly, Tun Saing on second thought held that his loan represented more than a reasonable amount for the hire of the bullocks and that if Ma Pu took the bullocks back she ought to pay him the difference. For these reasons I set aside the order of the Magistrate passed under s. 250, Criminal P. O., and direct that the compensation paid by Ma Pu be refunded to her.

s.

Order set aside.

MADRAS HIGH COURT.

Second Appeal No. 95 of 1936

April 25, 1939

WADSWORTH, J.

AKUTHOTA BYRE GOWDU—APPELLANT
versus

MUNIAMMAL AND ANOTHER—RESPONDENT
Hindu Law—Adoption — Authority — Testator by will authorising both widows separately to make adoption—Construction of will.

Where by a will the testator authorises both his widows separately to make adoption the instrument should be construed on the assumption that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised among Hindus. The testator cannot therefore be intended to have authorized simultaneous adoptions by the widows. It must be inferred that he must have contemplated following the ordinary rules of Hindu Law whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. Where there is no such refusal or consent by the senior widow, the adoption by the junior widow is invalid. *Akhoy Chunder v. Kalapahar Haji* (1) and 14 Ind. Cas. 17 (3), relied on.

S. A. against the decree of the Sub-Judge, Salem, in A. S. No. 9 of 1935.

Mr. D. R. Krishna Rao, for the Appellant
Messrs. C. S. Venkatachariar and D. Ramaswamy Iyengar, for the Respondents.

Judgment.—This appeal raises the question of the validity of an adoption. The properties in question formed part of the estate of one Sampanghi Rame Gowdu who had a son Byre Gowdu. The father and the son separated and it was agreed as one of the terms of the partition that the father's estate should be held during his lifetime by his second wife Lakshmakkal and on her death should go to Byre Gowdu, the son by the first wife. Lakshmakkal during her lifetime transferred those properties to her nephew, defendant No. 1. Byre Gowdu had two wives, the first was the plaintiff and the second was one Ramakkal. Neither of them had any children. Byre Gowdu died in 1909 leaving a will which concludes with the following sentence :

"...If after my lifetime, both of you (i. e., the two wives) do not agree to live together dividing the said properties into two equal shares, you shall separately make adoptions....."

Apparently this was regarded as giving each of the widows power to adopt without regard to the other. At any rate in 1909, shortly after the death of Byre Gowdu, the junior widow Ramakkal adopted defendant No. 2. There is no doubt about the fact of the adoption which is embodied in a deed, Ex. 2. At the time of the adoption, the two wives who are sisters were living together. The plaintiff made no objection to the adoption; but it has been found as a fact that she did not consent to it. The adopted son lived with the two widows for many years without his status being questioned. However, after defendant No. 1 got a transfer of Lakshmakkal's property, he also got a surrender from defendant No. 2 of the latter's interest therein. Ramakkal died in 1930 and Lakshmakkal died in 1932.

Byre Gowdu's father had died long before. So that at the time of the suit there were living, the plaintiff who is the senior widow of Byre Gowdu, defendant No. 2, adopted by the junior widow Ramakkal, and defendant No. 1, the nephew and transferee of Byre Gowdu's father's second wife.

We are no longer concerned with the plaintiff's right to the half of Lakshmakkal's property which goes to her as the widow of her husband. The appeal relates only to the right of the plaintiff to the half of the property which would have devolved upon Ramakkal had she been alive when Lakshmakkal died and is now claimed to have devolved upon defendant No. 1 by reason of the surrender by defendant No. 2, the adopted son of Ramakkal. The main question in the appeal is whether this adoption was valid. Fortunately there is no longer any difficulty about the facts and the only trouble relates to the effect of the provision in Byre Gowdu's will. Ex. B, which has already been extracted authorizing each of the widows to adopt. It seems to me that this difficulty can be resolved by reference to authorities. The Privy Council in *Akhoy Chander v. Kalapahar Haji* (1), dealing with a case in which two widows were each authorized to make adoptions, and in pursuance of that authority made simultaneous adoptions, held *firstly* that the instrument should be construed on the assumption that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised among Hindus. *secondly* their Lordships held that simultaneous adoptions by two widows were contrary to law.

Next there is the case in *Bijoy Krishna v. Ranjit Lal* (2), the decision being confirmed in appeal by the Bench whose judgment is reported in *Ranjit Lal v. Bijoy Krishna* (3). That case concerned an instrument which authorized two widows to act according to their religious tenets by adopting three sons successively. It was held following the Privy Council decision just cited that the instrument must be read not as authorizing an illegal simultaneous adoption but as giving power of adoption to the widows successively and that this being so the elder widow had the prior right to exercise the power of

(1) 12 A 406; 12 I A 198; 4 Sar. 678; 9 Ind. Jur. 400 (P O).

(2) 38 O 694; 12 Ind. Cas. 460.

(3) 39 O 582; 14 Ind. Cas. 17; 10 O W N 440.

adoption and that the younger widow had no right to adopt before the elder widow had exhausted her right or refused to use it. The reasoning is that such a construction is not contrary to the terms of the instrument and is in accordance with the ordinary rule of Hindu Law, which may be assumed to have been in the mind of the person giving the authority at the time when the instrument was drafted. The confirming decision has been quoted with approval in a Madras case *Venkatappa Mayaniam Bahadur v. Ranga Rao* (4), though the point actually arising in that case was rather different.

It seems to me that these decisions dispose of the contention that the adoption of defendant No. 2 by Ramakkal was valid. Exhibit B on its face might be read as authorizing each of the widows to make an adoption either simultaneously or one after the other, in which case there might be living contemporaneously two adopted sons to one man a notion repugnant to Hindu Law. Similarly it is contrary to the ordinary rule of Hindu Law that when there are two widows they should be permitted to include in an unseemly scramble for priority in adopting a son to their deceased husband, the rule being that in such a case the senior widow should have the right which will only pass to the junior widow if the senior widow refuses to adopt or consents to an adoption by her co-widow. Applying this rule to the construction of Ex. B, we must, I think, infer an intention to authorize each of the widows to adopt, the procedure contemplated being that prescribed by the ordinary rules of Hindu Law whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. On the findings of fact it must be held that there was no such refusal to adopt by the plaintiff nor was there any consent to the adoption. It follows that the adoption is invalid. It has also been contended that defendant would be entitled to the property if not as an adopted son at least as a *persona designata*. There is no force in this contention. The deed of adoption Ex. 2 makes it clear that the rights thereby conferred upon defendant No. 2 are conferred solely and only by virtue of the adoption made under it. It is not the case of a gift to an individual with an erroneous description of that individual but a case of

the performance of a formal act by virtue of which the rights in the property would accrue. The formal act being invalid no rights can pass under it. In the result therefore the appeal is dismissed with costs of respondent No. 1 (plaintiff). Leave to appeal is refused.

N.-D.

Appeal dismissed.

ALLAHABAD HIGH COURT

First Appeal No. 74 of 1937

November 8, 1939

THOM C. J. AND GANGA NATH, J.

SANTU—APPELLANT

versus

MAIKU AND OTHERS—RESPONDENTS

Will—Will traced to possession of deceased and last seen there not forthcoming after his death—Presumption arising therefrom—Evidence—Appreciation—Nervous witness, value of.

If a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it. The presumption will be more or less strong according to the character of the custody which the testator had over the will. *Allan v. Morrison* (1) and *Anwar Hossein v. Secretary of State* (4), relied on.

A witness's evidence should not be rejected merely because he has appeared nervous in the witness-box.

F. A. from the decision of the District Judge, Cawnpore, dated January 8, 1937.

Mr. B Mukerji, for the Appellant.

Mr. Ram Nama Prasad, for the Respondents.

Thom, C. J.—This is an appeal by an objector to an application for probate. The applicants presented an application for probate of the will of one Sita Ram alleged to have been executed and registered by him on May 3, 1929. That Sita Ram who died on February 22, 1934, did execute a will on May 3, 1929, does not, in our judgment admit of any doubt whatever. The learned District Judge who heard the application for probate has upon a consideration of the evidence held that the will, a certified copy of which only has been produced was executed by Sita Ram on that date. The two attesting witnesses had died by the time the application came before the learned Judge for final disposal. One of these witnesses, Baldeo Prasad, however had made at an earlier stage of the proceedings a declaration which is referred to in the application itself. The declaration is as follows:

"I, Baldeo Prasad, one of the witnesses to the last

(4) 39 M 772; 30 Ind. Cas. 106; A I R 1916 Mad. 919; 29 M L J 18; 18 M L T 19; (1915) M W N 424.

will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature thereto."

Furthermore the scribe Chandu Lal gave evidence and deposed that the will in respect of which probate is sought was executed by Sita Ram. The endorsement shows that Sitaram was duly identified before the Sub-Registrar. It is unnecessary to refer further to the evidence on this point. We see no reason whatever to differ from the conclusion which has been reached by the learned District Judge. The applicants having failed to produce the original will it was for them to show that the will had not been revoked by the testator before his death. In this connection it is appropriate to refer to the provisions of the will. In the will the testator declares :

"I have arrived at an age of sixty years, I have no male or female issues, my wife has died. I have purchased out of my own hard earned money, two houses.....I am not living in my houses and carry on business separately for a long time. I have no co-sharer or co-partner in my movable and immovable property and both the houses have not been transferred in any way or stand hypothecated anywhere. I think it proper that I should make some proper arrangement of my property in my life time so that after my death my property may not be wasted. I, therefore, while in a sound state of body and mind and in the full enjoyment of my senses, without compulsion and coercion on the part of anyone else and of my own accord I have executed, after due consideration and in consultation with my well-wishers, the will in the following terms. So long as I, the executant, shall remain alive, I shall be the owner in possession of all my movable and immovable property outstanding debts, household goods, ornaments, cash, utensils and clothes. I shall have every proprietary power to bring the things to my own use and make transfers in respect thereof. After the death of me, the executant, Sri Thakur Krishnaji installed in the temple in house No. 19-127 situate in Patkapore Bazar, Ram Narain, city of Cawnpore shall be the owner in possession of my movable and immovable property, household goods, outstanding debts, ornaments and cash, etc."

It will be seen that by the aforementioned provisions the testator made an endowment of his entire property. The later provisions in his will make provision for the creation of a trust to manage the endowed property. Eight trustees were appointed, the first named being Maiku Lal one of the petitioners. It is alleged by the petitioners in their petition that the original will had been mislaid since the testator's death. The evidence adduced by the petitioners in regard to the disappearance of the will was directed to proving that one of the trustees mentioned in the will namely Shri Kishan appropriated the will on the day after the death of the testator and had refused to make it available. In the course of his evi-

dence Maiku Lal deposed :

"He (the testator) himself until his death managed the property on behalf of Thakurji. In the interval between the execution of the will and the testator's death I did not see the will. When the testator's property was examined after his death no list was drawn up. The household property was left as it had been. The money and documents were found by the idol of Thakurji. Shri Kishan opened the door next day in my absence and took the money and the will away. I read out the will aloud in front of all present after the testator's death. I asked Sri Kishan for the will four or five days later. He said he had it under lock and key and would let me have it later. After that I asked for it several times but he always made excuses saying he would give it to me later. This went on for two or three months. I then gave up asking for it. Two or three months after that he gave me the key. I then opened the Kothri in the absence of Sri Kishan but in the presence of others, that was two or three months after the death of the testator and the day after I had been given the key. The Kothri is in the same house as *mandir*. Various things were found of which a list was made. I and others signed the list. The will was not found. I have the list but not with me at the moment. There was no note on the list that the will was not found. The will was not asked for from Sri Kishan after that."

On the point of the finding of the will on the day of the testator's death Maiku Lal is supported by the witnesses Ramanuj and Dr. Suraj Narain. (After dealing with the evidence of these witnesses their Lordships proceeded further.) We would observe in the first place that a witness's evidence should not be rejected merely because he has appeared nervous in the witness-box. Many witnesses are nervous when giving evidence in Court. In the second place it is to be noted that nowhere in his evidence has Suraj Narain deposed as the learned District Judge seemed to think he did that he had seen Sri Kishan remove the will. What the witness said was :

"In the morning Sri Kishan in my presence took the money and gave it to Sheo Mangal. He left the will himself."

We have examined the original deposition and it appears that what the witness stated was that "he kept the will himself." We do not see any inconsistency on this point in the evidence of Maiku Lal and Dr. Suraj Narain. According to the evidence of Maiku Lal after the will was read it was given into the custody of Sri Kishan. Later apparently the money which was also given to Sri Kishan was handed over to Sheo Mangal. The will was kept according to Suraj Narain by Sri Kishan. There is nothing therefore in Dr. Suraj Narain's evidence to justify the observation that he had stated that he saw Sri Kishan remove the will. In regard to the learned District Judge's criticism of the statement of the witness that he had been often shown the will by

the testator we would observe that this was an answer given in cross-examination and it may well be that the witness simply agreed to an answer suggested by the cross-examiner. We are satisfied after a review of the evidence of the witnesses adduced by the petitioners and in the light of other considerations to which we shall now refer that there is no reason not to accept their testimony. The learned District Judge upon the question of the discovery of the will after the testator's death appears to have accepted the evidence of Sri Kishan who denied that there was a will discovered after the testator's death. The learned District Judge however appears to have overlooked the statement made at an earlier stage of the proceedings in his Court by Sri Kishan. The statement is as follows :

"The fund relating to the property dedicated by Sita Ram Halwai, resident of Patkapore, to Sri Radha Krishnaji, is not with me, it is with Shao Mangal. He might have spent something out of it but the remaining amount is with him. He might be having about Rs. 800 with him."

There is clearly an implied admission in this statement that there had been a dedication by Sita Ram; this dedication could only have been by the will executed on May 3, 1929. Whilst rejecting the evidence produced by the petitioners and accepting in part at least the evidence produced by the objector the learned District Judge has nevertheless granted probate. At the conclusion of his judgment he observes ;

"I have not been enlightened on the law on the subject, and I have probably got it wrong; but it appears to me that in circumstances such as these where execution of a will some years prior to the testator's death is proved and the will is not forthcoming and nothing whatsoever can be said further about the will, the proper presumption to make is that the will was still subsisting when the testator died. It is of course possible in such circumstances and therefore in the present case that the testator himself cancelled the will by destroying it. But that is obviously only one of several possibilities, and I do not see why the Court should be called up to presume that that is actually what happened. At all events as I have already said, I have not been referred to any law to that or indeed to any other effect. It appears to me that the more proper presumption to make in the absence of any evidence on which it can be held that the testator cancelled the will by destroying it or otherwise, is that the will continued to subsist and to remain in full force up to the testator's death."

The learned District Judge has misdirected himself in law. The law upon the question is well settled and it is not as the learned District Judge has stated it. On this point reference may be made to the case in *Allan v. Morrison* (1). This was a

case decided by the Privy Council and in the course of their judgment the Board observe :

"It was not denied that there is a presumption, to use the language of Lord Wensleydale in *Welch v. Phillips* (2), that if a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it. Whether this should be called a presumption of law or fact does not seem material. It may of course be rebutted, and as said by Cockburn, C. J., in *Sugden v. Lord St. Leonards* (3), the presumption will be more or less strong according to the character of the custody which the testator had over the will."

Reference may be made further upon the point under discussion to *Anwar Hossein v. Secretary of State* (4), in which the law on the subject was exhaustively discussed. In the present case however there is evidence which satisfies us that the will was in existence at the time of the testator's death. As we have observed we do not see any reason to reject the testimony of Maiku Lal, Dr. Suraj Narain and Ram Anuj. Further, there is no evidence whatever to justify the conclusion that the testator had changed his intention in regard to the disposition of the property as that intention was embodied in the will which he executed on May 3, 1929. On the contrary the facts and circumstances point to the continued intention of the testator that his wishes as embodied in that will should be given effect to. It was the testator who had established the idol in his own house. This is a matter upon which there can be no question. He, right upto the day of his death, resided in the house and maintained the idol. Furthermore it is plain from the terms of the will itself that its execution was not the result of hasty decision. The testator was a comparatively old man, he had no issue and he desired in these circumstances to make provision for the disposal of his property in the event of his death. There is nothing to indicate that there was any reason for his departing from his intention by revoking his will. The revocation of the will would no doubt be to the benefit of the objector who is a distant relation, but there is nothing to show that the testator changed his mind and destroyed the will with the intention that the property should go to his heirs. The facts that the testator up to the day of his death maintained the idol in his house is quite inconsistent with a departure from

(2) (1836) 1 Moo P O 299; 43 RR 83.

(3) (1876) LR 1 PD 154; 45 LJ P 49; 34 LT 372; 24 WR 880.

(4) 31 O 885; 8 O WN 821.

(1) 900; A O 604; 69 LJ P O 141.

the intention that his property should be dedicated to the idol after his death.

We would further observe that the objector has produced no evidence in respect of the averment contained in his written statement "that the deceased had great affection for the objector and his son Manna and the relations continued to be very cordial." As observed the objector is a distant relation and in the course of the will the testator has referred particularly to the fact that he had no male and female heirs. There is no reference in the will to his distant relations. After a full consideration of the evidence upon the record we are satisfied that the will a certified copy of which has been produced is the last will and testament of Sitaram and that the will was in existence at the time of the testator's death. In these circumstances the applicants who are trustees appointed by the testator to manage the endowed property are entitled to probate. In the result the appeal is dismissed with costs.

D.

Appeal dismissed.

NAGPUR HIGH COURT

Second Appeal No. 791 of 1937

September 14, 1939

GRILLE, J.

NARHARI—PLAINTIFF—APPELLANT

versus

Mst. MAHARANI—DEFENDANT—

RESPONDENT

O. P. Land Revenue Act (II of 1917), s. 109—Succession to tenure of protected thekedar, how governed—Hindu holder—Idea of notional jointness.
Succession to the tenure of protected thekedar is governed under s. 109, O. P. Land Revenue Act by the personal law of the deceased thekedar. The law which is to be applied is the ordinary law of Hindu succession as modified in minor details by s. 109, and irrespective of any idea of notional jointness which might arise from the principle that the tenure is impartible.

Hence where a person who after expressly denying the status of jointness with his deceased brother who was the last holder of the tenure, subsequently puts forward a claim as reversioner on the death of the widow of his deceased brother and not as a survivor, he is not entitled to succeed to the exclusion of the daughter of the last holder. In such a case no question of notional jointness arises. 126 Ind. Cas. 237 (1), distinguished.

S. A. from the appellate decree of the Court of the District Judge, Raipur, dated September 14, 1937.

Mr. R. B. Choudhri, for the Appellant.

Mr. V. V. Kelkar, for the Respondent.

Judgment.—This is a plaintiff's second appeal from an affirming judgment of the lower Appellate Court. The plaintiff sought a declaration that an order passed in the Revenue Court regarding mutation in the name of a protected thekedar, which mutation had been effected in the name of one Mst. Maharani, was null and void, and that he was entitled to the status of protected thekedar.

The last protected thekedar was his brother Jagatram. The defendant is Jagatram's daughter by Mst. Laxmi. Originally the plaintiff joined with him in the plaint his nephew Kangalu on the ground that they were joint and had been joint with Jagatram and his widow Mst. Apurna and that on Apurna's death he was entitled to succeed and that Mst. Maharani was not Jagatram's daughter and her mother had not been married to Jagatram. He stated that the thekedari rights had originally been conferred on Tilkho, the father of Jagatram and himself. The defendant asserted her legitimacy and her paternity and denied that Narhari, the plaintiff, was joint with the rest of the family. She also asserted that her father Jagatram had been the first protected thekedar. It will thus be seen that the plaintiff based his claim (from the fact that both he and his nephew were co-plaintiffs) on jointness and survivorship and also denied the defendant's legitimacy and descent from Jagatram. He, however, definitely abandoned this position and in an oral statement made before the commencement of the trial it was stated on his behalf as follows:—

"As plaintiff No. 1 alone is the heir of Jagatram as his reversioner and inherited the protected thekedari rights of the village on the death of his widow Annapurna the question of jointness or separateness of the plaintiff with Jagatram is not material and is not pressed any further as plaintiff claims no interest on that account. It is denied that Lakshmi was the married wife of Jagatram or that the defendant is the legitimate daughter."

The plaintiff therefore made it clear by abandoning his co-plaintiff and by stating that he was Jagatram's reversioner that he did not rely at all on his status as being a joint member of the family with his deceased brother Jagatram, and on his reiteration of the defendant's illegitimacy the suit went to trial on this latter question alone. It has been found in both Courts that Mst. Laxmi was the married wife of Jagatram and that the defendant was his legitimate daughter. In addition to an attempt to contest that

finding of fact in second appeal the plaintiff-appellant now puts forward the contention in law that as the estate was impartible and he had not renounced his right to succeed, he must be held to be notionally joint with his deceased brother Jagatram all along, and as the nearest male relative he was entitled to succeed in accordance with the principles laid down in *Ram Sundar Mal v. Collector of Gorakhpur* (1) (the decision in this case was reversed later by their Lordships of the Privy Council but only on the question of the registration of a document, and the decision was upheld on the points of Hindu Law). This point found no mention in the memorandum of appeal preferred in the lower Appellate Court, but the point was raised in that Court in the course of argument, and it was held that as the plaintiff had specifically renounced his claim on the ground of jointness, it was not open to him to raise the question again.

In *Ram Sundar Mal v. Collector of Gorakhpur* (1) it has been laid down that in the case of an impartible estate held originally by a common ancestor of the contesting parties, on the failure of a male descendant of the last deceased holder the nearest male of another branch will succeed to the exclusion of the widow of the last holder and that unless there has been an express proof of renunciation by such male claimant or his ancestor, the notional jointness among the male members of the family continues despite prolonged separation in residence, worship and social intercourse. Now, it is clear that in the case which I am now considering, even on the assumption that the first protected *thekedar* was Tilkho, the plaintiff's father, and not Jagatram, his brother, a fact which the trial Court assumed without putting the disputed matter in issue, the law as enunciated in *Ram Sundar Mal v. Collector of Gorakhpur* (1) has no application to the present case, which is governed by s. 109 of the Land Revenue Act. It is true that the tenure of protected *thekedar* is declared to be impartible. The plaintiff claims that the succession has not been determined according to law. It is, however, laid down in s. 109 that the succession shall be regulated by the personal law of the deceased *thekedar* subject to certain conditions which to some extent modify the ordinary personal law applicable to Hindus,

(1) 52 A 793; 126 Ind. Cas. 237; (1930) A L J 724; Ind. Rul. (1930) All 797; A I R 1930 All 797.

The scheme of succession laid down in s. 109 (1)(b) demonstrates that any question of notional jointness through a common ancestry is to be excluded; I refer in particular to the proviso to cl. 2 of sub-s. (b) which states that of such persons bearing the same degree of relationship to the deceased *thekedar* one who is joint in estate at the time of his death shall be preferred to one who was not so joint. There is thus a clear distinction between a joint and a separated brother as understood in the ordinary Hindu Law of succession. Also there is provision in the case of more than one widow, which of the widows is to succeed. If the law in *Ram Sundar Mal v. Collector of Gorakhpur* (1) applies to this case, there would be no provision for widows at all.

It follows, then, that the law which is to be applied is the ordinary law of Hindu succession as modified in minor details and irrespective, since it is so provided in the statute, of any idea of notional jointness which might arise from the principle that the tenure is impartible, and there can be no doubt that this is the view which the plaintiff himself took in the trial Court where he claimed as a reversioner on the death of the widow of the last holder and pinned his case on his ability to prove that his deceased brother had left no legitimate issue. The claim that the Courts below have failed to take into consideration the fact that his father was the first *thekedar* and that by the oral statement he did not renounce his right as a member of the joint family, entitled to succeed by survivorship on that account, is thus untenable, and if this claim was in the plaintiff's mind and he genuinely had no desire to relinquish it, the oral statement on his behalf would certainly have been differently worded. The statement there made was a correct exposition of the law that the succession to the tenure was governed by the personal law of the deceased *thekedar* with such modifications as would prevent more than one person succeeding to the tenure. That being so, the plaintiff-appellant can only succeed on the supposition that the defendant is not the legitimate daughter of the deceased, a daughter being a nearer heir than a separated brother. That the plaintiff was a separated brother of the deceased admits of no contradiction; he himself has claimed as a reversioner rather than as a survivor, having expressly denied the status of jointness, and

indeed it has been shown that more than 10 years before he admitted that he was separated from his brother.

Similarly, turning to the question of the defendant's legitimacy, we find that at the same time to which reference has just been made, the plaintiff in addition to admitting that he was separated from his brother admitted in the course of mutation proceedings that Laxmi was his brother's wife and that the defendant was their daughter. This, in addition to the findings of fact that the parents were married and that the girl is the legitimate issue of that marriage, forms an effective bar to this question being raised in second appeal. Reference has been made to a remark in Russell's Tribes and Castes on Koltas, to which caste the parties belong, that Girls should be wedded before maturity, as among most of the Uriya castes, and if no suitable husband is forthcoming a nominal marriage is sometimes arranged with an old man, and the girl is afterwards disposed of as a widow. It is contended that this marriage is one of that kind. Apart from the fact that the findings on record preclude any discussion as to the possibility of such a marriage, it is evident that the custom cited by Russell clearly postulates that the marriage is a nominal one without intercourse and without children. It has been held as a fact that a child of this marriage was born.

The appeal fails and is dismissed with costs.
s.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 350 of 1938

March 13, 1939

DAVIS, J. C. AND TYABJI, J.

MUHAMMAD AYOUB SAIFUDDIN

KHAN AND OTHERS—COMPLAINANTS

—APPLICANTS

versus

GULZAR MEHAR AND OTHERS—

OPPONENTS

Criminal Procedure Code (Act V of 1895), s. 145—Magistrate, if and when can cancel his order under s. 145 (1) or terminate proceedings.

Sub-sections (4) and (5) of s. 145, Criminal P. O., are not exhaustive and are not intended to prevent a Magistrate from terminating proceedings under s. 145, Criminal P. O., when he is satisfied that the very cause and reason of proceedings under s. 145, Criminal P. O., has ceased to exist. The Magistrate can cancel his order under sub-s. (1) or terminate the proceedings

when, upon other information, or, it may be, on his own information he is satisfied that no dispute likely to cause a breach of peace exists. However as proceedings are instituted upon some information, so they should be terminated likewise upon some information and ordinarily it is desirable before a Magistrate terminates proceedings of this sort in the exercise of powers which by necessary implication, the section confers, that he should have on record a Police report or other information to the effect that no dispute likely to cause a breach of the peace exists. But where, the diary shows that the parties attended the Court from time to time, talked about a compromise and then finally stayed away and did nothing for months, that might be said to constitute information which would justify a Magistrate in his opinion that no dispute likely to cause a breach of the peace existed any longer and would justify his order terminating the proceedings. 91 Ind. Cas. 399 (2) and *Manindra Chandra Nandi v. Barada Kanta Chowdhury* (3), relied on.

Or. Ref. by the Additional Sessions Judge, Sukkur, recommending setting aside the previous order.

Mr. P. S. Shahani, for Opponents Nos. 1, 2, 5, 6 and 7.

Mr. Partabrai D. Punwani, Advocate-General, for the Crown.

Davis, J. C.—This is a reference by the Additional Sessions Judge, Sukkur, in which he recommends that we set aside an order of the Sub-Divisional Magistrate, Shikarpur, directing that proceedings under s. 145, Criminal P. O., which were before him should be terminated. The learned Sessions Judge is of the opinion that as an order had been passed by the Sub-Divisional Magistrate under s. 145 (1), Criminal P. O., the only method in which the proceedings based upon that order could be terminated was by an order on an inquiry under sub-s. (4) or by an order under sub-s. (5) cancelling the order under sub-s. (1) and that it was not open to the Magistrate to terminate proceedings merely because on his own information or on the ground of lapse of time he was of the opinion that no dispute as to a breach of peace any longer existed. But we do not think that sub-ss. (4) and (5) are exhaustive and were intended to prevent a Magistrate from terminating proceedings under s. 145, Criminal P. O., when he was satisfied that the very cause and reason of proceedings under s. 145, Criminal P. O., has ceased to exist. At first sight it would appear that the words of sub-s. (5) are peremptory. An order passed under sub-s. (1) can be cancelled only under provisions of sub-s. (5) and that indeed appears to be the principal argument of the learned Judge and of the ruling in *Sastu Sahu v. Nathuni Thakur* (1) on which he relies. But sub-

(1) A I R 1924 Pat. 689; 83 Ind. Cas. 665; 26 Or. L J 105; 6 P L T 258.

s. (5) clearly is not exhaustive. It begins in this way:

"(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed"

It merely provides that nothing shall prevent the party required to attend under the order passed under sub-s. (1) from showing that there is no such dispute to justify the order. It also permits any other person interested to do the same, but it does not say that if the Magistrate himself is otherwise satisfied that the reason for the proceedings no longer exists, he should be compelled to continue with the proceedings which have lost their purpose; and when sub-s. (5) goes on to say that "subject to such cancellation the order of the Magistrate under sub-s. (1) shall be final," it means, we think, merely that in the special case to which sub-s. (5) has reference the order of the Magistrate under sub-s. (1) shall be final under certain circumstances; but it does not mean that in all other circumstances it shall also be final; it does not mean that the Magistrate cannot in fact cancel his order under sub-s. (1) or terminate the proceedings when, upon other information, or, it may be, on his own information he is satisfied that no dispute likely to cause a breach of peace exists. To hold otherwise would be to arrive at an absurd conclusion; for instance, after a Magistrate issued an order under sub-s. (1) of s. 145, Criminal P. O., the parties may come to an amicable settlement. They may never come near the Magistrate's Court or his camp again; is a Magistrate, then, to have no power to terminate proceedings taken in the interests of public peace, and which clearly have lost their purpose? We do not think it can be said that a Magistrate's power is limited in any such way or that sub-ss. (4) and (5) set out all the circumstances under which proceedings under this section can be brought to a close and in support of this view reference may be made to the case in *Narasayya v. Venkiah* (2) and the case in *Manindra Chandra Nandi v. Barada Kanta Chowdhry* (3). The Madras case followed the Calcutta case and in the Calcutta case this point was put thus:

"A party to a proceeding under s. 145 is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the question raised by him. If a Magistrate either refuses to make an order under

sub-s. (1) of s. 145, or, having made such an order, subsequently cancels it on the ground that a dispute does not exist likely to cause a breach of the peace, no private person has any status to contest the propriety of his refusal to make an enquiry into the question of possession."

In the Madras case the learned Judge said:

"It must be borne in mind that proceedings under s. 145 are not taken in the interests of private parties but for the preservation of the public peace and if the Magistrate is satisfied that the likelihood of a breach of the peace either did not exist or that it has ceased to exist, it is the proper duty of the Magistrate to drop proceedings under s. 145 and withdraw from interfering with the rights of parties in the property."

The learned Judge also points out that s. 145 (5), Criminal P. O., provides for a special case and that the existence of this sub-section does not prevent the Magistrate himself from terminating the proceedings if he is satisfied there is no likelihood of the breach of the peace and we would only add this: We think that even though the proceedings relate to a breach of the peace, it is desirable that as a certain formality is required in the institution of these proceedings, so they should be terminated by the learned Magistrate likewise with some formality. And as proceedings are instituted upon some information, so they should be terminated likewise upon some information and that ordinarily it is desirable before a Magistrate terminates proceedings of this sort in the exercise of powers which, by necessary implication, we think, the section confers, that he should have on record a Police report or other information to the effect that no dispute likely to cause a breach of the peace exists. But where, as in this case, the diary shows the parties attended the Court from time to time, talked about a compromise and then finally stayed away and did nothing for months on end, we think that might be said to constitute information which would justify a Magistrate in his opinion that no dispute likely to cause a breach of the peace existed any longer and would justify his order terminating the proceedings. It may be, the information on which he acted was derived from the Court diary and the conduct of the parties, but under the circumstances that information is as good as any other and we can say that as proceedings were started upon some information under sub-s. (1) so also they were terminated by the Magistrate upon some other information sufficient to justify the exercise by him of those powers which the section by implication necessarily confers. We think therefore this is not a

(2) 49 M 232; 91 Ind. Cas. 399; A I R 1925 Mad. 1202; 27 Cr. L J 95; 49 M L J 84.

(3) 30 C 112; 60 W N 417.

case where the public interests or even the letter of the law requires that we should interfere. We therefore direct that the reference should be returned accordingly.

s.

Reference returned.

RANGOON HIGH COURT

Civil Miscellaneous Appeal No. 10 of 1939

April 4, 1939

ROBERTS C. J. AND BRAUND, J.
TAN BA CHENG AND ANOTHER—
APPELLANTS

versus

REGISTRAR, ORIGINAL SIDE, HIGH
COURT—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 476—Jurisdiction of Court to make complaint of abetment of offence under s. 205, Penal Code—Discretion as to making complaint under s. 476 exercised by single Judge of High Court—Interference with, by appellate Bench in appeal.

A complaint of abetment of forgery is a complaint of an offence punishable under one of the sections of the Code named in s. 195 (1) (b) namely s. 205, I. P. O. Moreover, the phrase in s. 476, Criminal P. O., "any offence referred to in s. 195, sub-s. (1), cl. (b)" must mean any offence to which s. 195, sub-s. (1), cl. (b) has reference. The Court therefore has jurisdiction to make a complaint of abetment of an offence under s. 205, I. P. O.

The power to lay a complaint under s. 476, Criminal P. O., is a discretionary power, and an appellate Bench of the High Court would not interfere with the exercise of his discretion by a single Judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record.

O. Misc. A. from an order of the High Court, in Civil Misc. Case No. 12 of 1939.

Mr. N. M. Cowasjee, for the Appellants.

Mr. Myint Thern, The Government Advocate, for the Respondent.

Roberts, C. J.—This is an appeal brought against the Registrar on the Original Side of this Court, who has drawn up two complaints against both and one of the appellants respectively, in accordance with an order of the learned Judge on the original side, passed on January 21, of this year under s. 476, Criminal P. O. The material words of that section, for the purpose of this appeal, read as follows:

"When any Civil Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in s. 195, sub-s. (1), cl. (b), which appears to have been committed in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed (in the case of the High Court)

by such officer as the Court may appoint, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate."

The suit in question was one in which the two present appellants were the plaintiffs. It was of a complicated nature and in the course of a protracted hearing the learned Judge came to the conclusion that a forgery had been committed and that, although the appellants had not committed it themselves, they had aided and abetted its commission. If that be so, they had committed an offence punishable under s. 205, read with s. 100, I. P. O. He also came to the conclusion that appellant No. 2 had committed perjury, punishable under s. 193. Accordingly, he formed the opinion that it was expedient that, in the interests of justice, an inquiry should be made into the commission of those two offences.

The first point which is taken before us is that the words of the section say that the Court has jurisdiction, where it thinks that an inquiry should be made "into any offence referred to in s. 195, sub-s. (1), cl. (b)" to make a complaint; and it is said, and said rightly, that the offence of abetment is not specifically mentioned in s. 195, sub-s. (1), cl. (b), Criminal P. O., although by sub-s. (4) of s. 195 it has been enacted that the provisions of sub-s. (1), with reference to the offences named therein, apply also to criminal conspiracies to commit such offences and to the abetment of such offences and attempts to commit them. It is clear that under this section a Magistrate can take cognizance; not only of the offence under s. 195, sub-s. (1), cl. (b), upon the complaint in writing to the Court in relation to which the offence is alleged to have been committed, but of all cases in which the abetment of such offence has been proved. If therefore a Court decides that it is expedient that an inquiry should be held and that a complaint should be made against a person for the commission of forgery contrary to s. 205, I. P. O., and such a complaint is heard by the Magistrate, he plainly has jurisdiction to convict that person of abetment of forgery merely if he has arrived at the conclusion, after hearing the evidence, that the accused was not a principal but an abettor. It is said that, although this is so, where the Court has arrived at that conclusion it cannot make a complaint against an abettor merely, because the offence of abetment is not specifically men-

tioned in s. 195, sub-s. (1), cl. (b). I cannot help feeling that this leads to an absurd conclusion and, although the statute is a penal one and must be construed strictly, I find it impossible to assent to an argument which is based upon these premises. If two persons in two different Courts in the same building on the same day were found to have been *prima facie* guilty of exactly the same offence in relation to a proceeding before the Court, namely the abetment of forgery, the Judge in one Court, having ground at first to suppose that the suspected person might be the principal offender, might act under the jurisdiction conferred by s. 476, and the Magistrate, finding him an abettor only, might send him to prison, whereas in the second Court the Judge realizing that there was no possible ground for saying that the person suspected was a principal but that he was an abettor merely, according to Mr. Owasjee's argument, would be powerless to proceed against him for exactly the same offence as in the other Court. This, I think, would reduce the administration of criminal law to an absurdity.

When one looks at s. 195, sub-s. (1), cl. (b), it seems to me that a complaint of abetment of forgery is a complaint of an offence punishable under one of the Sections of the Code named therein, namely s. 205. It is quite true that it is only punishable under s. 205 when read with s. 109; but if there were no s. 205 it would not be punishable at all. If therefore it is not punishable without the existence of s. 205, I feel that it is an offence punishable under that section of the same Code, even though that section has to be read with other sections in order to find exactly in what the guilt consists and what the measure of punishment may be.

Moreover, I think, that the phrase in s. 476, Criminal P. O., "any offence referred to in s. 195, sub-s. (1), cl. (b)" must mean any offence to which s. 195, sub-s. (1), cl. (b) has reference. The provision that I am quoting does not say "any offence specifically mentioned in s. 195, sub-s. (1) cl. (b)." It says, "any offence referred to..." Now, what are the offences to which s. 195, sub-s. (1), cl. (b) has reference? They are these named offences and then, by way of explanation sub-s. (4) says that the provisions of sub-s. (1) with reference to the offences named therein apply also to the abetment of such offences and attempts to commit them. In my opinion, therefore, on all these grounds—and, be it noted, if one

only of these arguments is sound, it suffices—that case comes within the jurisdiction of the learned Judge. It seems to me impossible to think that the provisions of the criminal law can be construed in such a way as to exclude from the ambit of his powers the making of a complaint in relation to an offence less incriminating, generally speaking, than the principal offence, and deprive him of the power to make a complaint of an offence to a Magistrate, who has full jurisdiction to deal with that offence whether it is one committed by a principal offender or by an aider and abettor merely.

Having disposed of this matter, we next have to consider whether the learned Judge exercised his discretion in a matter in which we have now held he had jurisdiction. I am of opinion that his discretion in this case was properly exercised; and in saying this I desire to be most careful in avoiding any expression of opinion as to whether he was right upon the facts or not, or as to whether I should have myself exercised the discretion in the same way; in so saying I desire neither to criticize the learned Judge nor to offer to the Magistrate who will try this case the least assistance as to what my view, if I have had material to form any view in relation to it, may be. Dunkley, J., in a case in which I was sitting with him, in *Rash Mohan Shaha v. The Registrar, Original Side of the High Court at Rangoon, Civil Misc. Appeal No. 9 of 1938* said:

"The power to lay a complaint under s. 476, Criminal P. O., is a discretionary power, and an Appellate Bench of this Court would not interfere with the exercise of his discretion by a Single Judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record."

There is a right of appeal given against complaints made by a Court under s. 476, Criminal P. O.: so is there a right of appeal given on mere questions of fact to Appellate Courts. It has been laid down by this Court over and over again and following the English practice and the judgment of Viscount Sankey, L. C., in *Powell v. Streatham Manor Nursing Home* (1), that the Appellate Court will consider most carefully the tribunal whose decision upon facts it has to review and will only interfere when it is certain upon the facts that there was a real misapprehension of it. We have to apply the same principle, as it seems to me, in dealing with s. 476, Criminal P. O., as we apply in relation to appeals. It is well-

(1) (1935) A.C. 243; 104 L.J.K.B. 301; 152 L.T. 563; 79 S.J. 179; 51 T.L.R. 289.

known that in an appeal on a pure question of fact from the original side of this Court the Appellate Court shows great reluctance to interfere with a Judge of experience who has had the opportunity of investigating matters at first hand for himself. Nonetheless, Appellate Courts often, for the benefit of Subordinate Courts, give directions by way of general guidance to Judges as to how they should ascertain the facts and as to the proper manner in which evidence is to be appreciated. Here we have an appeal from an order under s. 476, Criminal P. O., made directly by a High Court Judge upon the original side in a case which came before him. And speaking for myself, I am disinclined to think that he is likely to have been wrong, not in the view which he took of the facts, but in the exercise of his discretion by reason of the fact that he may not have observed all the rules which Courts from time to time have said ought to be borne in mind by Subordinate Judicial Officers when considering the desirability of making complaints under this section.

Whenever the machinery of the criminal law is set in motion, regard must be had to the particular facts of the case. It is impossible to say when a complaint ought to be made under this section and when it ought not: no hard and fast rule in this case can be laid down. And I am perfectly satisfied from a reading of the learned Judge who made the order, that he has carefully considered the matters before him and whether he was right or wrong with regard to the fact (as to which I express no opinion), he has exercised the discretion which is required of him in making the order. I think, for the purposes of this judgment, I need no more than make two quotations from what the learned Judge has said. He said:

"The minute book was vigorously attacked by the learned Advocate for the defendant trustees. The book therefore was one of the utmost importance in the suit, and the question as to who wrote the entries in that book was equally important. It is in that regard that Mr. Chin Hone On said that he actually saw Mr. Tan Ba Cheng writing the entries in it and we now know that that is false."

And he had previously remarked in relation to the other matter:

"It necessarily follows from the mere fact that the plaintiff were co-plaintiffs in a suit under s. 92, that they agreed together, the one with the other to do this thing, namely to cause to be done an illegal act, that is to say the commission by a person, whose identity has not as yet been established, of an offence punishable under s. 205, I. P. O."

He reviewed the evidence with some care and said:

"I am not now deciding whether or not the plaintiffs have in fact committed all or any of the abovementioned offences. My present function is merely to consider whether a *prima facie* case has been made out. It seems to me that there is a reasonable foundation for a charge under all the abovementioned sections of the I. P. O."

And he adds that there is a reasonable probability of a conviction. Whether he is right or wrong as regards the last matter is quite beside the point. He then says, having examined s. 476;

"I am of opinion that there is ground for inquiry into the abovementioned offences in regard to both the plaintiffs."

And he sent the case for inquiry and trial to the District Magistrate. We have looked at the form of the order drawn up by the learned Registrar and we are of opinion that it is expedient, that orders under this section should be carefully drawn up and that it is desirable, and we accordingly direct that the learned Registrar should attend in Chambers before my brother Braund in order to supervise the drawing up of this order. It is important to see that the complaint which is lodged follows the directions laid down in s. 476, Criminal P. O., with care and that it omits from its contents any reference which might be construed by the Court before which the proceedings are taken as a pressing invitation to record a finding adverse to anyone charged with an offence. All that the learned Judge does is to exercise his discretion and in the exercise of it to decide that the criminal law should be put in motion and that he has done in this case: and I am by no means disposed to put a spoke in that machinery so as to injure its motion. The case must go on in the usual way and the learned Magistrate who tries it must try it as he would do a complaint of an ordinary kind and must remain completely unaffected by any consideration of its origin. It is for him, and for him alone, to try whether either a *prima facie* or a satisfactory case has been made out against any of these accused persons and if there is no ground for the complaint which is lodged, no doubt it will be his duty as well as his pleasure to acquit them both. There will be no order as to costs.

Braund, J.—I agree. So far as the question whether this Court ought, in appeal, to interfere with the discretion exercised by the learned Judge under s. 476, Criminal P. O., is concerned, there is very little I have to add. As in all cases of appeal:

which involves the discretion of a subordinate Court, the limits within which the Appellate Court ought to act must be very closely circumscribed and it seems to me to be in the first place essential to appreciate what it is that the appeal lies from. There is a world of difference between an appeal from a decision of fact by a subordinate Court and a decision from the exercise of a discretion. In this particular case all that was required of the learned Judge was that, upon the evidence which he had available to him and upon his own individual appreciation of it, he had to come to a formal opinion—it has to be observed that it is his opinion that was material about two things; *first* whether there appeared to him to have been committed an offence in relation to the proceedings that had gone on in his Court, and *secondly*, whether it was in the public interest, or rather, in the interest of justice, that he should put in motion what my Lord the Chief Justice has described as the machinery of the criminal law. And all we can do in appeal is to look at such available record as we have of what the material was in the Court below and to try to see whether the learned Judge carried out that duty. We are not in the least concerned to decide here whether, if the same material had been before us, or either of us, we or either of us should have come to the same conclusion; all we have to do shortly, is to see whether the learned Judge in fact exercised the jurisdiction that the Act vested in him. Now, what do we find? After all the best test of what the learned Judge has done is to see how he has himself described his own mental process. He said in his judgment that he appreciates that he is not deciding whether or not the plaintiffs had in fact committed the offences in question. He says:

"My present function is merely to consider whether a *prima facie* case has been made out. It seems to me that there is a reasonable foundation for a charge under all the abovementioned sections of the I. P. O. and that there is a reasonable probability of a conviction."

Now, the learned Judge made that statement after a long process of taking evidence and after a very careful consideration of the evidence himself and it seems to me, at best, that it would be impossible to say that on the face of the record there has been any failure at all by the learned Judge to exercise a discretion upon those principles which s. 476 requires him to use. So far as the major charge, that is to say, the charge of forgery is concerned, it relates to both the appellants and there was material

upon which the learned Judge could come to some such conclusion as the one he reached. I must not be misunderstood as weighing up the evidence on either side, because I certainly would not allow myself to express any opinion as to whether a case is likely to be made out against the appellants or not; all I am concerned with is to point out what the material was. The learned Judge had a case which the plaintiffs had started and in which they pressed, among other things, for the appointment of a number of new trustees. And the learned Judge in effect says this:

"I find in the course of these proceedings that there are a number of trustees put forward as new trustees. I find that they took very little interest in the proceedings. They did not even attend Court. They have not approached the Advocate who has been instructed; and in short, they were content to let matters take their own course."

On the other hand, Mr. Cowasjee points out that there is no evidence that any of these proposed trustees were nominees of the plaintiffs. The learned Judge himself has, in his judgment, considered these facts. He says:

"None of the others was sufficiently interested ever to enquire from the Advocate whom they had instructed, at any time during the fifteen months or more which elapsed between their signing the written statement and my giving judgment in the suit, how the case was going, and at no time throughout the somewhat lengthy hearing did they attend the Court. Defendant No. 37 did come to Court during the hearing and was called as a witness by the plaintiffs themselves. But he said in cross-examination that he himself did not want to be a trustee. It is quite clear that he is really a puppet of the plaintiffs."

All I am pointing out is that it is wrong to say that there was no material before the learned Judge from which he could conclude as he did; but, by that I must be very careful not to give the impression that I endorse any finding against the plaintiffs in that respect. It seems to me, therefore, for those reasons and the other reasons which my Lord the Chief Justice has given, that it is impossible to say here that the learned Judge has exercised no discretion.

As regards the other point, as to whether the Court has jurisdiction or not, it is a point which at one time gave me, I confess, a good deal of difficulty. The point is a very short one; it can be simply stated. I think in these terms; whether in s. 476, Criminal P. C., the words "referred to in s. 195, sub-s. (1), cl. (b) or cl. (c)" require that the offence in respect of which the complaint is ultimately laid must be one of those which are mentioned specifically in s. 195, sub-s. cl. (b) or cl. (c), or whether it

is sufficient that the offence is one to which those clauses apply or have reference. It has to be conceded that, if the words, "referred to in" are construed in their strictest possible sense, it would mean that the offence has to be one of those which are to be found within the four corners of s. 195, sub-s. (1), cl. (b) or cl. (c). And it is that circumstance that at one time gave rise to considerable difficulty in my mind, coupled with the circumstance that, on ordinary principles, one has to construe a penal provision in a statute strictly—strictly, that is in favour of the person who is liable to be penalized by the Section. But that does not mean, I think, that where a Section of a penal statute admits of one reasonable interpretation only we are not to be entitled to give it the only reasonable construction we can give it because it does some slight violence to the natural meaning of the words. Here, it seems to me that there is only one way in which the words "referred to in" can be construed so as to give a reasonable construction at all to the scheme which is envisaged by s. 476. And I find a passage in "Maxwell on the Interpretation of Statutes" (at p. 240) which seems to support that view. He says:

"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important, and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature. The paramount object, in construing penal as well as other statutes, is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy."

Now, returning to s. 476 read with s. 195, we have to observe that the offence of abetment is dealt with only in sub-s. (4) of s. 195. By that sub-section it was added as an amendment that the provisions of s. 195, sub-s. (1), cl. (b), were to apply to an abetment. And in that sense quite clearly s. 195, sub-s. (1), cl. (b) is made to have reference to an abetment. It is clear that unless we construe the words "referred to in" as meaning "to which s. 195, sub-s. (1), cl. (b), is applicable" there would be no way in which the offence of the abetment, when it arises in relation to an offence connected with proceedings in Court, could ever be

made the subject of a complaint. Section 195 (1) (b) read in conjunction with sub-s. (4) in effect says that no complaint relating to an abetment of an offence under s. 205 shall be laid except on the complaint in writing of a Court. That is quite plain. If, it seems to me, you are going to paralyze the only means by which a Court can lay a complaint by excluding from it abetment, it amounts, in my view, to paralyzing the whole machinery; or, to put it in popular language, it seems to me to make complete nonsense out of the clear intention of the Legislature that the machinery shall apply to abetment.

I have given a careful consideration as I can, to this point because, admittedly at one stage it did worry me. But I can see no escape from the alternative either of reducing the Section to complete meaninglessness or else to giving to the words "referred to in" the construction which I have indicated earlier in this judgment. It seems to me, therefore, for these reasons, that there was jurisdiction in the learned Judge to lay the complaint as he has done in respect of the offence of abetment read in connexion with s. 205. For all those reasons, I agree with my Lord the Chief Justice that this appeal must be dismissed. I only desire to add that whoever hears the criminal case which is now liable to follow, must be careful to approach the matter afresh and not to allow himself in any way to be influenced by the views which the learned Judge has expressed. No question of fact nor of law has yet been found against either of the appellants so far as the charges against them are concerned. It will be best, in this as in all other cases of the kind, if the Magistrate who ultimately tries the case does not even read the judgment out of which the complaint has arisen.

S.

Order accordingly.

MADRAS HIGH COURT

Appeal No. 49 of 1938

September 5, 1939

BURN AND STODART, JJ.

JULURI VENKATARATNAM AND OTHERS

—APPELLANTS

versus

BALABHADRUNI CHENNAYYA AND

OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 39, O. XXI, rr. 5, 8 — Transmission of decree for execution to Sub-Court — Application for execution, when lies—Decree has to be sent to District Court under O. XXI, r. 5 only for transmission.

An order transferring a decree to another Court takes effect from the date on which it is passed and the transferee Court has jurisdiction to entertain application for execution from the date of the passing of the order of transfer. 144 Ind. Cas. 923 (1), relied on.

The decree under O. XXI, r. 5, Civil P. O., has to be sent to the District Court for mere transmission to the transferee Court and therefore no application lies to the District Court and O. XXI, r. 8 does not apply to such a case. *Debi Dial Sahu v. Moharaj Singh* (2), dissented from.

A. against an order of the Sub-Judge, Vizagapatam, dated March 3, 1937.

Mr. N. Vasudeva Rao, for the Appellants.

Messrs. G. Lakshmanna and G. Chandrasekhara Sastry, for the Respondents.

Judgment.—The decision of the learned Subordinate Judge is, we think, clearly wrong. It is opposed to the decision in *Modali Ademma v. Venkatasubbaya* (1). With respect, we are unable to agree with the decision in *Debi Dial Sahu v. Moharaj Singh* (2). Rules 5 and 8 of O. XXI, Civil P. O., are distinct and independent. Under s. 39, Civil P. O., the Court which passed the decree may send it for execution "to another Court..." The Court which passed the decree in this case had power to send the decree for execution to the Sub-Court, Vizagapatam, and in fact that was the order passed by the learned Subordinate Judge, Guntur, on August 29, 1936. The decree, under r. 5, O. XXI, had to be sent to the District Court, Vizagapatam, for mere transmission to the Sub-Court, Vizagapatam: vide O. R. P. No. 139 which forbids the decree-holder to make any application to the District Court. Rule 8 of O. XXI applies only to those cases in which the decree is sent for execution to the District Court in another district, (or for that matter in the same district). In such cases, the District Court is not obliged to execute the decree itself but may transfer it for execution to any Subordinate Court having jurisdiction. If the decree is not sent for execution to the District Court, the District Court cannot execute it but must merely transmit it to the Court specified in the order of the Court which passed the decree: vide s. 38, Civil P. O., which shows that the only Courts competent to execute a decree are (1) the Court which passed it, (2) the Court to which it is sent for execution.

Following *Modali Ademma v. Venkatasubbaya* (1), we hold that the order of

(1) 56 M 692; 144 Ind. Cas. 923; A I R 1933 Mad. 627; 65 M L J 137; (1933) M W N 789; 38 L W 133; 6 R M 26.

(2) 22 O 764.

transfer in this case took effect from August 29, 1936, that the Sub-Court, Vizagapatam, had jurisdiction to execute it thereafter and that the decree-holder's application on August 31, 1936 was not barred by limitation. The order of the lower Court is accordingly set aside and the petition must be restored to file and disposed of according to law. The appellants will recover their costs here and in the lower Court from the contesting respondent No. 1.

N.-D.

Order set aside.

CALCUTTA HIGH COURT

Application in Suit No. 185 of 1912

April 5, 1939

SSN, J.

GOBINDA NATH SAHA CHOUDHARY—

DECREE-HOLDER—APPLICANT

versus

DURGA NARAIN SAHA AND OTHERS—

JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Arts. 183, 181—Application to bring legal representatives of deceased judgment-debtor on record falls within Art. 183—Decree-holder may apply at any time within 12 years of decree or revival of decree—Right to bring such legal representatives on record, when arises—Civil Procedure Code (Act V of 1908), O. XXII—Applicability to execution proceedings—Right to execute decree, if abates on failure to bring legal representatives of deceased judgment-debtor on record—Execution—Transfer of decree to another Court—Transmitting Court, if loses seisin of decree.

An application to bring legal representatives of deceased judgment-debtor on record is one to enforce a judgment or decree within the meaning of Art. 183, Lim. Act and if made within 12 years it is within time.

The death of a judgment-debtor does not enlarge or decrease the period of limitation prescribed for the execution of a decree. To enforce a judgment passed by High Court the decree-holder must apply for execution at any time within 12 years of the passing of the decree or of the revival of the decree. If the judgment-debtor be dead the decree-holder must still apply within this period. He need not take any steps to bring the judgment-debtor's heirs on the record at any anterior period; if he does it within this period of 12 years prescribed for the execution of the decree he will be in time.

The right to bring the legal representatives on the record does not arise on the death of the judgment-debtor; it arises only when an application for execution is made.

Order XXII, Civil P. O., has no application to execution proceedings and the right to execute a decree does not abate or get extinguished by reason of the fact that the legal representatives of the judgment-debtor have not been brought on the record within any specified period.

When a decree has been transmitted for execution to another Court, the transmitting Court does not lose entire seisin of the decree. So far as the Court of transfer is concerned, it continues to have jurisdiction over the execution proceedings until such

execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree the circumstances attending such failure. 109 Ind. Cas. 417 (1), relied on.

Mr. D. N. Sen, for the Applicant.

Mr. M. N. Ghose, for the Respondents.

Order.—This is an application by a decree-holder for recording the deaths of certain judgment-debtors and for leave to execute the decree against their legal representatives. Notice of this application has been served on all these legal representatives. One of them has appeared and opposed the application. His name is Samarendra Narain Saha. In his affidavit in opposition he takes up the position that the decree is over 12 years old and that its execution is barred by limitation inasmuch as there has been no revivor of the decree within the meaning of Art. 183, Lim. Act, within 12 years of this application. At the hearing, Counsel on behalf of Samarendra Narain Saha took up a different position. He admitted that there had been revivors of the decree within the meaning of Art. 183, Lim. Act, the last one being on September 29, 1926, when the decree-holder received a part payment of the decretal amount pursuant to an order dated August 11, 1926 passed by this Court, directing that the part payment should be made. He took up the position, however, that the present application was not an application to enforce a judgment and that, therefore, the limitation of 12 years provided by Art. 183, Lim. Act, would not govern this application. He contended that this application is one to which the residuary Art. 181, Lim. Act, which prescribes a period of three years limitation applies inasmuch as no period of limitation has been fixed for such an application by any other Article of the Lim. Act or by s. 48, Civil P. C. He next points out that this application has been brought more than three years after the death of the persons whose heirs are sought to be substituted and argues that it is barred by limitation. It will be convenient for a proper understanding of the contentions of both parties to set out certain facts.

The decree was passed on May 19, 1913 against Durga Narain Saha, Ram Narain Saha, Hriday Narain Saha and Kristodhone Saha. The plaintiff was Gobinda Nath Saha Chowdhury. Gobinda Nath Saha Chowdhury died leaving certain heirs. These heirs by two deeds of assignment transferred their interest in the decree to the petitioner Janada Sundari Dassi. On

September 11, 1919 the petitioner obtained an order from this Court in execution of this decree whereby the sum of Rs. 20,000 lying to the credit of Suit No. 766 of 1913 was attached. In 1921 another attachment was levied with respect to a sum of money lying to the credit of an execution case in the Court of the Subordinate Judge, Foruth Court, of Mymensingh, and a sum of Rs. 2,200 was received in part satisfaction of the decree. On September 29, 1926, Jnanada Sundari received a sum of Rs. 3,783-11-11 out of the sum lying to the credit of Suit No. 766 of 1913, pursuant to an order of this Court. It is admitted that the decree has been kept alive and that the period of limitation of twelve years prescribed for the execution of the decree will commence to run from September 29, 1926. On March 3, 1938, that is to say within twelve years of the date when the decree was last revived, the petitioner applied to this Court for transmission of the decree to the Court of the District Judge of Dacca for execution. On March 7, 1938, the decree was transferred to Dacca. On March 11, 1938 the petitioner applied before the Subordinate Judge of Dacca for execution of the decree and the case was marked "Money Execution Case No. 27 of 1938." She also applied there for substitution of the names of the heirs of the deceased judgment-debtors Hriday Narain Saha, Ram Narain Saha and Kali Narain Saha. I might mention here that the original judgment-debtor Durga Narain Saha died leaving him surviving Kali Narain Saha, Surendra Narain Saha and Brojendra Narain Saha as his heirs, and that Kali Narain died on November 10, 1930 leaving him surviving Amarendra Narain Saha and Samarendra Narain Saha as his heirs and legal representatives. Hriday died in 1930 and Ram in 1926.

When this application was made before the Subordinate Judge of Dacca, the heirs sought to be substituted objected on the ground that the executing Court had no jurisdiction to make the substitution and contended that the application should have been made to this Court which had passed the decree. Upon this objection being raised, the learned Subordinate Judge on September 10, 1938 directed the petitioner to obtain orders from this Court and kept the execution case pending. Thereafter the petitioner on November 7, 1938 made the present application. The November 7, was the date on which this Court re-opened after the *puja* vacation.

It is conceded that if this application is governed by Art. 183, Lim. Act, then this application has been brought within the period of limitation inasmuch as the petitioner would be allowed the period during which the Court was closed. The contention, however, is that this application for leave to execute the decree against the legal representatives of the judgment-debtors is not an application to enforce a judgment and that it is governed by Art. 181, Lim. Act. It is argued that as it has not been made within three years of the death of the judgment-debtors whose heirs are sought to be brought on the record it is barred by limitation. In my opinion this contention cannot be given effect to. In support of this argument learned Counsel cited certain cases which dealt with the question of what amounted to a revivor of a decree within the meaning of Art. 183, Lim. Act. His argument was that if this application did not amount to a revivor it could not amount to an application to enforce a judgment. In my opinion it is not necessary to consider on this application whether the present application would or would not revive the decree or whether every application for enforcing a judgment must necessarily revive the decree. That is not the question which has to be determined now. What has to be determined is whether the present application is one which is barred by limitation.

It is admitted that the application for execution made before the Subordinate Judge of Dacca being within twelve years of the last revivor of the decree is within time, but it is said that the present application is not an application for execution and that, therefore, it is barred. If this argument is given effect to, it will lead to rather strange results. The death of a judgment-debtor does not enlarge or decrease the period of limitation prescribed for the execution of a decree. To enforce a judgment passed by this Court the decree-holder must apply for execution at any time within 12 years of the passing of the decree or of the revivor of the decree. If the judgment-debtor be dead the decree-holder must still apply within this period. He need not take any steps to bring the judgment-debtor's heirs on the record at the anterior period; if he does it within this period of 12 years prescribed for the execution of the decree he will be in time. Order XXII, Civil P. O., has no application to execution proceedings and the right to execute a decree does not abate or get extinguished by reason of the fact that

the legal representatives of the judgment-debtor have not been brought on the record within any specified period. If effect is given to the contention of learned Counsel for the respondent that an application to bring the legal representatives of a judgment-debtor on the record must be made within three years of the death of the judgment-debtor, the effect will be in this case to cut down the period of limitation for execution of decrees which is prescribed by Art. 183, Lim. Act. Again if this contention be pushed to its logical conclusion the death of a judgment-debtor may in certain cases operate to enlarge the period of limitation by three years.

There is another difficulty in the way of the respondent. What would be the starting point for the period of limitation if this application be governed by Art. 181? The right to bring the legal representatives on the record does not arise on the death of the judgment-debtor; it arises only when an application for execution is made. In this view the application is within time. I am of opinion further that the contention of the respondent cannot be given effect to as it is in conflict with the provisions of law prescribing the period of limitation for the execution of decrees and also for the reasons which I state below.

What has happened in this case is this. The decree-holder applied to this Court to transmit the decree to the Dacca Court for execution there. The decree-holder did not then make any application in this Court for bringing the legal representatives of the deceased judgment-debtors on the record. I do not think that she was bound to do so as the application here was for transmission of the decree and not for execution of the decree. The application for execution was made before the Subordinate Judge at Dacca and at that time the decree-holder applied to bring the legal representatives on the record in the execution case. The learned Subordinate Judge, having regard to the provisions of s. 50, Civil P. O., very rightly directed the decree-holder to apply to this Court for the determination of the question as to who were the legal representatives. S. 50 says that the Court which passed the decree is the Court to which application should be made to execute a decree against the legal representative of the judgment-debtor. The executing Court, if it is not the Court which passed the decree, is not the proper Court to decide whether execution should proceed against the legal representatives. The decree-holder has therefore

come to this Court and has asked this Court to substitute the legal representatives of the judgment-debtors in the execution proceedings which are still pending before the Subordinate Judge. When a decree has been transmitted for execution to another Court, the transmitting Court does not lose entire seisin of the decree. So far as the Court of transfer is concerned, it continues to have jurisdiction over the execution proceedings until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree the circumstances attending such failure (s. 41, Civil P. O.)

In this connection I would refer to the case in *Jang Bahadur v. Bank of Upper India Ltd.* (1) at p. 233. In the present case the execution case is still pending in the Dacca Court and the present application is for an order from this Court that the execution may proceed against the legal representatives of the judgment-debtors. The application is in the circumstances of the present case an application to enforce a judgment or decree within the meaning of Art. 183, Lim. Act and as it has been made within 12 years it is within time. No other objection is raised by the respondent. I therefore allow the prayer of the petitioner with costs. Certified for Counsel.

s.

Petition allowed.

(1) 55 I A 227 (333); 109 Ind. Cas. 417; A I R 1928 P O 162; 3 Luck 314; 5 O W N 502; 32 O W N 790; 26 A L J 681; 48 O L J 23; 28 L W 25; 30 Bom L R 1373; 55 M L J 545; (1928) M W N 863 (P O).

RANGOON HIGH COURT

Special Second Appeal No. 376 of 1938

March 22, 1939

MOSELY J.

DAW YON—PLAINTIFF—APPELLANT

versus

U MIN SIN—DEFENDANT—RESPONDENT

Transfer of Property Act (IV of 1882), s. 3—"Immovable property" includes benefits to arise out of land—Assignment of rents and profits of land can be made only by registered instrument.

Immovable property is not defined in the T. P. Act, which merely says that it does not include standing timber, growing crops or grass; but it is defined in s. 2, sub-s. 29, General Clauses Act, and this definition applies to transfers of property. According to this definition "immovable property" shall include land, and benefits to arise out of land. Hence the assignment of rents and profits of the land can only be made by a registered instrument. 15 Ind. Cas. 32 (1), referred to.

S. S. A. from the judgment of the District Court, Yamethin, in O. A. No. 58 of 1938.

Mr. Anklesaria for the Appellant.

Mr. Beecheno, for the Respondent.

Judgment.—The plaintiff-appellant, Daw Yon, sued the brother of her deceased husband, U Min Sin, for recovery of twelve "rent documents," or in the alternative, for Rs. 1,500 damages. The plaintiff's case was that she got the property in question, some three hundred acres of paddy land, at a partition of her deceased husband's estate, and as she had no previous experience of letting lands to tenants, she asked the defendant to have lease deeds printed and lease her lands for her. The defendant however got the lease deeds printed with his name as lessor and collected the rents. She claimed in her plaint that she had collected the bulk of the rents herself, and it appears that the valuation of the suit was based on an order of the District Court in its Civil Appeal No. 20 of 1937, the record of which is not before the Court. It is not argued that that valuation was not correct. The defendant in his written statement claimed that he had spent Rs. 5,000 on behalf of the plaintiff in the previous litigation by which she obtained partition, and that though he did not ask for repayment, the plaintiff wanted to show her gratitude, and as she could not pay him she requested him to let out the lands in his name and take the rents for himself, more particularly since, as she had only just succeeded to the property, the tenants would not be likely to pay her the rents. The plaintiff claimed, and the defendant's agent, U Maung, in his evidence admitted, that the plaintiff, in the two months between the filing of the suit and the date of the plaintiff giving evidence, had succeeded in collecting the rents. The plaintiff however was entitled to go on with the suit in any event, because after she filed this suit the defendant sued all the tenants for rent, and of course, if he won in those suits, she would have to indemnify those tenants. It is obvious however that she should have impleaded the tenants in this suit, and sued also for a declaration against both U Min Sin and them, that she was the beneficial owner of the leaseholds and was entitled to the rents. Under the circumstances however a decision has to be arrived at on the case as it stands and on the relief claimed.

The Judge of the trial Court gave judgment for the plaintiff, and rightly in my

opinion held that she was altogether unlikely to have made a gratuitous offer of so large a sum of money when she herself had nothing and had to pay the taxes, and he said that if the agreement had been as the defendant said it was, there was no reason why the tenants should not have paid him the money. A previous agreement between the parties is Ex. 1, which recites that U Min Sin had advanced this five thousand rupees in question, and it also says that he was not going to make any claim whatever for it; so it does not help the defendant. There is no other proof of the matter. The learned District Judge reversed the judgment of the trial Court and dismissed the plaintiff's suit on the ground that the burden of proving agency was on the plaintiff and that the tenants were likely to side with her as they were interested to do so, and that there was no other evidence to prove her case. In my opinion, the whole case can be decided on an issue of law which has been raised in this appeal (ground No. 3). The transfer in question is alleged to have been an oral one, made by Daw Yon at U Min Sin's house; she herself admits that she spoke of the arrangement there. The assignment made is supposed to have been one of the rents and profits of the land and, in my opinion, it could only be made by a registered instrument. Immovable property is not defined in the T. P. Act, which merely says that it does not include standing timber, growing crops or grass; but it is defined in s. 2, sub-s. 29, General Clauses Act, and this definition applies to transfers of property. According to this definition, "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

The transaction in question was claimed by the defendant to be one of assignment of the rents for one year only, the Burmese year 1293. The defendant does not claim that he got a lease of the land itself from the plaintiff. Had he got a lease for one year, that lease could have been made by an oral agreement accompanied by delivery of possession (s. 107, T. P. Act). Delivery of possession, of course, means delivery of possession of the immovable property dealt with in the section, that is to say the land itself. In such a case the lessee is under certain liabilities set out in s. 108 of the Act, even if he makes sub-leases [s. 108, sub-s. (j)] including liabilities to keep the property in good condition and restore it in such condition, and other liabilities men-

tioned in this section. It is argued for the defendant that the transaction was in effect such a lease, but he does not claim this in his written statement; he merely says that he was to be allowed to take the rents and profits which were assigned to him for this old debt. Nor do his witnesses support such a case. If it were possible to treat the assignment as a usufructuary mortgage or one year for this old debt, then it could not be made orally, being of property worth over one hundred rupees (ss. 58 and 59, T. P. Act).

A somewhat similar case was *Babu Lal v. Bhawani Das*, 15 Ind. Cas. 32 (1), where the property was the rents of a bazar leased by the mortgagee in possession to another. It may be said that in that case the tenants were already in possession and there could be no question of sub-leasing, and the position of the lessee was unequivocal, for he could only be the lessee of the rents, and not of the shops; whereas in the present case the arrangement was for U Min Sin to grant the tenancies as well as to receive the rents. It appears that he gave tenancies in some cases to old tenants and in others to new tenants. I conceive that this fact that U Min Sin was to lease the lands does not make any difference, and that the transaction set up here was that he was to let out the land instead of the plaintiff, and that the rents were assigned to him.

If the transaction set up by the defendant is, as in my opinion it is, to be considered as one by which the plaintiff assigned these rents, then I consider that the defendant is out of Court. As already said the defendant did not take up the position that the land itself was leased to him. He did not plead and it would have been futile to plead that he was to make the leases on behalf of the plaintiff, and collect and keep the rents, for that would still have been an assignment of future rents—immovable property—which could only be effected by registered deed. In any case on the evidence I think that the plaintiff succeeded in proving that the defendant was merely her agent for the purpose of leasing out the land, and that she did not agree or intend to assign to him or to let him retain the rents at all. (After examining the evidence regarding this, his Lordship continued.) The initial burden of proving the plaintiff's case that Min Sin was merely her agent to lease the land for her was on the plaintiff, and I consider that her evidence and the probabilities

(1) 15 Ind. Cas. 33; 9 A L J 776.

of the case were sufficient to establish it. Had the defendant been allowed in law to prove his case that the plaintiff permitted him to lease out the lands in his own name and keep the rents for himself—that was an extremely improbable case, and in my opinion he failed to prove it. The decree of the lower Appellate Court will therefore be reversed, and the decree of the trial Court restored with costs throughout.

s.

Appeal allowed.

NAGPUR HIGH COURT

Second Appeal No. 66 of 1936

August 14, 1939

GRILLE, J.

BRIJLAL PRASAD—APPELLANT

versus

Mahant LALDAS—RESPONDENT

Defamation—Suit for — What plaintiff must allege — Privilege—Statements in written complaint found to be false—If protected—Practice—Relief—Variance between pleadings and proof.

A plaintiff in a case of defamation ought to allege not only the publication, and set out not only the words, but that they were published or spoken to, at any rate, some named individuals at a particular time and place specified in the plaint. 96 Ind. Cas. 89 (3), relied on.

In a civil action for damages for defamation in respect of statements made by a person in a written complaint to a Magistrate the statements are privileged though they are found to be false. 141 Ind. Cas. 382 (4) and 45 Ind. Cas. 540 (5), relied on.

Although parties should be kept to their pleadings it is not every variance between pleading and proof that is fatal. But this cannot militate against the fundamental principle that no plaintiff should obtain a decision on facts which he has not pleaded and which were not put in issue at all. 121 Ind. Cas. 204 (2), relied on.

S. A. from the appellate decree of the Court of the Additional District Judge, Bilaspur, dated January 13, 1936.

Mr. W. Dutt with Messrs. Sen and Adhikari, for the Appellant.

Mr. M. R. Bobde, for the Respondent.

Judgment.—The plaintiff, who is the respondent before me, brought a suit for damages on account of alleged defamation against the appellant. The plaintiff had complained that in order to harass him and to bring him into disrepute in the eyes of his neighbours the defendant had drafted a complaint under ss. 352 and 323 of the I. P. C., alleging that the plaintiff's servant had struck him at the direct instigation of the plaintiff who was present, and that while doing so the plaintiff had abused him filthily. This

complaint together with an application for a transfer of the case to any other Court than that of the Honorary Magistrate at Sheorinarayan where the parties resided, was presented to the District Magistrate who directed that it should be heard by Mr. Tak, a Subordinate Judge with magisterial powers. The complaint was as a matter of fact withdrawn and the case dismissed under s. 203 of the Criminal P. C. The plaintiff also averred that after this action by the defendant the latter had repeated the defamatory statements to various persons. The defendant pleaded that the statements were true and admitted having made the complaint and presented it to the District Magistrate, but he denied that he had repeated the allegations to people of Sheorinarayan. The trial Court found that the statements made by the defendant were defamatory and untrue, but that in so far as they were contained in the complaint which was presented to the District Magistrate, they were covered by absolute privilege and that it had not been proved that oral statements amounting to slander had been made at all. If they had been proved, the trial Judge was prepared to hold that the plaintiff would have been entitled to damages to the extent of Rs. 500. The claim was dismissed.

The plaintiff appealed and the defendant put in cross-objections in so far as the findings were against him, namely, on the question of the truth of the allegations and the burden of proof. These facts were found against the defendant-respondent in the lower Appellate Court and the cross-objections were dismissed. The finding of the trial Court to the effect that the libel contained in the written complaint was covered by absolute privilege was upheld. Neither was the finding that there had been no publication, as deposed to by the witnesses whom the trial Court had disbelieved, disturbed. The lower Appellate Court nevertheless came to the conclusion that publication of oral statements had been proved both at Sheorinarayan and at Bilaspur on the strength of certain statements made by the defendant himself as a defence witness, D. W. No. 9. These admissions were to the effect that after the alleged assault by Kaloo, the plaintiff's servant, the defendant had reported the incident to his master Baijnath and also that on coming to Bilaspur he had made a written report to, according to the learned Additional District Judge, the District Superintendent of Police, but according

to the evidence to the Assistant District Superintendent of Police and according to the document on which the Appellate Court relied to the Deputy Superintendent of Police. The exact grade of the Officer is immaterial, although this inaccuracy should not have occurred. The Court held that on these admissions there had been oral defamation both at Sheorinarayan and at Bilaspur and holding that the plaintiff had established his case, awarded him a decree for damages for Rs. 500. The defendant has preferred a second appeal.

The appeal must succeed, and there can be no doubt that the lower Appellate Court has reached conclusions on allegations unwarranted either by the plaintiff's pleadings or by the issues in the case. There can be no question that the alleged assault is said to have taken place on April 17, 1933. After reciting that a false complaint had been made and quoting the relevant words in the complaint on which he relied in para. 3 of his plaint, the plaintiff goes on to say in para. 7:

"The defendant did not only commit this act in the Court alone, but he also orally told all these false things to several gentlemen, so that they might form a bad opinion about the plaintiff."

Again after stating that he only claimed Rs. 500 damages as, if he had claimed damages according to his status, he had no hope of recovering them from the defendant, the plaintiff goes on to say in para. 9 of the plaint:

"The cause of action accrued at Bilaspur within the territorial jurisdiction of the said Court on April 18, 1933 and April 20, 1933 when the complaint and the application were drafted and presented and when a few days thereafter the defendant made verbal statements to several persons."

Later in an oral statement in which the plaintiff was allowed to supplement his pleadings, it was stated on his behalf:

"The plaintiff cannot give the exact words of the defamatory oral statement made by the defendant to the people at Sheorinarayan in the last fortnight of the month of April 1933. The plaintiff does not wish to disclose at this stage the names of the persons to whom or in whose hearing the oral defamatory statements were made by the defendant."

Now, it will be observed that the cause of action is not based on any statements that were made prior to April 18, 1933. The defamatory oral statements alleged are definitely alleged to have taken place after that date. The statement made, according to the defendant's own admission in the witness box, to his master Baijnath was made immediately after the alleged occurrence and was therefore made on

April 17. Neither the plaint nor the pleadings made any reference whatever to any defamation uttered to an Assistant District Superintendent of Police or to a Deputy Superintendent of Police, and this matter was not put in issue at all.

The learned Counsel for the respondent contends that the variance between pleading and proof must not be construed with undue severity and relies on some observations in *Ananda Chandra Chukerbatty v. Braja Lal Singh* (1). No doubt, as there stated, although parties should be kept to their pleadings, it is not every variance between pleading and proof that is fatal. But this cannot militate against the fundamental principle that no plaintiff should obtain a decision on facts which he has not pleaded and which were not put in issue at all. If any authority for this fundamental proposition is required, it is to be found succinctly stated in *Siddik Mohammad Shah v. Saran* (2). Even if it were to be held that the allegation that an oral defamatory statement concerning the plaintiff was made to a Police Officer of Bilaspur could be looked into, there is an entire absence of proof as to what that statement consisted of. The statement itself has not been produced, the Police Officer concerned has not been examined, and the only reference to its existence is the sentence in the plaint that a report to that effect has been made to the Deputy Superintendent of Police and the admission by the defendant in the witness-box that he had drafted a complaint to the Assistant District Superintendent of Police (the contents of this complaint are not specified), that his Pleader took it to the Police Officer who told him to make a complaint and that he accompanied the Pleader. There is no evidence whatever that the defendant said a word to the Police Officer, and nevertheless the lower Appellate Court has found that the defendant orally expressed the substance of the defamatory matter at Bilaspur. No reference was made apparently in the lower Appellate Court to the report which was made to the local Sub-Inspector at Sheorinarayan, no doubt because the officer who was called as a witness for the plaintiff had no recollection of any complaint having been made against the plaintiff although there was one against his servant, and the credit of this witness could not easily

(1) 50 C 292 (293); 74 Ind. Cas. 793; A I R 1923 Cal. 142; 36 C L J 356.

(2) A I R 1930 P C 57; 121 Ind. Cas. 204; 24 S L R 136; Ind. Rul. (1930) P C 28; 31 P L R 150; 58 M L J 7 (P O).

be impeached since he is admittedly not prejudiced in favour of the defendant who had been under surveillance and for whom he was looking very shortly after the complaint had been made.

On the question of the establishment of the publication of the slander at Sheorinarayan the learned Counsel for the respondent argues that this matter was put in issue and that there has been a finding on it in the lower Appellate Court in his favour and that this finding cannot be disturbed. The issue in question runs: "Whether the defendant orally expressed the substance of the defamatory statements in the complaint to any person of Sheorinarayan?" Strictly speaking, this issue would appear to relate to persons who reside in the village wheresoever the statement was made; but the statement made on the plaintiff's behalf in continuation of his pleadings would indicate that the object of the issue was to decide whether the slander was published at Sheorinarayan. The witnesses who were called on behalf of the plaintiff to establish this contention were disbelieved, and the lower Appellate Court did not see fit to differ from the decision reached by the trial Court. Nevertheless on the defendant's own admission in the witness-box that he made a statement to Baijnath it has been held that there was publication of the slander at Sheorinarayan. I have already pointed out that the plaintiff's case both in the plaint and in the oral statement which followed it was that any oral statements of which he complained were made subsequent to April 18 and 20, 1933. It has been shown that the statement to Baijnath such as it was—and what was actually said has never been elucidated—took place on April 17, and it is also quite apparent from a perusal of the evidence of the discredited witnesses, P. Ws. Nos. 5 and 6, that they were deposing to incidents which according to them took place on April 17, as well. There is therefore not one shred of evidence on the issue whether there was a slanderous statement at Sheorinarayan at the material time to support the decision which has been given in the plaintiff's favour.

The decision, then, of the lower Appellate Court is based on no evidence at all and is given on grounds which the plaintiff has not even pleaded. The plaint and the subsequent oral statements are vague and, in my opinion, deliberately vague. I am in entire respectful agreement with the opinion expressed in the Allahabad High Court

in *Nannu Mal v. Ram Prasad* (3), to the effect that a plaint in a case of defamation ought to alleged not only the publication, and set out not only the words, but that they were published or spoken to, at any rate, some named individuals at a particular time and place specified in the plaint. Here the words alleged to have been spoken are not given; the plaintiff stated in his pleadings that he was unable to give them, and he deliberately declined to disclose the names of the persons to whom or in whose hearing the slanderous statements were made. Even in the evidence he did not call as witnesses persons to whom the statements were made, but only persons who overheard them. It is impossible for a plaintiff to succeed on vague allegations of this nature. The statements made in the written complaint have been found to be false, but in a civil action for damages for defamation in respect of such statements there can be no doubt that the defendant is in a privileged position, as found in both the Courts below and as held by me in *Manmohan Singh v. Thakur Bishal Singh* (4) and also by the Allahabad High Court in *Chunni Lal v. Narsingh Das* (5).

In addition to the unwarranted result reached in the lower Appellate Court, I must also comment on some exaggerated and careless statements in the course of the appellate judgment. At the end of para. 9 the learned Judge has stated:

"Therefore even if the witnesses examined by the plaintiff to prove slander are not believed, the statements of the defendant himself afford evidence that he told persons at Bilaspur and also at Sheorinarayan that the plaintiff instigated Kaloo to beat him. It is not conceivable that when the defendant goes the length of coming to Bilaspur for medical examination of his injury and moves heaven and earth to make a complaint against the plaintiff, he would not proclaim the complaint in his own village."

The sole basis for thisrodomontade is that the defendant stated in cross-examination that he made a statement of some kind to his master Bijnath and that immediately on coming to Bilaspur he made a complaint (the nature is of which unproved) to the Police and was advised to make a complaint in the Criminal Courts, which he did. Again in para. 6 the learned Judge has stated:

"That Kaloo did beat the defendant is a fact, which the plaintiff's own witness, P. W. No. 7 states."

(3) A I R 1926 All. 672; 96 Ind. Cas. 89.

(4) 29 N L R 24; 141 Ind. Cas. 362; A I R 1933 Nag. 47; (1933) Cr. Cas. 191; Ind. Rul. (1933) Nag. 58; 15 N L J 149.

(5) 40 A 341; 45 Ind. Cas. 540; A I R 1918 All. 69; 16 A L J 360 (F B).

This statement is entirely untrue. The plaintiff's witness, P. W. No. 7, deposes to an altercation and states that it was the defendant who beat Kilo and not Kilo who beat the defendant. An error of this kind which states the exact opposite of what the witness deposed is a blemish which should not appear in the record of a Judge of such standing.

The result is that the appeal succeeds, the decree of the lower Appellate Court is reversed and that of the trial Court restored and the plaintiff's suit is dismissed. The plaintiff-respondent will pay the defendant-appellant's costs throughout.

s.

Appeal succeeds.

RANGOON HIGH COURT.

Civil Miscellaneous Appeal No. 32 of 1939

August 22, 1939

MYA BU OFFG. C. J. AND SPARGO, J.

U YAN SHIN—APPELLANT

versus

MA E SEIN AND OTHERS—RESPONDENTS.

Workmen's Compensation Act (III of 1923), s. 3 (1) — "Out of employment" — Onus is on applicant — Accident held did not arise out of employment and no compensation could be awarded to dependent.

In claiming compensation under Workmen's Compensation Act, the onus lies on the applicant to prove that the accident arose out of the employment, and if the evidence is not sufficient to establish this, the claim fails. *Warner v. Couchman* (5), relied on, [p. 769, col. 1.]

An accident arises "out of" the employment where it results from a risk incidental to the employment, as distinguished from risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind.

The deceased workman used to be employed at various times in the work of jungle cutting and similar operations at the mine. On the day of his death, the deceased was employed in the work of clearing jungle along a boundary of the mine for the purpose of survey. While the workmen were going back to their camp in the same mining area, a dead tree on the way fell on the deceased and killed him. The tree was at some distance from the place where the deceased actually had to work. The accident was of the kind which anyone who happened to pass by the tree at the time would have met with:

Held, that the accident did not arise "out of" the employment of the workman and hence no compensation to dependent could be awarded.

[Case-law referred to.]

O. Misc. A. against an order of the Commissioner for Workmen's Compensation, Tavoy, dated April 25, 1939.

Mr. Chan Htoon, for the Appellant.

Mr. Eunoose, for the Respondents.

Mya Bu, Offg. C. J.—This is an appeal against an award of compensation made by

the Commissioner for Workmen's Compensation in favour of respondent No. 2, a daughter and defendant of one Maung Lu Lwin, who met with an accident, as a result of which he was killed on the spot on November 23, last. The appellant is a mine owner, and the deceased used to be employed at various times in the work of jungle cutting and similar operations at the appellant's mine known as the Hlegataung Mine. On the day of his death, the deceased was employed in the work of clearing jungle along a boundary of the mine for the purpose of survey. The work gave over at three o'clock, when the check roll of workers for that day was called. Thereafter, while the workmen were going back to their camp in the same mining area, a dead tree on the way fell on the deceased and killed him. It appears that some appreciable time had elapsed from the time that the workmen left the place where they had been working and the deceased had covered quite a substantial distance from that place when he met with this accident. The learned Commissioner for Workmen's Compensation held that the accident occurred in the course of the employment because, although the workmen were discharged from their work at three o'clock when the roll of workmen was called, yet they had to go back to their camp where they were to deposit the implements which they had brought, at the workshop on their arrival back at the camp. The learned Commissioner also held that the accident arose out of the employment. It is with reference to this latter finding that the validity of the award has been mainly assailed.

In *Burma Oil Co. Ltd. v. Ma Hmwe Yin* (1) it was pointed out that under the provisions of the Workmen's Compensation Act, an accident must not only occur "in the course of," that is to say during, the employment, but in addition must arise "out of" it, and that an accident arises "out of" the employment where it results from a risk incidental to the employment, as distinguished from a risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind. In that case a drilling coolie of the Burma Oil Company, who had his quarters provided by the company some four miles distant from the well where he worked, left his quarters for work on night shift early to see a friend on the way, choosing one of the three roads—

(1) 13 R 553; 159 Ind. Cas. 1095; A I R 1935 Rang. 428; (1935, Cr. Cas. 1245; 8 R Rang. 328.

longer one—and on the way he was bitten by a snake on the road and lost his life. The cooly had to make his journey to the well after dark because he was on night shift at the time. It was held that the accident which caused the death of the workman did not arise "out of" or "in the course of" his employment. On the question as to whether the accident in this case arose out of the employment, that case affords a parallel to the present one. In *Charles R. Davidson & Co. v. M'Robb or Officer* (2) Lord Finlay observed, (p. 317) :

"In order to come within the statute an accident must not only occur 'in the course of,' that is to say during, actual employment, but in addition must arise 'out of' it. In other words, there is required to be shown something in the nature of a causal relation between the accident and an order, expressed or implied, given by the employer."

In the same case Lord Dunedin expressed the view that "in the course of employment" was a different thing from "during the period of employment," while Lord Atkinson remarked: "In my view the words 'arising out of' suggest the idea of cause and effect." In *Kelly v. Kerry County Council* (3), where a workman engaged on the road during a storm whose duty was to clean out the gulleys to prevent the water flooding the road was struck dead by lightning, it was held that the death was not occasioned by accident arising out of the employment. This case is useful as drawing a distinction from that in *Andrew v. Fairclough Industrial Society, Ltd.*, (4), in which a brick layer while working on a scaffolding twenty-three feet in height was struck by lightning and there was evidence that the position of a man on a scaffolding twenty-three feet high was one of special danger from lightning, and it was held that, as the man's employment necessitated his occupying that place of peculiar danger, and as the accident occurred in consequence of his dangerous position, the accident was one arising out of his employment. In *Dennis v. A. J. White and Co.* (5), the House of Lords upheld the claim for injury to a boy in the employment of a firm of builders who was ordered to go through the streets of London on a bicycle to fetch some plaster, and came into collision with

a motor car and was injured. The observations of Lord Finlay L. C. and Lord Parker of Waddington afford an instructive guide as to the principles according to which the question as to whether the accident arose out of the employment should be determined. Lord Finlay observed :

"There are of course cases in which it is necessary to enquire whether the nature of the employment specially exposes a workman to a risk of a general nature. In the case of injury by lightning it is very material to inquire whether the work involves special exposure to the danger of being so struck, as in the case of employment upon a steeple or elevated scaffolding. In the case of injury by a bomb thrown from hostile aircraft the fact that the workman was engaged on work in a building brilliantly lighted so as to attract the notice of the enemy crews might be most material as showing that the injury by the bomb was one which arises out of the employment. In the case of sun-stroke or frost-bite it is material to show that the work involves special exposure to the heat or the cold."

Lord Parker of Waddington stated the principle as follows :

"It requires no direct evidence to prove that a boy employed to ride a bicycle through London traffic runs the risk of injury by collision with other vehicles. The risk is inherent in the nature of the employment or to put it in another way, if a collision occurs, a causal relationship between the employment and the collision can be properly inferred, and in default of further evidence, in my opinion, ought to be inferred by a judge of fact. Most employments have peculiar risks inherent in their nature. A person employed to break stones runs the risk of being injured by a flying splinter. A person employed to climb a ladder runs the risk of injury from a fall. In neither case would positive evidence be necessary to prove that the injury by accident arose out of the employment. That it did arise would be a legitimate inference from the nature of the employment coupled with the occurrence of the accident causing the injury. There may, of course, be risks so general that without further evidence no such inference would arise. Every one is liable to be struck by lightning, to be frost-bitten, or to be injured by bombs dropped from hostile aircraft. In such cases it may be necessary to establish the causal relationship implied in the expression "injury by accident arising out of the employment" by positive evidence; such, for example as proving that the circumstances of the employment exposed the employee to a greater risk than that run by persons not so employed, or not so employed under the same conditions."

In the present case the falling of the tree on the deceased cannot be said to be inherent in the nature of the employment, namely cutting and clearing jungles or bushes, or even trees, and the causal relationship between the employment and the falling of the tree cannot be properly inferred in default of further evidence. The tree was at some distance from the place where the workman actually had to work. The accident is of the kind which anyone who happened to pass by the tree at the time would have met with. The onus lies on the applicant to prove that the

(2) (1918) A.C. 304 (317); 87 L.J.P.C. 58; 1918 W.O. & I. Rep. 136; 118 L.T. 451; 62 S.J. 347; 34 T.L.R. 213.

(3) (1908) 42 I.L.T. 23.

(4) (1904) 2 K.B. 32; 73 L.J.K.B. 510; 90 L.T. 611; 52 W.R. 451; 68 J.P. 409; 30 T.L.R. 429.

(5) (1917) A.C. 479; 86 L.J.K.B. 1074; 1917 W.O. & I. Rep. 247; 116 L.T. 774; 61 S.J. 558; 33 T.L.R. 434.

accident arose out of the employment, and if the evidence is not sufficient to establish this, the claim fails: See *Warner v. Couchman* (6). There is no circumstance which indicates in this case that the employment, namely the cutting and clearing of jungles, bushes and even trees, exposed the deceased to the danger of a falling tree at some other place, although that place might happen to be on the premises of his employer. The causal relationship of the employment has not been established. The award made by the Commissioner for Workmen's Compensation must therefore be and it is hereby set aside: no order as to costs.

Spargo, J.—The finding of the Commissioner was that the accident happened while the workmen were returning to the camp where they had to deposit their tools. We were asked to say that the accident arose out of the deceased's employment because his work was that of cutting jungle and felling trees and therefore that brought him within reach of the danger of trees falling upon him. But the trees that fell upon him was not one of those that the deceased's duty caused him to fell, but was a dead tree which apparently fell because it was dead. The employment of the deceased did not expose him to any more danger from that than any other person who happened to be there would have to run. In *Burma Oil Co., Ltd., v. Ma Hmwe Yin* (1), at p. 561* there occurs this passage:

"An employer is not liable to compensate a workman for an injury that has been caused by reason of the workman being exposed to a risk to which all persons who happened lawfully to be present at the time and place of the accident would be subjected, unless the workman at such time and place was exposed to an exceptional risk of sustaining the injury by reason of the work which he was engaged by the employer to carry out.

I agree that the accident is not proved to have arisen out of the employment, and the order for compensation must therefore be set aside. I agree that there should be no order as to costs.

D.

Award set aside.

(6) (1911) 1 K B 351; 80 L J K B 526.

*Page of 13 R.—[Ed.]

PESHAWAR JUDICIAL COMMISSIONER'S COURT

Criminal Reference No. 6 of 1940

February 2, 1940

ALMOND, J. C.

KHAN MOHAMMAD AND ANOTHER—
PETITIONERS

versus

EMPEROR—OPPOSITE PARTY

*Criminal Procedure Code (Act V of 1898), s. 342—
Mere failure to record examination of accused does not
result in miscarriage of justice when Magistrate has
considered the statements.*

When a Magistrate has considered the statements of the accused they cannot possibly be prejudiced by the mere fact that he did not reduce those statements to writing in the proper column provided in the summary register. It would therefore be absurd to say that the mere failure to record the examination has resulted in a miscarriage of justice. 90 Ind. Cas. 434 (1), and 158 Ind. Cas. 129 (2), distinguished.

L. Basheshar Nath, for the Petitioners.

Mr. Raja Singh, for the Crown.

Order.—This case has been reported by the Additional Sessions Judge, Peshawar. The petitioners Khan Mohamed and Afridi were convicted at a summary trial of an offence under s. 448, I. P. O., and were fined Rs 20 each. The learned Additional Sessions Judge has reported the case on the following grounds:

"The Magistrate was bound to examine the accused under s. 342, Criminal P. O., and was bound to record this examination on his record and he has failed to do so."

The order of reference does not make it clear whether in the opinion of the Additional Sessions Judge the Magistrate had failed both to examine the accused and to record their examination or whether he had merely failed to record the examination. An examination of the record shows that the accused were actually examined, for in the column of the register provided for, the finding of the Magistrate, there is a specific reference to the defence set up by the accused. The question therefore for decision is whether the failure of the Magistrate to record that examination is fatal to the accused. Learned Counsel for the petitioners has relied upon a case decided by a Full Bench of the Sind Judicial Commissioner's Court reported in *Emperor v. Nabu* (1). The learned Advocate-General on the other hand relies on a case decided by a Bench of the Allahabad High Court reported in *Sia Ram v. Emperor* (2). In the Sind case

(1) A I R 1926 Sind 1; 90 Ind. Cas. 434; 26 Cr. L J 1554; 20 S L R 34 (F B.)

(2) A I R 1935 All. 217; 158 Ind. Cas. 129; (1935) Cr. Cas. 260; 36 Cr. L J 1290; 57 A 666; (1935) A L J 257; 1935 A L R 945 (2).

it was ruled that failure to examine an accused person under the provisions of s. 342, Criminal P. O., at a summary trial was fatal to the prosecution case, but from a perusal of the judgment in that case it appears to have been held that the accused had not actually been examined. In the Allahabad case some doubt as to whether the accused had been examined or not was expressed but there was definitely no record of the examination and it was there laid down that the mere fact that the examination had not been recorded did not show that the accused had not actually been examined and it was further held that even if the accused had not been examined under s. 342, Criminal P. O., it would not be fatal to the case for the prosecution unless it were also shown that the failure to examine him had in fact occasioned a failure of justice. The facts of the present case are slightly different from either of the reported cases, for in the case before me there can be no doubt that the convicts were actually examined and the only irregularity committed by the Magistrate was that he did not record that examination. In my opinion it would be absurd to say that the mere failure to record the examination has resulted in a miscarriage of justice. The Magistrate considered the statements of the accused and they cannot possibly have been prejudiced by the mere fact that he did not reduce those statements to writing in the proper column provided in the summary register. For these reasons I am of opinion that the order of the Magistrate must be upheld and dismiss the application of the petitioners.

s. *Application dismissed.*

PRIVY COUNCIL

Appeal from the Lahore High Court
March 18, 1940

LORD ATKIN, LORD THAKKERTON AND
LORD PORTER

SOCIÉTÉ BELGE DE BANQUE S. A.—

APPELLANT

versus

RAO GIRDHARI LAL CHAUDHARY—

RESPONDENT

Practice—Counsel—Admission by, on point of law—Whether binding on Court.

Acceptance of a finding by a Counsel, amounting to an admission of a point of law cannot be binding upon a Court; and it is not precluded from deciding the rights of the parties on a true view of the law. 178 Ind. Cas. 23, reversed. [p. 772, col. 1.]

Sir T. Strangman, K. O. and Mr. A. G. P. Pullen, for the Appellant.

Messrs. D. N. Pitt, K. O. and V. K. Krishna Menon, for the Respondent.

Lord Atkin—This is an appeal from the High Court at Lahore who reversed a decree of the Subordinate Judge at Delhi in favour of the plaintiffs, the present appellants. The circumstances in which the plaintiffs' claim arose are as follows. The defendant was chairman of The Delhi Sugar Mills Limited, an Indian company which carried on business at New Delhi. The company, before December, 1933, had had dealings with a Belgian company Messrs. Atelier de Construction de J. J. Gillains, who may be called the contractors, who had been engaged in providing equipment for the company and held shares in the company. Apparently in December, 1933, it was desirable for the company to obtain further financial assistance as they were contemplating making an addition to their factory, and for that purpose were acquiring a lease of a site which it was proposed should be mortgaged presumably to the contractors. Negotiations were opened between the defendant and the plaintiffs, a Belgian bank. The plaintiffs were bankers of the contractors and were represented at New Delhi by Mr. Van Campenhout, the general attorney of the bank, and Mr. Delait, the Manager of their office. The contractors were represented by Mr. Palante who was their general attorney in India, and was also a director of the company. On December 27, 1933, a meeting took place at the bank's office at Delhi at which Mr. Van Campenhout and Mr. Delait, representing the bank, Mr. Palante, representing the contractors, and the defendant were present. Terms were arranged and were expressed in a letter signed by the defendant and addressed to Mr. Van Campenhout. The letter is in the following terms:

"Delhi:

Dated December 27, 1933.

A. J. Van Campenhout, Esquire,
Attorney of Societe Belge
de Banque, S. A.,
Bruxelles:
Swiss Hotel, Delhi.

DEAR SIR,

In continuation of our conversation regarding the question of the transfer of shares held by Messrs. J. J. Gillains in the Delhi Sugar Mills Limited, in favour of Societe Belge de Banque S. A. (which question is being dealt with separately), I have the pleasure to inform you that I agree to sell 250 fully paid-up shares standing in my personal name to your bank on the following conditions:—

(i) That this sum of Rs. 25,000 will be expended.

by you, in securing the lease of the factory site and in paying the Company's half share of the costs of securing the mortgage-deed of the factory, etc., in favour of Messrs. J. J. Gillains and the cost of the transfer of the said shares. Whatever balance is left over will be paid to the Delhi Sugar Mills, Limited.

(ii) The sum of Rs. 25,000 stated above, will thus be treated as a loan to the Company from me.

(iii) That an interest of 6½ per cent. will be paid by the Company on this loan which will be transferred to your Bank.

(iv) That the Bank will not be entitled to any dividend on these shares and will have only the right to the interest as stated in cl. (iii).

(v) That I guarantee to re-buy at the same price these shares within six months and that the Bank will guarantee to re-sell to me these shares at any time I like within the stipulated period of six months.

(vi) Should I fail to re-buy these shares by the end of this period, and/or to pay the interest, the Bank will have the right to sell the shares to anybody else, and to claim from me damages, if any, and to keep the dividend. The dividend, if any, earned on these shares within the next six months will be transferred by the Bank to me after the same has been received from the Company.

(vii) That you will obtain Messrs. J. J. Gillain's consent to this transaction.

Yours faithfully,
GIRDHARI LAL."

The letter was acknowledged by a letter of the same date signed by Mr. Van Campenhout and handed personally to the defendant. Mr. Palante had at the meeting assented to the transaction. The acknowledgment is as follows:

"Delhi :
Dated December 27, 1933.
Girdhari Lal Chaudhary,
Esquire,
Chairman,
Delhi Sugar Mills, Limited,
New Delhi.

DEAR SIR,
I beg to acknowledge with thanks your letter of date, and to confirm that the S. A. Societe Belge de Banque S. A. agree to purchase from you 250 fully paid shares standing in your name of the Delhi Sugar Mills, Limited, on the following conditions:—

1. That the purchase price of Rs. 25,000 for the said shares will be expended by us in securing the lease of the factory site and in paying the Company's half shares of the costs in securing the mortgage-deed of the factory, etc., and the cost of the transfer of the said shares. Whatever balance remains after the above expenditure, will be paid to the Delhi Sugar Mills, Limited.

2. The said sum of Rs. 25,000 will then be treated as a loan to the Company from you.

3. The Company will pay interest at the rate of 6½ per cent. on the said loan and this interest will be transferred by you to our Bank.

4. You guarantee to buy back at the same price the said shares within six months and the Bank guarantees to re-sell the same to you at any time you like within the stipulated period of six months.

5. The Bank will not be entitled to any dividend on the said shares during the period of the six

months, but will only have the right to the interest as provided in the cl. (3).

6. Should you fail to re-buy these shares by the end of this period and/or to pay the interest the Bank will have the right to sell the shares to anybody else and to claim from you the damages if any, and to keep the dividend. The dividend, if any, earned on these shares within the next six months will be transferred by the Banque to you, after the same has been received from the Company.

7. That we will obtain Messrs. J. J. Gillain's, consent to this transaction.

8. The above transaction of purchasing the shares and paying the price of 25,000 will be carried out and completed after the draft mortgage has been approved and is ready to be engrossed and after the draft lease has been approved by the lessor, the Company and ourselves, and is ready to be engrossed.

Yours faithfully,
(Sd.) A. VAN CAMPENHOUT,
Belge de Banque, duly
authorised agent."

On the same day a receipt for the letter was given by the defendant signed by the secretary of the company. By letters of the same day signed by the defendant as chairman for the company and addressed to Mr. Palante the company agreed to the assignment by the contractors to the bank of their rights against the company and also of their shares in the company. Both letters concluded that they were subject to the payment by the bank of Rs. 25,000 in terms agreed between Mr. Girdhari Lal and the bank. On the same day also the defendant addressed to Mr. Van Campenhout a letter in which he says "will you please pay to the Delhi Sugar Mills Limited a sum of Rs. 4,000 out of Rs. 25,000 which has been earmarked for securing the lease of the factory site and for obtaining the mortgage-deed." The letter went on to say that it was understood that the remaining sum of Rs. 21,000 would be enough to meet all these expenses; but that if there should be a shortage the defendant guaranteed that it would be made good by the company. The bank duly paid the Rs. 4,000 to the company who credited the sum to the defendant. At later dates they paid to the defendant Rs. 17,440-12-9 for payment to the assignor of the lease, a sum which is again credited in the books of the company to the defendant. They paid further sums for the stamp on the assignment and costs of its preparation and for stamps on the mortgage-deed. The latter sum they eventually recovered, so that they finally expended on this transaction Rs. 22,259-12-9. In the meantime the bank had been pressing the defendant to transfer to them the 250 fully paid shares which were the consider-

ation expressed in the letters for the above payments by the bank. On January 12, 1934, they tendered a draft transfer deed to the defendant asking him to have it engrossed with the number of the shares. It appears that at the date of the letters the shares issued to the defendant were not fully paid. Difficulties arose as to this: a certificate for 500 fully paid shares was said to have been issued by the company on March 12. It purported to be signed by the defendant and the secretary, and also it is said by Mr. Palante, but Mr. Palante is said to have erased his signature and for that reason it was at one time said that it became impossible for the defendant to transfer 250 shares. Eventually after interviews and several letters asking for performance the plaintiffs in a peremptory letter dated May 9, required the defendant to settle the matter within 24 hours. No reply was forthcoming and on May 11, the plaintiffs by their solicitors wrote cancelling the agreement and claiming the money they had paid under it. Credit for the mortgage stamp returned was not then available. The present suit is brought for the nett sum paid by the bank, and in the circumstances narrated it appears difficult to see how the defendant could succeed. The chief point made by the defendant which found favour with the Subordinate Judge and the High Court was that there never was a concluded agreement. Clause 8 of the bank's letter of December 27, 1933, it is said introduced a new term which prevented the letter from being an acceptance of the defendant's offer, and there is no evidence of an acceptance of the bank's counter offer. Without dealing with the last contention, against which there appears much to be said, their Lordships are satisfied that the paragraph relied on stated no new term but merely expressed what was necessarily implicit in the defendant's offer. How could the bank expend an unascertained amount in securing the lease of new premises until the terms of the lease had been approved between the lessor and the company? The approval of the terms by the bank in the circumstances was in contemplation of everyone. How could the costs of the mortgage be ascertained until the draft mortgage had been approved? Every circumstance points to the necessity of the condition expressed in the paragraph being necessarily intended by the defendant in his offer. It seems certain that money could not be paid for a lease unless the lessor and the lessee had come to a

final agreement as to terms. But it was said the bank were asked to promise to expend part of the Rs. 25,000 "in securing the lease"; and, this involved an absolute promise by them to obtain the lease: hence a term that the expenditure was conditional upon the parties agreeing to the terms of the lease converted an absolute promise into a conditional one. The answer is that the promise asked for was not an absolute promise. This is a financial arrangement with a bank. How could they negotiate still less promise to succeed in negotiating a lease for a factory site in which the lessor as well as the lessee must always have the final word? "Expend in securing" obviously means expend "the money required to pay for" the lease. Their Lordships are therefore unable to agree with the conclusion of the learned Subordinate Judge accepted by the High Court in answer to the first issue that there was no concluded agreement. Their Lordships find it difficult to believe that there was not some misunderstanding; on appeal as to the acceptance by Counsel for the bank of all the trial Judge's findings. But if Counsel did accept such a finding it could only amount to an admission of a point of law which cannot be binding upon a Court; and their Lordships do not consider themselves precluded from deciding the rights of the parties on a true view of the law.

If then there was a concluded agreement it seems to matter little whether it was an agreement of purchase or of loan. Despite the initial words of the agreement which indicate purchase it seems difficult to resist the conclusion that the transaction was in truth a loan. The provision for payment of interest to the supposed purchaser on his supposed purchase price together with the agreement to buy back the shares in 6 months at the same price and the stipulation that the supposed seller is in the meantime to enjoy the profits of the property supposed to be sold point strongly in this direction. And it is to be noticed that in the correspondence the reference by the bank is to advances while in evidence the manager for the bank more than once styled the payments advances without any demur by the opposite party. But Mr. Pritt for the defendant, insisted that the transaction was one of purchase. If grown up men, he said, choose to call a transaction a purchase then it is a purchase, however, in-

consistent with such a legal conception are the agreed terms. But if it was a purchase then, in the circumstances of this case, the plaintiff's remedy is as simple as if it were a loan on security. The purchaser had paid the purchase price to the seller while the seller refused to deliver the goods agreed to be sold. On cancelling the bargain the purchaser was plainly entitled to recover the money he had so paid. And obviously it makes no difference whether the price had been paid to the seller direct or to third persons by his direction. If the transaction were a loan the borrower agreed to borrow money on the security of shares which he undertook to deliver to the lender. He refused to deliver them and the lender in cancelling the transaction is entitled to recover the money which he has advanced.

In the view of the transaction which has been adopted above it becomes unnecessary to consider the legal results which would follow if the negotiation had still remained open. Their Lordships must, however, not be taken to concur in the conclusion arrived at by the High Court, and they may remark that the provisions of s. 70 of the Indian Contract Act seem to have been overlooked in both Courts. They can find no ground for styling the alleged contract a contract of guarantee as was stated in the High Court judgment. The letters and all the material documents indicate that the defendant and the defendant alone was to be the principal debtor.

In the result their Lordships agree with the decree passed by the trial Judge though for a different reason. They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court at Lahore dated November 1, 1937, be set aside and the decree of the Subordinate Judge, Delhi dated December 22, 1936, be restored. The defendant must pay the costs of the appeal to the High Court and to His Majesty in Council.

D.

Appeal allowed.

Solicitors for the Appellant.—Messrs. Parakar Garrett & Co.

Solicitors for the Respondent.—Messrs. Cardew Smith & Ross.

PRIVY COUNCIL

Appeal from the Bombay High Court

March 7, 1940

VISCOUNT MAUGHAM, LORD PORTER AND

SIR GEORGE RANKIN

SIR JAMSHEDJEE JEEJIBHOY,

BART, AND OTHERS—APPELLANTS

versus

SORABJI BYRAMJI WARDEN

AND OTHERS—RESPONDENTS

Executor—Liability—Executors of deceased debtor giving security by equitable mortgage over asset of deceased's estate to one of creditors in respect of debt due from estate—Personal liability of executors—Security given in consideration of creditor's forbearance to sue for two years and promising to pay interest for that period—Executors held personally liable for interest for aforesaid period, but not for whole debt.

If the executors of a deceased debtor think fit for consideration to give security by deposit of title deeds over an asset belonging to his estate to one of his creditors in respect of a debt due from the estate, the transaction may or may not be one to which other creditors or persons can take exception. But if it is not intended that the executors should assume personal liability for the secured debt there is nothing in the T. P. Act or in the law of India to make them so liable by reason that they have granted the security or by reason that they have done so by deposit of the testator's deeds.

Where in consideration of the creditors' forbearance to sue for a period of two years the executors gave security for the testator's debt by equitable mortgage of the right, title and interest of the testator making it clear at the time that the payment to the creditor was conditional upon the sufficiency of the assets and depended upon the future of land values and the executors also undertook to pay interest on the debt for the aforesaid period of two years:

Held, that the promise to pay interest not having been expressly qualified, in the context there was not enough to show that the promise was intended as conditional upon the sufficiency of the testator's assets having regard to the limited period of time (two years) to which it extends and the circumstances of the transaction. The executors not having made it clear that their words of promise were not to be taken in the direct and simple sense of a personal covenant, made themselves personally liable for the interest which accrued during the two years with interest thereon. [p. 777, col. 2.]

Held also that the fact that the executor was to assume liability for the interest alone and that only for a defined period did not impose a liability for the whole of the debt. [p. 778, col. 1.]

Messrs. Ronald F. Roxburgh, K. C., and R. J. T. Gibson, for the Appellants.

Sir Thomas Strangman, K. C. and Mr. S. P. Khambatta, for the Respondents.

Sir George Rankin.—This is an appeal by the representatives of the original plaintiff in a suit to enforce a mortgage by deposit of title deeds. The suit was brought on the Original Side of the High Court of Bombay on January 7, 1936, by an old lady named Jaiji Hirjibhoy Parekh.

Her daughter Meherbai had married one Byramji Hirjibhoj Warden, father of the defendants. Byramji had died on October 26, 1924, leaving a will whereby he had appointed the defendants, his four elder sons, to be his executors. Probate had been granted to them in 1925.

By his will dated October 6, 1922, (codicil of August 19, 1924), Byramji declared (cl. 11) that his immovable properties were generally mortgaged and that it would take a long time before they could be sold at the best price after paying the mortgage debts. He accordingly authorised his executors to postpone the sale for any period not exceeding five years from the date of his death. He referred (cl. 12) to the fact that Bai Jaiji (the plaintiff) and a number of other persons held his promissory notes, stating that he ordinarily renewed them yearly or at longer intervals and paid them interest monthly or at times at longer intervals. He directed that the amount due to these creditors should be paid with interest by his executors and he authorised his executors to renew these notes with interest. After making provision for his daughters, for a fifth son named Rustomji and for certain other persons, he directed that at the end of seven years after his death the residue of his property should be divided into four equal parts, each part to be held in trust for one of his four elder sons (the present defendants-respondents) for life and on such son's death for his children.

At his death the estate of Byramji, which consisted mainly of shares in companies and immovable properties in Bombay, was valued by the Collector for the purposes of the duty payable on obtaining probate at about 8½ lacs of rupees and the debts of Byramji were returned at about 6 lacs. The debt due to Bai Jaiji was entered as amounting to Rs. 25,780 for principal and Rs. 620 for interest. That the solvency of the estate would depend entirely upon the condition of the property market in Bombay has at all times been plain and after the death of Byramji his executors found it difficult to realise his properties. By 1923 the fifth son, Rustomji, was threatening steps to realise the sum of Rs. 50,000 which had been settled upon him by his father's will and in this year several mortgages were given by the executors over immovable properties of the estate to creditors of the testator. In particular, on August 10, 1928, an equitable mortgage by deposit

of title deeds was given to Bai Jaiji and the registered memorandum set forth the terms thereof as follows:—

"Memorandum of agreement made and entered into at Bombay this August 10, 1928, between Sorabji Byramji Warden, Hirjibhoj Byramji Warden, Jamshedji Byramji Warden and Pestonji Byramji Warden all the four of Bombay Parsi inhabitants, Executors and Trustees of the last Will and Testament of the late Byramji Hirjibhoj Warden of the one part and Bai Jaiji Hirjibhoj Parekh of Bombay Parsi inhabitant of the other part whereas the said Byramji Hirjibhoj Warden, was during his lifetime indebted to the said Jaiji Hirjibhoj Parekh in a certain sum, which with interest up to date exceeds the sum of Rs. 30,000 and whereas the said Byramji Hirjibhoj Warden, died in October 1924, leaving a Will dated October 6, 1922, probate whereof has been issued by the High Court of Bombay in its testamentary jurisdiction to the said Sorabji, Hirjibhoj, Jamshedji and Pestonji, the sons of the said Byramji Hirjibhoj Warden and Executors and Trustees of the said Will and whereas the said Bai Jaiji Hirjibhoj Parekh, has called upon the Executors to pay off the debt due to her by the estate and in default, threatened to proceed further in a Court of Law, and the Executors having at present no cash available for the satisfaction of the said debt, offered to give security to the extent of Rs. 30,000 by giving an Equitable Mortgage of the right, title and interest of the said Byramji Hirjibhoj Warden in the immovable properties described in the Schs. A, B and C hereto by depositing their respective title-deeds described in the Schs. D, E and F which the said Bai Jaiji Hirjibhoj Parekh, the Creditor, has agreed to accept and not to sue, till such time not exceeding two years as the depression in the property market in the opinion of the Mortgagors passes off, and whereas the said Byramji Hirjibhoj Warden was entitled to the entirety of the immovable properties in the Schs. A and B and to a half share in the immovable property described in the Sch. C hereto. Now it is hereby agreed that the deeds and documents specified in the Schs. D, E and F relating respectively to the immovable properties described in the Schs. A, B and C this day been deposited by the said Sorabji Byramji Warden, Hirjibhoj Byramji Warden, Jamshedji Byramji Warden and Pestonji Byramji Warden, with the said Bai Jaiji Hirjibhoj Parekh with intent to create an Equitable Mortgage upon the said immovable properties for securing to her the said Jaiji repayment with interest of the sum of Rs. 30,000, (Thirty thousand) this day due to her by the estate of the said deceased Byramji Hirjibhoj Warden, represented by the Executors of his Will the said Sorabji, Hirjibhoj, Jamshedji and Pestonji, such sum to be repayable at any time within two years from the date hereof, such time to be selected by the said Executors and that they will in the meantime pay interest every month on the first day of each English month at the rate of six per cent. per annum with compound interest at the same rate with quarterly rests on all arrears of interest not paid on the due date, and it is hereby further agreed that the said sum of Rs. 30,000 is repayable in Bombay, and until so repaid with interest as aforesaid, the said deeds and documents and the respective properties to which they relate will be held by the said Bai Jaiji Hirjibhoj Parekh as an equitable security and that the executors will, if so require by the said Jaiji, insure the structures on the lands comprised in the said security in a sum not exceeding Rs. 30,000 at the costs of the executors."

Having received no payment whether

on account of principal or interest, Bai Jaiji brought her suit as already mentioned on January 7, 1936. She asked for the usual preliminary decree for sale but added a claim that if the proceeds of sale should be insufficient, the defendants be held personally liable to make up the deficiency, contending that by the memorandum of August 10, 1928, the defendants had made themselves personally liable for the repayment of the principal sum of Rs. 30,000 and interest thereon. This was a very proper question to be decided at the trial. Barlee, J., as trial Judge found against the defendants both as regards principal and interest, proceeding on the view that an executor must perform a promise made by him as executor *de bonis propriis* unless he has expressly excluded his own liability and that this he does not do by the mere use of the word executor. By his preliminary decree (August 5, 1936), he gave liberty to the plaintiff to apply for a personal decree against the defendants in the event of the net sale proceeds being insufficient to satisfy in full the plaintiff's claim for principal, interest and costs. While the defendants' appeal to an Appellate Bench was pending, Bai Jaiji died on December 25, 1936, and the executors of her will (the present appellants) were substituted in her stead. At the hearing of the appeal, Beaumont, C.J. and Blackwell, J., construed the memorandum as imposing no personal liability on the defendants. Their decree dated September 28, 1937, negatived the plaintiff's right to apply for a personal decree against the defendants but gave liberty to the plaintiff to lodge a claim for any deficiency against the estate of Byramji but without prejudice to any question whether such claim was maintainable.

The evidence called at the trial has little bearing upon the true construction of the memorandum of August 10, 1928. The second defendant, Hirjibhai, who appears to have been the most active of the executors, gave evidence that he had advanced some money for paying off debts of the estate, that several creditors had been paid off chiefly out of monies of the estate, that some legacies had been paid out of monies advanced by him including a legacy left to one of his sisters which was paid on her marriage. He stated that the promissory notes held by Bai Jaiji carried interest at 6 per cent. with quarterly rests and that these had been handed over to him at the time of the mortgage trans-

action of August 10, 1928, and destroyed. He admitted that the income of the property in suit was collected by him after the granting of the mortgage on August 10, 1928, just as before. His evidence is that whatever might have been thought possible at the date of his father's death in 1924, by 1928 he had no longer any hopes of taking anything by the residuary legacy, since the utmost that could then be expected was that the debts of the estate might be cleared if land values improved. The only other witness called by the defendants was the solicitor who drew up the memorandum of August 10, 1928. He stated that he did so on the instructions of the second defendant who wanted to protect his grandmother, but that he did not himself see or consult the lady nor were any instructions taken by him from her though the second defendant was in communication with her throughout. Bai Jaiji herself gave evidence giving her age as 40 years: she said that Byramji had paid her the interest in his lifetime but that after his death the second defendant had not done so in spite of demands but had asked her to wait two years. She denied that she had handed over to him the promissory note.

Before the Board Mr. Roxburgh, for the appellants, in a clear and careful argument, examined separately three possible answers to the question whether the defendants had rendered themselves personally liable to Bai Jaiji, (1) that they were so liable both for principal and interest; (2) that they were so liable for interest alone either (a) for two years from the date of the memorandum, or (b) until repayment; (3) they were not so liable at all. In the High Court the learned trial Judge had taken the first view and the Appellate Bench the third; their Lordships agree, however, that the second must be carefully considered. It was further contended for the appellants that personal liability might be brought home to the defendants either on the footing that they have agreed to pay or on the footing that they have admitted assets. Upon the second of these alternatives it was suggested that the learned Judges in India do not seem to have disputed the applicability of the principles of English Law and that the English decisions, some of which were followed by Barlee, J., are particularly strong to the effect that an executor may incur liability by making a statement about the assets of the testator which

amounts to an admission of assets. Their Lordships, however, for reasons which will be indicated later in this judgment, are not prepared to give unqualified adherence to the view that English Law as to admission of assets is law in India either within or outside of the Presidency towns.

In the present case it is to be observed that in the plaint the personal liability of the defendants was put entirely upon the memorandum of August 10, 1928. It was not pleaded that the defendants had become liable by reason of any admission of assets *dehors* the memorandum whether by conduct or by words. Indeed admission of assets as distinct from agreement to pay personally was not in the plaint put forward as a ground of claim at all. In these circumstances while the memorandum must be given its true effect in law, it is not open to the appellants, for the purposes of this appeal, to rely on statements made in evidence by the second defendant as to his sister's legacy having been paid or other creditors having been paid or having been given security. If, however, the appellants should at any time get judgment against the defendants for any sum to be realised out of the assets of the testator, it may be that in execution proceedings it will still be open to them on the basis of some such facts to make a case (under sub-s. (2) of s. 52 of the Code) that the defendants have not duly applied all the assets which came to their hands.

The only matter upon this appeal is the nature and extent of the liability incurred by the defendants under the memorandum of August 10, 1928. The defendants are in the opening words described as executors and trustees of the will of Byramji. The recitals do not contain any details of the debt due from Byramji's estate. The dates of the loans, the rate of interest, the sums outstanding for principal and for interest are not given: all that is said is that up to date the debt exceeds Rs. 30,000. The recitals do, however, purport to disclose in terms that the executors had no cash available wherewith to pay the debt, that their only prospect of paying depended on the state of the property market which was at that time depressed, and that they were giving security in order to gain two years' time. There is here no suggestion that the defendants as executors had been in default in any way or were admitting that they had assets out of which they might and should have paid. Their offer to Bai Jaiji as

recited is an offer to give her security for the testator's debt to the extent of Rs. 30,000 by equitable mortgage of the right, title and interest of the testator. Though the second defendant deposed that the debt originally carried interest at six per cent. with quarterly rests, the learned trial Judge was not prepared to believe that compound interest was payable at all, the promissory notes having been destroyed. But the way in which the debt is recited in this memorandum without any distinction between what was then due for principal and interest is, in their Lordships' opinion, some corroboration of the defendant on this point and there is no contradiction by Bai Jaiji. Their Lordships find it very difficult to make any inference against the defendants on the ground that the original terms as to interest were varied by the memorandum—a contention which seems to them to be unproved.

The operative clause of memorandum begins by creating an equitable mortgage upon the properties for securing to Bai Jaiji repayment with interest of the sum of Rs. 30,000 then due to her by the estate of Byramji represented by the executors of his will. This is followed first by a clause—"such sum to be repayable at any time within two years from the date hereof such time to be selected by the said executors"—which is no more than a way of saying that it was not to be demandable for two years. Then comes the interest clause (so to call it): "that they (the said executors) will in the meantime pay interest every month on the first day of each English month at the rate of six per cent. per annum with compound interest at the same rate with quarterly rests on all arrears of interest not paid on the due date."

By s. 58, cl. (a), of the T. P. Act it is clear that a mortgage may be given as security not merely for money lent but for any debt or liability. If the executors of a deceased debtor think fit for consideration to give security over an asset belonging to his estate to one of his creditors in respect of a debt due from the estate, the transaction may or may not be one to which other creditors or persons can take exception. But if it is not intended that the executors should assume personal liability for the secured debt there is nothing in the T. P. Act or in the law of India to make them so liable by reason that they have granted the security or by reason that they have done so by deposit of the testator's

deeds. Apart from the clause as to interest, which calls for a separate discussion, the memorandum contains no covenant by anyone to repay the principal sum of Rs. 30,000, no statement that the executors would assume personal liability for it, no representation or admission to the creditor as to the sufficiency of the testator's assets to meet either the original debt or the sum of Rs. 30,000.

There is, however, a covenant to pay interest on the sum of Rs. 30,000. This is not itself qualified by any phrase to the effect that they agree "as executors" to pay it or that they are to pay it out of the assets of the testator. Nor is there any other specific expression directed to distinguish between a simple promise by the defendants to pay and a promise by the defendants, for themselves and their successors in office, to pay upon condition that the assets of the testator should permit of the payment being made thereout. The question arises whether such a qualification can be derived from the context, and on this point much depends upon the period in respect of which the promise to pay interest is made. Their Lordships think it to be reasonably plain that the words "in the meantime" have reference to the period of two years or less referred to in the words immediately preceding and that they cannot be extended to cover the whole period that might elapse between the date of the memorandum and the actual payment of Rs. 30,000 to Bai Jaiji. The defendants were to continue to collect the rents of the mortgaged property and might very reasonably have been expected, for the two years during which she gave up her right to recover her money, to see that the interest was paid to her. The recitals as to her having made demands must be taken against the defendants and it seems unreasonable to doubt that the lady would feel the loss of this portion of her income. On the other hand the clause is the only covenant to pay interest and the only part of the memorandum in which any specific rate of interest is mentioned. It is expressed in language which is common form in Indian mortgages, which not infrequently, as the reports show, provide expressly for the payment of interest up to the "due date" of the mortgage but omit to make provision for any subsequent period. The last clause, however, makes the property a security for the interest as well as the principal until repayment. The learned Judges of the Appellate Bench con-

sidered that the covenant to pay interest was to be read with the reference to interest in the previous part of the same clause and merely specified the interest already referred to. The question is by no means free from difficulty, but upon a careful consideration of the clause their Lordships think, the promise not having been expressly qualified, that in the context there is not enough to show that the promise was intended as conditional upon the sufficiency of the testator's assets having regard to the limited period of time (two years) to which it extends and the circumstances of the transaction.

It is to be noticed that the executors had not been paying the interest and that apparently the estate was without sufficient cash even to ensure that the interest would be regularly paid. The rate is not expressly stated to be the same rate as applied to the original debt even if it was so in fact. Their Lordships do not think that they will be applying to this Indian case a technical or unjust rule if they hold that it was for the executors to make clear that their words of promise were not to be taken in the direct and simple sense of a personal covenant, and that on a true construction of this memorandum they have made themselves personally liable for the interest which accrued during the two years with, of course, interest thereon.

It was contended for the appellants that if it be found that the defendants had made themselves personally liable to pay any interest, this finding would involve a liability on their part in respect of the whole of the debt both principal and interest, at all events if the obligation which they undertook differs in any way from the original obligation of the testator. It was said that the sum of Rs. 30,000 was only a part of the testator's debt and that the testator was not shown to have been liable for compound interest. Hence, on the facts of the present case, the principle was invoked that a promise by an executor to pay interest differing in any particular from the testator's own obligation involves admission of assets and renders the executor personally liable for principal also. As authority for this proposition, reference was made to *Bradley v. Heath* (1) and *Childs v. Monins* (2),

(1) (1830) 3 Simon 543; 30 R.R. 217.

(2) (1821) 2 Brod & Bing. 460; 5 Moore 282; 23 R.R. 513.

Williams on Executors, 12th Ed., Vol. II, pp. 1164-5.

These were both cases in which executors appear to have qualified their promise to pay the testator's debt by the words "as executors" and yet were held personally liable on the construction of the instrument as a whole upon the ground that they promised to pay in the future with interest for which the testator was not liable. In *Bradley's case* (1), the matter was entangled with further debts incurred by the executors to the creditor after the testator's death. In *Childs' case* (2), the instrument was a promissory note, the promise was joint and several and was to pay on demand. These cases disclose reasons why the words "as executor" will not in all circumstances be sufficient to show that the payment is only to be made "out of the estate."

In India as in England it is open to an executor in consideration that a creditor of his testator will forbear to sue to make himself liable for the debt whether the assets of the testator be sufficient or insufficient. The forbearance will be consideration to support the promise. It may even be that where there is an agreement by the creditor to give time, the executor will readily be regarded as intending to make himself personally liable. This must, however, in all cases be a question either of fact (what the agreement was) or of construction, if the agreement was reduced to writing: though their Lordships know of nothing in the law of India which warrants any presumption against the executor in this regard, his words of covenant will *prima facie* be given their ordinary meaning. If the truth be that the executor has obtained time not by promising that he would pay but by granting to the creditor a mortgage or charge over assets of the testator in respect of the debt or part of the debt, there is no rule of Indian law which alters or enlarges the agreement of the parties. And if it be, as in the present case, part of that agreement that the executor shall assume liability for the interest alone and that only for a defined period, to impose a liability for the whole of the debt would be all the more pointedly in conflict with the intention of the parties. It is good sense to infer when a person makes himself liable indefinitely for the interest on a debt that he means to assume liability for the principal since if the debt be never paid the interest would run for ever. It is also true that

the mere agreement that interest shall be paid shows forbearance by the creditor. Such considerations throw light upon the intention of the parties but they do not otherwise impose liability upon executors. If the realisation of a testator's estate is a matter of difficulty and if it be thought of benefit to the estate that a creditor should be induced to give time for payment of his debt, there may be every reason why the executor should seek to make an arrangement for time on payment of enhanced interest or on other special terms entirely at the expense of the estate and without risk to himself. The question is whether he has done so: to what has the creditor agreed? This is more safely answered by an Indian Court upon a direct view of the circumstances of the case, the character of the document, if any, and its language fairly taken as a whole, than through the refracting medium of decisions given in another country one hundred years before.

It is maintained, however, that by admission of assets the executor has incurred personal liability without entering into a contract to pay personally or even after entering into a contract under which the creditor's right to payment is conditional upon the sufficiency of the assets. On the terms of the memorandum in the present case, which their Lordships have now construed, it is not possible to suggest that the executors were representing, affirming or admitting that the assets would be sufficient to meet the debt or the sum of Rs. 30,000. On the contrary they gave plain warning that everything would depend upon the future of land values in Bombay.

As English cases have been cited in the High Court and before the Board upon the subject of "admission of assets" their Lordships think right to notice that the English cases require to be interpreted with reference to their setting or background in English Law. In Williams on Executors—the well recognised repository of learning on this subject—the scheme of the English Law and the conditions upon which judgment could be recovered *de bonis testatoris* or *de bonis propriis* are described (cf. 12 Ed. 1930, vol. II, pp. 1166, 1240, 1293-6) and it will be sufficient here to refer to them in a summary manner. If an executor was sued for the debt of his testator and had not assets to satisfy the debt, he had to take care to plead *plene administravit* or *plene administravit præter*:

otherwise judgment for the plaintiff amounted to a conclusive admission that he had assets to satisfy it. Where this plea was taken the burden was on the plaintiff to show that assets existed or ought to have existed in the hands of the defendant at the date of the writ but this burden might be discharged by proof of some conduct of the defendant amounting to admission of assets. In an administration action such admission entitled the plaintiff to an immediate order for payment without taking the accounts. Indeed the general rule was that admission of assets to one claimant on them was an admission to all: also that an admission of assets can never be retracted unless a case of mistake be clearly established. To charge an executor on his own promise to pay the debt of the testator, in addition to the writing required by the Statute of Frauds, it was necessary to show consideration for the promise. Clearly enough forbearance by the creditor to sue would be good consideration, but there were also decisions to the effect that assets come to the hands of the executor were consideration and that if admission of assets was implied by the promise, the promise was binding.

The Indian system of recovering debts due from a person deceased is different in important respects. In the first place the legal representative who is liable to be sued is not in general an executor or administrator at all but the Muhammadan heir or the Hindu son or a mere intermeddler with the deceased's estate as is now made clear by s. 2 (11) of the Civil P. O. The form of judgment given for the debt against the legal representative is for payment out of the property of the deceased. If no such property remains in the hands of the defendant, execution can be had against his own property on proof that property of the deceased had come into his possession, unless he proves that he has duly applied such property of the deceased. The Court executing the decree will require him to produce accounts as necessary (ss. 50, 52). If the legal representative has wrongly applied part of the assets of the deceased he may be made liable in such proceedings to the creditor: his right being to get credit only for what has been "duly disposed of" or "duly applied." But there is no trace in the Code or, so far as their Lordships are aware, in the decisions of Indian Courts of any doctrine comparable to the English doctrine as to admission of assets. If he

has paid a small legacy when the assets are insufficient to meet the debts, the legal representative may fail to get credit for the money wrongly spent but that is all. He will not render himself liable by an admission as though it were an estoppel; though he must like anyone else fulfil his promises and make good his representation (cf. s. 115, Indian Evi. Act). The law of India puts upon a legal representative the full burden of showing that he has duly applied all assets proved to have come to his hands but it has no bias tending to make a legal representative liable to answer with his own property for the debts of the deceased, even if it be true that he knows better than the creditor the position of the deceased's estate. That "assets come to his hands" is consideration for a personal promise to pay the debt of the deceased is a doctrine to which it is difficult to give a meaning under the Indian Contract Act, but (as has already been indicated) forbearance to sue is consideration as to which there is no difficulty provided it is in fact agreed; though the counter-consideration given by an executor is not necessarily an unqualified promise to pay the debt.

Having construed the memorandum of August 10, 1928, as imposing personal liability upon the defendants in respect only of the interest accruing during the ensuing two years with interest thereon as therein provided, their Lordships are of opinion that there should be added to the preliminary decree for sale as it now stands an order that the appellants be at liberty to apply, in the event of the net sale proceeds proving insufficient to satisfy in full the principal sum and interest and costs and interest on costs due on the security of the equitable mortgage of August 10, 1928, for a personal decree against the defendants for the interest or the balance thereof as the case may be due in respect of the period of two years from August 10, 1928, at 6 per centum per annum with interest thereon at the same rate with quarterly rests.

Their Lordships will humbly advise His Majesty accordingly. They do not find it necessary to disturb the orders for costs made by the High Court on appeal. As the appeal succeeds only upon the question of two years' interest and fails as regards the principal and further interest, their Lordships do not think fit to award any costs of this appeal to the appellants.

and direct that the appellants pay to the respondents half their costs of this appeal.

Solicitors for the Appellants.—Messrs. Latten & Daise.

Solicitors for the Respondents.—Messrs. T. L. Wilson & Co.

MADRAS HIGH COURT

Appeal No. 312 of 1935

March 13, 1939

PANDRANG ROW AND ABDUR RAHMAN, JJ.

MADURA MUNICIPALITY THROUGH

COMMISSIONER—APPELLANT

versus

K. ALAGIRISAMI NAIDU—

RESPONDENT.

Contract Act (IX of 1872), ss. 198, 65, 70—S. 196, if refers to contracts expressly forbidden either by persons ratifying them or by law—Option of ratification, exercise of—Contract of sale unenforceable for want of sanction under s. 68, Madras District Municipalities Act (V of 1920)—Vendee unable to restore goods—Must make compensation—Conflict between s. 65, Contract Act (IX of 1872), and s. 68, Madras District Municipalities Act (V of 1920)—Suit under s. 65, nature of—Interest on amount of compensation—Madras District Municipalities Act (V of 1920), s. 68—Sanction has to precede every contract exceeding Rs. 1,000—Sanction given after expiry of period for which auction is held—Contract held not valid—S. 68, if draws distinction between executed and executory contracts.

Section 196, Contract Act, refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later or by law. Moreover, an option of ratification could be held to be capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open. *Phillips v. Homfrey* (3) and *Morrell v. Studd* (4), relied on.

The language of s. 65, Contract Act, includes agreements which are destitute of legal effect from their inception. When an agreement is discovered to be unenforceable and not illegal and when a party has not been guilty of any conduct which would disentitle him to come to Court there appears to be no reason why the principle underlying s. 65 should not be given effect to. It would be extremely inequitable to find that when a contract has not been entered into by authorized persons or is found to be unenforceable for want of certain formalities, the advantage gained by a party should not be, when it was not intended to be gratuitous, restored or compensated. The relief which a person asks for under s. 65, Contract Act, has not been forbidden by any law and it cannot be legitimately argued that in trying to secure such a relief he is attempting to do indirectly what he had been forbidden by law to do directly. [p. 783, col. 1.]

So where a contract of sale is found to be unenforceable for want of a sanction under s. 68,

Mad. District Municipalities Act, the vendee who has received the goods but is unable to restore them must make compensation for that under s. 65 or s. 70, Contract Act.

[Case-law relied on.]

Section 65, Contract Act was meant to cover those agreements as well which are discovered to be void from their inception while ss. 96 and 97, U. P. District Municipalities Act or ss. 68 and 69, Mad. District Municipalities Act, 1884, apply to contracts only. The distinction between an agreement and a contract must not be lost sight of. It would thus appear that the provisions of s. 65, Contract Act, were only intended to come into play when an agreement was discovered to be unenforceable at law according to the rules laid down in ss. 96-97, U. P. District Municipalities Act or ss. 68 and 69, Mad. District Municipalities Act. The result is that instead of their being any conflict between the special and general laws we find that the general law would permit a party to get relief when on account of a special law the agreement cannot be considered to be enforceable or in other words characterized as a contract.

In a suit on the basis of a contract, a party is trying to enforce its terms while in a suit under s. 65, a party merely asks for restoration or compensation as the agreement has not matured into a contract and he wants to be placed in the position in which he would have been if no agreement had been entered into.

In the absence of any contract, there is no liability to pay any interest and the same cannot be decreed.

Sub-cl. (1) and sub-cl. (2) of s. 68, Mad. District Municipalities Act cannot be construed to mean that while delegation of the power under sub-cl. (1) might be general in regard to contracts of less than Rs. 1,000 the power of making contracts in regard to transactions exceeding that figure must be specific. Moreover, the necessity to obtain the sanction of the Council for the making of a contract before the same is made implies that the Council must be made aware not only of the matter in regard to which the contract would be entered into but also in regard to its terms and conditions. The sanction has to precede and not follow the making of every contract which exceed Rs. 1,000. Where, therefore, a person has made a bid at a Municipal auction and the contract has been sanctioned by the Municipality after the expiry of the period for which the auction is held, the contract is not valid.

The word "contracts" used in s. 68, Mad. District Municipalities Act covers both "executed" and "executory" contracts.

A. against the decree of the Sub-Judge (Principal), Madura, dated March 8, 1935.

Mr. M. Patanjali Sastry, for the Appellant.

Mr. K. Rajah Ayyer, for the Respondent.

Abdur Rahman, J.—This appeal arises out of a suit instituted on behalf of the Madura Municipality for the recovery of a balance of Rs. 5,220-7-1 alleged to have been due from the defendant in respect of the rights of taking rubbish and night-soil for the years 1928-29 and 1929-30, and for interest calculated at 12 per cent. per annum. It was asserted in the plaint that

the defendant was the highest bidder in auctions held by the Sales Committee of the Madura Municipality for both these years, the defendant's bid being Rs. 53,500 for the first year and Rs. 55,500 for the second one. The defendant had, it was admitted, paid the whole of the amount for the first year leaving a balance of Rs. 146-7-0 for interest and the greater portion of the amount due for the second year leaving a balance of Rs. 4,181-7-1 for principal and Rs. 892-9-0 for interest. So far as the first year was concerned, a decree for Rs. 146-7-0 was passed in favour of the Municipality and no appeal has been filed by the defendant against that portion of the decree. As for the balance of Rs. 5,074-0-1, the trial Court held that there was no valid contract between the parties as the mandatory requirements of ss. 68 and 69, District Municipalities Act, were not complied with, but the plaintiff would be entitled to recover the amount if it was found to be due on the principles underlying ss. 65 and 70, Contract Act. The trial Court was not however satisfied on merits that the Municipality had succeeded in establishing its claim. The suit was therefore dismissed in regard to the second year. The Municipality has preferred this appeal in consequence.

The first point which arises for determination relates to the validity of the agreement executed by the defendant and signed by the Chairman of the Municipality and some of its members on April 8, 1929, (Ex. B) after the second auction had been held. It may not be very material in this case but it is rather interesting to find that most of the terms of the printed agreement which the defendant was asked to sign and signed had nothing to do with the sale of rubbish and night-soil. The Municipal clerk who was entrusted with the duty of having the agreement prepared appears to have selected a wrong printed form for the purpose and got it executed by the defendant. The mistake does not seem to have been detected even when the Chairman or the other members were signing. The document thus had led to some confusion but in view of the conclusions to which we have arrived, this mistake has not proved to be material.

The agreement on which reliance was primarily placed in the plaint was not sanctioned by the Municipality until a few months after the expiry of the period for which the second auction was held. It has not been denied and indeed it cannot be disputed that the value or amount of the

contract, Ex. B, exceeds Rs. 1,000. The question then is if the Chairman or any other person could enter into this contract without the previous sanction of the Municipality. An examination of the provisions contained in s. 68, Madras District Municipalities Act, would show that the Municipality is authorized to delegate to the Chairman or Committee consisting of two or more members the power of making on its behalf any contract whereof the value or amount does not exceed Rs. 1,000, but when the value or amount of the contract exceeds Rs. 1,000 the sanction of the Municipality has to be taken for the making of the contract before the same is made. This means that no contract of the value or amount exceeding Rs. 1,000 can be entered into or made by any person before the sanction of the Municipality has been obtained. It was contended by Mr. Patanjali Sastri on behalf of the Municipality that it would be unnecessary for the Municipal Council to sanction every individual transaction before it is made and that it would be enough if instead of delegating an authority generally to either the Chairman or to a Committee consisting of two or more members of the Municipal Council as permitted by s. 68, sub-cl. (1), it confers the power of entering into or making a contract in regard to a particular transaction. In other words, the point of distinction according to him between sub-cl. (1) and sub-cl. (2) of the section is that while delegation of the power under sub-cl. (1) might be general in regard to contracts of less than Rs. 1,000 the power of making contracts in regard to transactions exceeding that figure must be specific, although he contends that in neither case would it be necessary for the Municipal Council to know the exact terms on which the contract was to be entered into.

We cannot accept this contention and are of opinion that s. 68 (2) could not be construed in that manner. The omission of any reference in that sub-section to the persons on whom this power could be conferred, if it could be conferred at all, is significant. Moreover, the necessity to obtain the sanction of the Council for the making of a contract before the same is made implies that the Council must be made aware not only of the matter in regard to which the contract would be entered into but also in regard to its terms and conditions. The sanction has to precede and not follow the making of every contract which exceeds Rs. 1,000. This could only

be possible if the whole of the proceedings, which culminated in the highest bids made by the defendant, are, before the necessary sanction is obtained, considered to be in the nature of an offer which has to be placed before the Municipality and could mature into a contract after that has been accorded. Once the proposal is sanctioned by the Municipality all that would remain to make the contract enforceable would be to express it in a manner recognized by law. The penalty for entering into a contract which contravenes the provisions of s. 68 is contained in sub-cl. (2) of s. 69 and the result is that any contract entered into in contravention of the provisions of s. 68 (2) would not bind the Municipal Council. It must therefore follow that this contract could not be deemed to have come into existence after the auction was finished; and the final bid given by the defendant must be in the circumstances regarded as a mere offer. This had to be accepted within a reasonable time and could not be held to have remained open even after the period for which it was made. The acceptance of the offer by the Municipal Council in July 1930 was in our opinion misconceived.

It was argued by the learned Counsel for the appellant that the resolution passed by the Municipality in July 1930 must at all events be taken to have ratified the auction held in April 1929 and must be taken to relate back to the date on which the agreement was signed by the Chairman and other Municipal Councillors. It is hardly necessary to consider the correctness of the argument in regard to the doctrine of relation back as applied to contracts entered into by certain persons on behalf of others without their knowledge or authority particularly when the decision in *Bolton v. Lambert* (1), on which reliance was placed by Mr. Patanjali Sastri in this connection although not disapproved by their Lordships of the Privy Council in *Fleming v. Bank of New Zealand* (2) at p. 587, was yet not approved of by them, and when we find that s. 68, District Municipalities Act, imposes a disability and thus forbids every person other than the Municipality from entering into or sanctioning a contract which exceeds Rs. 1,000 in value. Section 196, Contract Act, refers to contracts which have been entered into by persons

on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later or by law. Moreover, an option of ratification could be held to be capable of being exercised within a reasonable time of the act purported to be ratified as held in *Phillips v. Homfrey* (3) and *Morrell v. Studd* (4), and not after the expiry of the period for which the option was open or as in this case three months after the expiry of the period for which the bid was given by the defendant. It is true that a distinction has been made at times between 'executed' and 'executory' contracts (see *Leake on Contracts*, Edn. 5, pp. 415-416), but s. 68, Mad. District Municipalities Act, which we have now been called upon to construe, draws no such distinction and the word "contracts" used in that section must be held to cover both "executed" and "executory" contracts. We would therefore hold that there was no valid contract between the parties and the view taken by the lower Court on this point was correct.

This is however not enough to dispose of the case. The defendant had admittedly taken the rubbish and night-soil from the Municipal depots for the whole year and has already paid, as stated above a large portion of the amount out of what he had agreed to pay. Should the Municipality be held disentitled then to recover the balance or any other sum which may be found to be due either on the basis of *quantum valabat* or on the principle embodied in s. 70, Contract Act, on the ground that the contract has been found to be unenforceable? There was a divergence of opinion on this point so far as this Court is concerned and some of the cases had gone to the length of deciding that when an agreement was found to be unenforceable for want of fulfilment of statutory requirement the whole suit should be dismissed: See *Raman Chetti v. Municipal Council, Kumbakonam* (5) and *Ramaswami Chetti v. Municipal Council, Tanjore* (6). But a more equitable view has been taken in later cases. See *Palaniswami Goundan v. English and Scottish Co-operative Wholesale Societies* (7), *Arunachala Nadar v. Sriwilliputtur*

(3) (1871) 6 Ch. A 770.

(4) (1913) 2 Ch. 648; 83 L J Ch. 114; 109 L T 628; 58 S J 12.

(5) 30 M 290.

(6) 29 M 360.

(7) A I R 1933 Mad. 145; 145 Ind. Cas. 412; 6 R M 63.

(1) (1889) 41 Ch. D 295; 58 L J Ch. 425; 60 L T 687; 37 W R 434.

(2) (1900) A C 577; (587) 69 L J P C 120; 83 L T 1; 16 T L R 469.

Municipal Council (8) and *Mudura Municipality v. Raman Servai* (9). The language of s. 65, Contract Act, has been held by their Lordships of the Privy Council in *Harnath Kunwar v. Indar Bahadur Singh* (10) to include agreements which are destitute of legal effect from their inception, and would therefore cover a case like the present where the agreement in pursuance of which the defendant took delivery of the rubbish and night-soil has been discovered to be of no legal effect from the beginning. There are certain cases which appear to hold that s. 65 would have no application where the void character of the agreement was known to the party: see *Ledu Coachman v. Hiralal Bose* (11), *Nathu Khan v. Sewak Koeri* (12). But these cases were decided on the principle that the contracts being either immoral or opposed to public policy were inherently illegal and the parties being in *pari delicto* the Courts could not render any assistance in enforcing them. The same cannot be said however of cases where agreements are held to be merely unenforceable on account of a failure to comply with certain forms or for want of giving expression to an agreement in the manner prescribed by law. The reason for this difference is obvious. It is impossible for a Court to give effect to or recognize an illegal transaction either by enforcing it or by ordering restitution to a party after it has been wholly or partially carried out. But when an agreement is discovered to be unenforceable and not illegal and when a party has not been guilty of any conduct which would disentitle him to come to Court, there appears to be no reason why the principle underlying s. 65 should not be given effect to.

It is hardly necessary to refer to English cases in this connection. Apparently, the language employed in s. 65 is much wider than the one employed in the Act of Parliament which came up for construction before Lindley, L. J., in *Young & Co. v. Mayor and Corporation of Royal Leamington Spa* (13) and since the statutory law of India is different from that which prevailed in England, the English decisions could not be of much value in interpreting the Indian statute. While examining ss. 65 and 70, Contract Act, a number of Indian decisions came to our notice and since most of them have taken the view which we ourselves take of these sections it would be supererogatory to do anything more than cite them: see *Municipal Committee, Gurjranwala v. Fazl Din* (14), *Municipal Committee, Lahore v. Miran Baksh* (15), *Zulaing v. Yamethin District Council* (16), *Mahammad Ebrahim Molla v. Commissioners for Port of Chittagong* (17), and *Pallonjee Eduljee & Sons v. Lonavale City Municipality* (18). A Full Bench case of the Lucknow Chief Court, *Municipal Board, Lucknow v. S. C. Deb* (19), takes a different view however. Having given our careful attention to the matter and with deference to the learned Chief Judge who wrote the leading judgment in that case we have not been impressed by the reasons underlying that decision. If the English cases on which reliance was placed are not taken into account, as they cannot be for the reason which has been mentioned above, the decision if analyzed will be found to have been arrived at mainly on two grounds: (1) that in the event of a divergence between a special law and the general law of the country the former has to be preferred and (2) that a man cannot be allowed to do by indirect means what he is forbidden by law to do directly.

The propositions advanced by the learned Chief Judge may be sound but did they have any application to the facts of that case? Is the special law in any way different from what has been described to be the general law of the country? According to the learned Chief Judge there is a conflict between the general law of the country as laid down in s. 65, Contract Act and the so-called special law in s. 97, U. P.

(13) (1883) 8 A O 517; 52 L J Q B 713; 49 L T 1; 30 W R 500.
(14) 11 L 121; 121 Ind. Cas. 187; A I R 1929 Lah. 742; 31 P L R 403; Ind. Rul. (1930) Lah. 187.
(15) 13 L 561; 140 Ind. Cas. 621; A I R 1933 Lah. 15; 33 P L R 1051; Ind. Rul. (1933) Lah. 22.
(16) 10 R 522; 140 Ind. Cas. 737; A I R 1932 Rang. 176; Ind. Rul. (1933) Rang. 5.
(17) 54 O 189; 103 Ind. Cas. 2; A I R 1927 Cal. 465.
(18) 1 L R (1937) Bom. 782; 171 Ind. Cas. 660; A I R 1937 Bom. 417; 39 Bom. L R 835; 10 R B 217.
(19) 8 Luck. 1; 137 Ind. Cas. 574; A I R 1932 Oudh 193; 9 O W N 461; Ind. Rul. (1932) Oudh 236 (F B).

(8) 58 M 65; 151 Ind. Cas. 46; A I R 1934 Mad. 480; 67 M L J 38; 40 L W 18; 7 R M 109; (1934) M W N 1163.

(9) 43 L W 39; 161 Ind. Cas. 46; A I R 1936 Mad. 98; (1936) M W N 85; 8 R M 764.

(10) 45 A 179; 71 Ind. Cas. 629; A I R 1922 P O 403; 50 I A 69; 23 O O 223; 9 O & A L R 270; 9 O L J 652; 44 M L J 489; 37 O L J 346; 27 O W N 949; 18 L W 323; 33 M L T 216; 5 P L T 281; 2 Pat. L R 237 (P O).

(11) 43 O 115; 29 Ind. Cas. 625; A I R 1916 Cal. 266; 21 O L J 537; 19 O W N 919.

(12) 15 O W N 408; 9 Ind. Cas. 161.

District Municipalities Act. We do not agree with this statement. The special law in the U. P. Municipalities Act is almost the same except in regard to certain minor details as contained in ss. 68 and 69, Mad. District Municipalities Act (IV of 1884) and defines how certain contracts between the municipalities and private individuals have to be made or expressed in order to be binding. Section 65, Contract Act, on the other hand only provides for the devolution of an obligation on a person who has received some advantage under an agreement which has been discovered to be void or unenforceable from the very beginning. The sections of the two Acts were framed by Legislatures with entirely different objects and one cannot be said to be in conflict with the other. Section 65, Contract Act, was meant to cover those agreements as well which are discovered to be void from their inception while ss. 96 and 97, U. P. District Municipalities Act or ss. 68 and 69, Mad. District Municipalities Act (IV of 1884), apply to contracts only. The distinction between an agreement and a contract must not be lost sight of. It would thus appear that the provisions of s. 65, Contract Act, were only intended to come into play when an agreement was discovered to be unenforceable at law according to the rules laid down in ss. 96-97, U. P. District Municipalities Act or ss. 68 and 69, Mad. District Municipalities Act. The result is that instead of there being any conflict between the special and general laws we find that the general law would permit a party to get relief when on account of a special law the agreement cannot be considered to be enforceable or in other words characterized as a contract.

So far as the second ground for the decision is concerned, the underlying assumption appears to be that a party in asking for restoration or compensation under s. 65, Contract Act, on account of the agreement having been denied the status of a contract, is nonetheless enforcing the same. This is not correct. In a suit on the basis of a contract, a party is trying to enforce its terms while in a suit under s. 65, a party merely asks for restoration or compensation as the agreement has not matured into a contract and he wants to be placed in the position in which he would have been if no agreement had been entered into. Moreover, a perusal of these sections in the District Municipalities Act would show that the Municipalities or their officers and members were not for-

bidden to enter into contracts. What they appear to lay down is that if a certain contract is entered into either by a person not mentioned in these sections or without the formalities regarded by them to be indispensable it would not be binding on the Board or the Municipality. First of all the rule only safeguards the interests of the Municipalities and does not specifically lay down that the contracts would not be enforceable at their instance. But even if the doctrine of mutuality is held to be applicable the only inference would be that the contracts could not be enforced by either party. It cannot be legitimately contended that in asking for a relief under s. 65, Contract Act, they are doing the same thing indirectly as was forbidden by the Municipalities Act. It would be extremely inequitable to find that when a contract has not been entered into by authorized persons or is found to be unenforceable for want of certain formalities, the advantage gained by a party should not be, when it was not intended to be gratuitous, restored or compensated. The Courts in India are and have been administering both law and equity and there is no reason why this equitable relief, which since the passing of Judicature Acts is grantable even by the Courts in England, should not be grantable here. The relief which a person asks for under s. 65, Contract Act, has not been forbidden by any law and it cannot be legitimately argued that in trying to secure such a relief he is attempting to do indirectly what he had been forbidden by law to do directly. By asking for an equitable relief he cannot be said to have got round the law. Indeed he ought to be taken to have admitted that the law does not permit such agreements to be enforced and it is only then that he asks the Courts to exercise its equitable jurisdiction in restoring the parties to the position in which they were before these infructuous agreements came into existence. We will be by holding s. 65, Contract Act, to be applicable, giving effect to both the letter and the spirit of the law.

The same conclusion would be arrived at if we hold that the contracts did not exist in the eye of law. In the absence of such a contract s. 70, Contract Act could well be applied. It cannot be said that there was anything unlawful in permitting the defendant to remove the rubbish or night-soil. It was certainly not intended to be done gratuitously and the benefit

was on the defendant's own showing enjoyed by him. We must therefore hold that as the defendant is unable to restore the rubbish and the night-soil which he had taken from the Municipal depots he must make compensation for it to the plaintiff Municipality. The next point for determination is the amount of compensation to which the plaintiff is entitled under ss. 65 and 70, Contract Act. The defendant had agreed to purchase the rubbish and night-soil for the year 1928-29 for a sum of Rs. 53,500. He offered to purchase the same for the year 1929-30 for a sum of Rs. 55,500. The increase in the offer was not apparently due to any increase in the market rates but in all probability to the fact that the Municipality had invited tenders for the removal of rubbish and night-soil by motor lorries instead of by Municipal carts: see Exs. J and J-1. A remark in Ex. Q that the depot for collections would be removed to the new site near Mathukattinam tank, Vandiyur limits leads us to think that this was also one of the factors which had induced the defendant to make a higher bid in the auction. The contract for the removal of rubbish and night-soil by motor lorries was given after a few months and the depots were not shifted to the new site during the whole of the period in which he removed them. If the defendant had not been convinced of these facts it is improbable that he would have exceeded the bid which he had given in the previous year. On account of the delay on the part of the Municipality in carrying out these changes we are inclined to hold that the proper measure of compensation would be the amount which the defendant had agreed to pay for the previous year particularly when the defendant has admitted in his statement as a witness that the prices of the rubbish and night-soil had not fallen during the year 1929-30. The defendant has not produced all the accounts which were in his possession and in the absence of the original chits in which the accounts were kept we are not prepared to believe that the accounts produced by him relate to all the supplies which were made to him from various depots. We must therefore hold that he was liable to pay Rs. 53,500 as compensation to the Municipality. Having paid Rs. 51,315-8-11, he is liable to pay balance Rs. 2,181-7-1. In the absence of any contract, there is no liability to pay any interest and the same cannot be decreed. We would therefore pass a

decree for Rs. 2,181-7-1 in favour of the Municipality. As the parties have partly succeeded and partly failed the proper order in the circumstances appears to be that they should bear their own costs both here and in the Court below.

Before parting with this case we must however advert to the illegible handwriting in which the evidence was recorded by the learned Subordinate Judge. We had occasion to refer to it during the course of the argument to verify the printed statements and we found it impossible to read them or to decipher as to what had been written by him. It may not be possible to insist on the handwriting being good but it must be legible. It is a surprise to us how the record of evidence which is almost indecipherable was at all printed. We hope that the learned Subordinate Judge would take steps in future to see that the statements recorded by him are not difficult to read.

N.-D.

Order accordingly.

NAGPUR HIGH COURT

Second Appeal No. 45 of 1935

October 28, 1937

POLLOCK AND DIGBY, JJ.

BHIKULAL AND ANOTHER—APPELLANTS
versus

BHAITYALAL AND OTHERS—RESPONDENTS

C. P. Tenancy Act (I of 1920), s. 9—Sale of occupancy holding in execution of rent decree—If free from encumbrance.

An absolute occupancy field sold in execution of a rent decree under s. 9, C. P. Ten. Act is not sold free from encumbrances. What is sold in execution of the rent decree is the interest of the judgment-debtor and where he has mortgaged the holding he holds it subject to the mortgage which he has created. The ordinary principle is that a purchaser cannot get a better title than that possessed by his vendor. 99 Ind. Cas. 415 (1) and S. A. No. 339 of 1934, relied on.

S. A. from the appellate decree of the Court of the District Judge, Nagpur, dated September 15, 1934.

R. B. M. B. Kinkhede and Mr. M. D. Khandekar, for the Appellants.

Mr. A. L. Halve, for Respondents Nos. 1 and 2.

Pollock, J.—On February 13, 1929 defendant No. 2 mortgaged his absolute occupancy field to the plaintiffs for Rs. 1,000. On November 4, 1930 the landlord obtained a decree for Rs. 107-3-9 in

cluding costs against defendant No. 2 for arrears of rent. The field was sold in execution of this decree and purchased by defendant Nos. 1 and 3 for Rs. 510 on November 28, 1931.

The plaintiffs have now sued to enforce their mortgage, and the main question in dispute is whether the field was sold free from encumbrances. Section 9 (1) of the C. P. Ten. Act provides that the rent of a holding of an absolute occupancy tenant shall be a first charge thereon and that such holding shall be liable to sale for the satisfaction of such charge in execution of a decree for rent against the tenant, and sub-s. (3) provides that any person claiming an interest in the holding may deposit in the Court executing a decree for rent on account of such holding the amount due under such decree and such deposit shall be credited in satisfaction of such decree. The plaintiffs, therefore, as mortgagees, could have deposited the amount due under the rent decree and thus have saved the property from being sold in execution. They did not do so and it is now contended that they cannot enforce their mortgage as the property was sold free from encumbrances at the execution sale. In support of this contention we have been referred to the opinion of Sir B. K. Bose which is printed at p. 191 of Barway's Law of Tenancy. On the other hand there is the decision of Kinkhede, A. J. C., in *Asaram v. Kanchedilal* (1) and of Gruer, J., in *Ganba v. Ganpatsao*, Second Appeal No. 339 of 1934 that an absolute occupancy field which has been sold in execution of a rent decree is not sold free from encumbrances. This view is accepted in Barway's Law of Tenancy, in Brahmarakshas's C. P. Ten. Act, and impliedly in Kathalay's Land Revenue Act at p. 531. What was sold in execution of the rent decree was the interest of the judgment-debtor and he held the holding subject to the mortgage which he had created. The ordinary principle is that a purchaser cannot get a better title than that possessed by his vendor, and, in the absence of any specific provision, I think that it must be held that the holding was not sold free from encumbrances. In s. 138 of the C. P. Land Revenue Act of 1917 it is specifically provided that any estate, *mahal*, share or land sold for arrears of land revenue due in respect thereof shall be sold free from

encumbrances, but there is no such provision in s. 9 of the C. P. Ten. Act, which was passed only three years later. If the legislature had intended that an absolute occupancy holding sold in execution of a rent decree should be sold free from encumbrances, it would have been very easy for it to say so and, in the absence of such provision, I think that it must be held that it is not sold free from encumbrances.

The appellants took the objection that the mortgage deed had not been properly attested. Punjaji (P. W. No. 1) one of the attesting witnesses, said that the executant signed in their presence and that then he and the other attesting witness then attested it. It is clearly implied that the attesting witnesses attested in the presence of the executant, and this point was apparently not argued in the lower Appellate Court, nor does it form a ground of appeal in this Court. I think that there is no substance in it.

The last point taken is one of interest. The consideration for the mortgage was Rs. 1,000, to which Rs. 250 was added as prospective interest, and the mortgagor agreed to repay the amount in 10 annual instalments of Rs. 125. Defaulted instalments were to carry interest at 2 per cent. per mensem from the date of the deed until payment of the entire amount and there was an agreement that if there was default in paying two instalments the mortgagor would pay the entire amount together with interest in a lump. There was no provision for the payment of any interest after the entire amount had become exigible. The agreement to pay interest on any defaulted instalment from the date of the deed was clearly a penalty, and the mortgagees are therefore entitled only to such interest as we think reasonable. From January 1, 1932 they are not entitled to interest exceeding 10 per cent. per annum by reason of the C. P. Reduction of Interest Act, 1936. I think that reasonable interest in this case would be simple interest at 12 per cent. per annum on Rs. 1,000 from the date of the mortgage until December 31, 1931, and simple interest at 10 per cent. per annum on Rs. 1,000 from January 1, 1932 until the new *dies datus* which I fix as January 18, 1938. There will therefore be a preliminary decree for sale in the usual form for Rs. 1,000 principal together with interest at the above rates and costs. If defendants Nos. 1 and 3 redeem, they will be

given credit for Rs. 107-3-9 which was the amount of the rent decree; I express no opinion on the correctness of this decision, but the decision was not challenged in appeal. As the appeal has almost entirely failed, I think that the plaintiffs should be allowed their costs in full throughout and Counsel's fee of Rs. 50 in this Court.

Digby, J.—I agree and would add a few observations. Under the Ten. Act of 1893 it was provided in s. 43 that the rent of the holding of an absolute occupancy tenant should be the first charge on that holding which should, subject to the other provisions of that Act, be liable to sale in execution of a decree for arrears of the rent thereof. It was held in *Bhagwandass v. Tarachand* (2) that the word 'charge' had much the same meaning as the same word used in s. 100 of the T. P. Act. It was decided that it was open to a landlord to institute a suit for the sale of the property charged in which case all persons having an interest in the said property must be joined as parties and that if a decree for sale were obtained and the holding sold in pursuance of that decree then the purchaser would undoubtedly take the holding free from all incumbrances. Under s. 9 of the Act now in force a simplified procedure is allowed. It is provided that notwithstanding anything contained in s. 100 of the T. P. Act, 1882, and O. XXXIV of the First Schedule of the Civil P. O., 1908, such holding shall be liable to sale for the satisfaction of the charge for rent in execution of a decree for rent against the tenant whether such decree orders such sale or not; while sub-s. (3) provides that any person claiming an interest in the holding may deposit in the Court executing a decree for rent the amount due under such decree.

It is no doubt arguable that in this simplified procedure the landlord is entitled to put to sale the holding over which he has a charge under s. 9, and not merely an equity of redemption in that holding. It is arguable that the redemption of the charge must be made by the mortgagee at the time under s. 9 (3), and that this is one of the cases where the sole remedy of the mortgagee who does not redeem will be that indicated by s. 73 of the T. P. Act. Nevertheless, it is a cardinal principle that nobody should be prejudiced by proceedings to which he is not a party.

(2) 14 O P L R 17, (19).

If then the mortgagee's right does not disappear in proceedings to enforce the charge against him it will subsist. If s. 9 permits of such a construction, it should be adopted. I think that although s. 9, as amended, provides a convenient procedure by which the landlord can satisfy his charge by sale of the property without having to bring a charge suit, the provisions of s. 9 do not involve the result that the mortgagee will be deprived of his rights under the mortgage by proceedings to which he is not a party. The point is not free from difficulty, and the opinion of Sir. B. K. Bose is obviously founded on the position that the landlord's charge exists over the holding, over the tenure which he or his predecessors created, and that if O. XXXIV of the Civil P. O., does not apply the landlord enforcing the charge does not have to make the mortgagee, who is really in the position of a subsequent mortgagee (his mortgage being postponed to the first charge) a party. But I consider that the view previously taken by Gruer, J., and now by my learned brother is the right view. I would also observe that if the contrary view were adopted there would be risk of fraud, by which mortgages could be rendered infructuous by decrees for arrears obtained behind the back of the mortgagee. I entirely agree that it would have been very easy for the Legislature to have stated clearly that the property was to be sold free from incumbrance if that was the intention of the Legislature.

s.

Appeal dismissed.

PRIVY COUNCIL

Appeal from the Allahabad High Court
March 18, 1940

LORD ATKIN, LORD THANKERTON AND LORD
PORTER.

HANSRAJ GUPTA AND OTHERS—
APPELLANTS

versus

THE DEJRA DUN-MUSSOORIE
ELECTRIC TRAMWAY Co. LTD.

—RESPONDENT

Fraud—Proof of—Suspicion not enough.

The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless, therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. [p. 789, col. 1.]

Sir Herbert Cunliffe K. C. and Mr. W. Wallach, for the Appellant.

Messrs. J. P. Eddy K. C. and Dingle Foot, for the Respondent.

Lord Thankerton.—This appeal is from a decree of the High Court of Judicature at Allahabad, dated September 1, 1933, which reversed a decree of the Subordinate Judge at Dehra Dun dated February 4, 1931 and, granted a decree to the plaintiff-respondent for a sum of Rs. 13,100 with interest at 6 per cent. from August 31, 1923.

The suit arises out of the misdeeds of Beltie Shah Gilani, who was the promoter and Managing Agent and Managing Director of the Dehra Dun-Mussoorie Electric Tramway, which was registered under the Indian Companies Act, 1913, on August 23, 1921, and was ordered to be wound up by the High Court on March 26, 1926. N. P. Asthani and Bhagwati Shanker being appointed the Official Liquidators. On investigation, it was found that large sums of the Company's monies had been misappropriated by Beltie Shah.

Certain contracts with the Company were made by Lala Raghmal, who carried on business as a contractor under the name of Madho Ram-Hadreo Dass at Calcutta and under the name of Madho-Ram-Budh Sing in Delhi. He was also a large share-holder in the Company. Raghmal died in September 1926, and the appellants Nos. 1 to 5 (appellant No. 3 being since deceased) are his legal representatives. Appellant No. 7 is the Official Receiver of the Calcutta High Court, who was appointed Receiver of the estate of Raghmal by an order of that Court dated June 16 1931. Appellant No. 6, Lala Mela Ram, was in the service of Raghmal and was the manager of his Delhi business.

On June 25, 1929, the Company through its Official Liquidators instituted the present suit claiming a sum of Rs. 39,750 with interest at 12 per cent. per annum, *i. e.*, Rs. 30,240-14-9, and future and *pendente lite* interest, on the ground of fraudulent conspiracy of Raghmal and his authorised agent, Mela Ram, with Beltie Shah in the misappropriation of the sum of Rs. 39,750 of the Company's monies.

Historically, it should be mentioned that in 1927 the Liquidators had taken misfeasance proceedings under s. 235 of the Indian Companies Act against Beltie Shah, which resulted in an order dated April 3, 1927, against Beltie Shah for sums amounting to

over three lakhs, which included the sum of Rs. 39,750 here in question. Beltie Shah was also criminally prosecuted and was sentenced to imprisonment for a period of five years. In March 1928, the Liquidators applied under s. 186 of the Indian Companies Act, for recovery from Raghmal of two sums of money, of which one was the amount here in dispute, but the application failed. The Liquidators also took misfeasance proceedings against the Company's auditors, Mukerji, J., on February 26, 1929, decreed the Official Liquidators' application and held the auditors liable to pay Rs. 89,812-8-0, including the amount here in dispute. On appeal, the High Court affirmed, with this modification :

"Though we affirm the order of the learned Judge that the auditors are to compensate the Company, to the extent of Rs. 39,750 we direct that execution for this amount shall be stayed until further order. The Liquidators are to be at liberty to make an application to discharge the stay order hereby granted in respect of this sum of Rs. 39,750 when the contest between themselves and the contractors has been finally decided (a) adversely to the Liquidators, or (b) in favour of the Liquidators, and they, after taking all reasonable steps to recover the amount, have failed wholly or in part to do so. If the Liquidators recover a portion of the Rs. 39,750 from the contractors, they should then apply to the Court giving credit to the auditors for that amount and seeking execution as to the balance only."

The auditors obtained leave to appeal to His Majesty in Council, but the appeal was compromised by the auditors paying Rs. 18,500 to the Liquidators in full and final discharge of the said decree. As will be seen, their Lordships do not consider these various proceedings material to the only issue which they find it necessary to consider.

Their Lordships do not find it necessary to review the evidence in detail, as that has been fully and well done by the Subordinate Judge.

It is established that the various sums making up the amount of Rs. 39,750 were misappropriated by Beltie Shah on the following dates,

			Rs.
April 11, 1922	...	...	8,750
April 24, 1922	...	...	6,000
August 18, 1922	...	...	2,000
October 26, 1922	...	...	5,000
January 15, 1923	...	...	12,000
March 29, 1923	...	...	6,000
			39,750

Both the Courts below have found that Mela Ram was not a party to the original misappropriations, and that he was not aware of them at least until the 18th or August 19

1923, when he had a meeting with Beltie Shah at Dehra Dun and signed at least two of the receipts for these sums. The plaintiff's case of an original conspiracy for the misappropriation of these sums has gone; further no suggestion is now made that Raghunath was personally a party to any fraud, but his estate is sought to be made liable for the alleged fraud of Mela Ram, his employee.

The alternative case, on which the respondent succeeded in the High Court, was stated by Counsel before this Board as follows,—that Mela Ram and Beltie Shah were jointly concerned in July and August 1923, in manufacturing false receipts fraudulently, to deceive the Company's auditors, thereby enabling Beltie Shah to conceal his misappropriation of the Company's moneys to the amount of Rs. 39,750; that they were fraudulently conspiring to that end, in order to defraud the Company; that the auditors were deceived, and that Beltie Shah was thereby enabled to conceal the misappropriations until December, 1926, when the Liquidators first became aware of the misappropriations; and that the Company was entitled to recover the damages flowing from that concealment from Mela Ram and also from the estate of Raghunath.

The Subordinate Judge believed the evidence of Mela Ram, whom he saw, and, in particular, accepted Mela Ram's evidence as to the explanations given to him by Beltie Shah which induced him to sign the receipts without any suspicion. The High Court, while recognising the respect with which they were bound to regard the views of the Judge who saw the witness as to his credibility, held that they were constrained by the other evidence, particularly the documentary evidence, to reject the explanations of Mela Ram, and to hold that he was a party to the fraud practised on the Company's auditors. They rejected certain other defences maintained by the present appellants as to limitation, the liability of Raghunath's estate after his death, and the scope of Mela Ram's authority, and, after a remand to ascertain the damages, they made a decree in the respondent's favour for Rs. 13,100 as already mentioned.

The crucial question in the appeal is whether the learned Judges of the High Court were justified in declining to accept Mela Ram's evidence. Their Lordships are prepared to accept the test laid down by Niamat-ullah J., in his judgment. After stating that the party alleging fraud is bound to establish it by cogent evidence

and that suspicion cannot be accepted as proof, the learned Judge says:—

"Unless, therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. I have approached the case with this point of view, and have been driven to the conclusion that the evidence, as a whole, excludes all hypothesis of good faith on the part of Mela Ram in granting the three receipts to Beltie Shah Gilani."

Similarly, Allsop J. says:—

"Considering all the circumstances I cannot believe that Lala Mela Ram issued these receipts in good faith. I am convinced that he issued them at the request of Beltie Shah in order to deceive the auditors and prevent them from entering upon an enquiry and that it was agreed that the liability should be cancelled as soon as the audit was over and the necessity for it ceased to exist."

It will, therefore, be right to examine the reasons given by the learned Judges for their conclusion.

First, as to the suggestion that the third receipt, for Rs. 6,000, was not signed by Mela Ram at the same time as the other two, as stated by him, but was signed after his receipt of the letter dated the August 11, of which there is a copy in the press copy book, their Lordships are of opinion that the Subordinate Judge was right in holding that the despatch of this letter had not been proved. Allsop J., lays no stress on this point, but Niamat-ullah J., says that P. W. Lahiri had stated that the letter was sent. This is not so, as Lahiri says that he had nothing to do with the letter when it was sent, and "it may be possible that notwithstanding that the letter of August 11, 1923, was not cancelled it was not despatched at all." The evidence clearly shows that the Company's books are very far from being reliable, and that they were frequently manipulated for Beltie Shah's purposes. The Subordinate Judge was entitled to take the view that this letter was part of Beltie Shah's devices to deceive the auditors.

Allsop J., relies on the previous relations of Beltie Shah and Mela Ram as justifying the conclusion that Mela Ram had at least some reason for thinking that Beltie Shah was not the absolutely honest and upright business man that he might appear to be to others who had only a casual knowledge of his affairs. This conclusion is based on the transactions relative to Raghunath's application for 10,000 ordinary shares of Rs. 10 each and 250 preference shares of Rs. 100 each dated the August 12, 1922, and the payment of the amount due on allotment of the shares by endorsement back to the Company of the cheque for Rs. 31,250 in

Raghmal's favour, part of the Rs. 35,000 advanced to Raghmal on contracts to be placed by him. Their Lordships are unable to agree that any dishonesty is necessarily to be inferred in these transactions. In the first place, Raghmal, against whom there is no reflection, was himself concerned in the application for shares, which is signed by him. Moreover the letter of September 13, 1922. Ex. C, which embodies the transaction, was sent to Calcutta and not to Delhi, and there is nothing wrong *ex facie* of the transaction. Similarly, the payment of commission on the shares to Mela Ram, which he states he handed over to Raghmal, is not of such an unusual character as necessarily to justify suspicion of Beltie Shah's honesty. The transactions are recorded in the books of the Company. Counsel for the respondent, who did not press this point, made a further suggestion, viz., that the agreement of February 23, 1922, between the Company and Madho Ram-Hardeo Das was so unusual and unheard-of that it was clearly a sham and that there was all the time a secret scheme between Beltie Shah and Mela Ram for despoiling of the Company. There is no evidence to support this suggestion, every probability is against it, and, in fact, though the Company's engineers, Tata Engineering Company Ltd., at first disapproved of the agreement, they ultimately accepted it. It should be remembered that the misappropriations that Beltie Shah committed in respect of the matters in which Mela Ram was concerned was a small part of his total misappropriations and that every probability was against his making a confidant of Mela Ram, who was only an employee.

There remains the question whether the statement of Mela Ram as to the explanations given to him by Beltie Shah, which induced him to sign the receipts is such as cannot be accepted as true, and not such as may be true or may merely give rise to suspicion as to its untruth.

In the first place, their Lordships are of opinion that the learned Judges have placed too much stress on the terms of the receipts; it is true that, correctly read, they appear to acknowledge cash payments direct to Mela Ram's firm, but the word "cash" does not appear in them, and it is made clear by the evidence that they were regarded not only by Mela Ram but also by Lahiri as covering payments on the firm's account to the manufacturers in England.

In the next place, the evidence of the

respondent's own witness, Lahiri, the accountant of the Company, who had knowledge of the books and of the auditors' requirements, appears to negative the validity of the conclusion of the High Court. Lahiri states:

"I understood at the time that some materials had been purchased and were awaiting delivery. I understood so on the assurance given by Beltie Shah. At that time (the end of August, 1923), I had no reason to suspect the accuracy of the assurance held out by Beltie Shah. At the time of making this reverse entry Mr. Beltie Shah explained to me that this amount had not been paid to Madho Ram-Hardeo Das and Madho Ram-Budh Singh, but that it had been paid directly to the manufacturers on behalf of Madho Ram-Hardeo Das and Madho Ram-Budh Singh. I had no reason to doubt the accuracy of the assurance held out by Mr. Beltie Shah, because that was the usual course of business between the Company and Lala Raghmal. In other words according to the practice money could be sent either to the manufacturers direct or through Lala Raghmal. I never had any discussions concerning the disputed items either Lala Mela Ram or with Lala Raghmal. From the statement made by Mela Ram to the Liquidator I am aware that Beltie Shah got receipts about these items from Mela Ram on holding out to him the same assurance that he had held out to me."

Bearing in mind the personality of Beltie Shah and his dominating position in the Company's affairs, their Lordships are unable to agree with the opinion of the learned Judges that Mela Ram's statement cannot be accepted. It is to be remembered that Mela Ram was undoubtedly ill at this time, and, further, his lack of business-like methods in not insisting on immediate proof that the payments on account had been made, is by no means necessarily indicative of fraud. Their Lordships would also add that, in their opinion, the conduct of Mela Ram subsequent to the granting of the receipts is—if anything—more consistent with innocence than with fraud. The reverse entries which Mela Ram obtained would be likely to draw the attention not only of the director, but also of the auditors to the matter. Lastly, their Lordships see no reason for doubting Mela Ram's statement that he knew nothing about the audit until about the middle of August. There was no apparent reason why Mela Ram must be taken to have known about the Company's auditing arrangements, or that the receipts were required for that purpose, as the High Court hold.

Their Lordships are accordingly unable to regard as adequate the reasons given by the High Court in justification of their reversal of the finding of the Subordinate Judge as to the evidence of Mela Ram. It follows that the respondent's case of fraud

has failed and the suit must be dismissed. It is therefore unnecessary to hear the parties on the remaining defences to the action, which were held over at the hearing of the appeal, pending the decision of the issue of fraud.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court should be set aside, and that the decree of the Subordinate Judge should be restored. The appellants will have their costs of this appeal, and also their costs in the High Court.

d.

Appeal allowed.

Solicitors for the Appellants:—Messrs. W. W. Box & Co.

Solicitors for the Respondents:—Messrs. Nehra & Co.

NAGPUR HIGH COURT
Miscellaneous Appeal No 139 of 1937
February 28, 1939.

GRILLE AND NIYOGI, JJ.
AZHAR HUSAIN—DECREE-HOLDER—

APPELLANT

versus

MOHAMMAD SHIBLI AND OTHERS

—PLAINTIFF—JUDGMENT-DEBTOR—

RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 58—"Representatives," in s. 47, scope of—Transferees from decree-holder or judgment-debtor, if included—Property attached in execution of decree obtained against legal representatives of deceased—Question, whether property forms part of assets of deceased raised by legal representatives or their transferees—Whether falls under s. 47 or O. XXI, r. 58—Proceedings under s. 47 between parties to suit—Auction-purchaser, if necessary party.

The term 'representatives' occurring in s. 47, Civil P. C., includes not only legal representatives in the sense of heirs, executors or administrators but also representatives-in-interest, that is, any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who so far as such interest is concerned is bound by the decree. *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (1), 25 Ind. Cas. 118 (2) and 51 Ind. Cas. 633 (3), relied on. [p. 792, col. 2.]

Where therefore, a decree is obtained against legal representatives of the deceased in respect of a debt charged against the assets of the deceased and in execution of that decree the assets of the deceased are attached, the question whether the properties attached are assets of the deceased or belong to the legal representatives themselves, raised by the legal representatives or their transferees who are bound by the decree, is a question relating to execution, discharge or satisfaction of the decree and must be determined in execution and not by a separate suit. It is only when the judgment-debtor claims to represent the interest of a third party in whom the property is vested that the case would fall outside the

purview of s. 47. In such a case as this what the judgment-debtor says is that although the property is vested in him it is so vested not beneficially but as trustee or executor for someone else. It is clear that in such a case the real objecting party is one who is a stranger to the suit and the objection having been made on his account his claim must be regarded as that of a third party and dealt with under O. XXI, r. 58.

[Case-law referred to.]

[Distinction between the position of a legal representative of a deceased person and of a *shebait* of a deity pointed out.]

In a proceeding arising under s. 47, Civil P. C., between the parties to the suit the auction-purchaser is not a necessary party. The non-joinder of the auction-purchaser in the appeal is not therefore fatal to it. 150 Ind. Cas. 611 (23), relied on. 121 Ind. Cas. 658 (22), distinguished. [p. 794, col. 1.]

Misc. A. from an order of the Court of the Second Additional District Judge, Jubbulpore, dated March 18, 1937.

Mr. Fida Hussain, for the Appellant.

Mr. W. B. Pendharkar, for Respondent No. 1.

Order.—This is a decree-holder's appeal from an order passed by the second Additional District Judge, Jubbulpore, in Civil Appeal No. 29-B of 1936 on March 18, 1937.

In Civil Suit No. 2-B of 1934, one *Mst. Tahirabi* obtained a decree for Rs. 3,000 on account of her dower debt against the assets of the deceased *Syed Ahmad Hussein* in the hands of *Altaf Hussain* and *Mst. Hira*, respondents Nos. 2 and 3. The appellant *Azhar Hussain* is the legal representative of *Mst. Tahirabi*. In execution of that decree two houses Nos. 76 and 77 were attached and one of them was auctioned while the attachment of the other remained in force. The respondent No. 1 *Muhammad Shibli* lodged an objection to the attachment on the allegation that neither of the two houses attached formed part of the estate of *Syed Ahmad Hussein* but that both the houses belonged to *Ahmad Hussein's* brother *Imdad Hussein* and that he orally gifted them to *Mst. Hira* and *Altaf Hussein's* daughter who in their turn sold the houses to *Muhammad Shibli* on December 7, 1935, after the date of the decree in Civil Suit No. 2-B of 1934 and the attachment. It is pertinent to state that the decree in Civil Suit No. 2-B of 1934 was passed on August 27, 1934, and that the houses had been already attached before judgment. In his objection *Muhammad Shibli* also contended that there was no valid attachment of the houses. The objection was dismissed in the original Court on

the ground that the purchase of the house by the objector was contrary to the attachment and that it was void under s. 64 of the Civil P. O. It thus rejected the objection on a preliminary point and did not enter into the merits of the case. On appeal by Muhammad Shibli, the objector, it was held that the objection should have been treated as falling under s. 47 of the Civil P. O., and not under O. XXI, r. 58, Civil P. O., and the case was remanded to the executing Court for enquiry into its merits.

This appeal is preferred by the decree-holder. It is contended on his behalf that the proceeding arising out of the objection fell to be governed by O. XXI, r. 58 and not by s. 47 and that the appeal was incompetent. It is also urged that the non-joinder of the auction purchaser was fatal to the appeal and that there was no necessity for remanding the case as the fact of attachment was admitted by the objector in the course of proceedings in the Court of the first instance.

It is conceded in this Court on behalf of the objector that the attachment was in fact made and that it was also valid; but that does not conclude the case since if it is held that the proceeding fell under s. 47 and not under O. XXI, r. 58, Civil P. O., the remand would be inevitable as there was no enquiry into the merits of the objection.

The main point in this appeal is whether s. 47 or O. XXI, r. 58, Civil P. O. applies. Section 47 which corresponds to s. 244 of the Act of 1882 and s. 11 of the Code of 1861 runs as follows:

"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

The section lays down two conditions, (1) that the questions which arise between the parties to the suit or their representatives, and (2) that they should relate to the execution, discharge or satisfaction of the decree. A party means a person who is either plaintiff or defendant, that is a person who seeks a remedy or a person against whom a remedy is sought. Normally a plaintiff or defendant comes to Court on his own account, but in some cases either of the parties may not sue or be sued on their own account but on account of some third person. Their capacity in the suit may not be that of the principals but that of representatives.

This circumstance gives rise to important legal consequences so far as the rights and liabilities of the parties are concerned. In suits to recover a simple money debt the plaintiff has a remedy against both the person and property of his debtor but in some suits there are defendants who cannot, save in exceptional circumstances, be made personally liable such as trustees, executors, receivers of insolvent estates, principal officers of corporation, *shebait*s of Hindu idols, *mohanth* of *math* or a guardian of a minor or legal representatives of a deceased person. They are not primary parties, that is to say, those who are liable on their own account but are representative parties who are liable on account of those whom they represent. Even among such representative parties there are some, for example, *shebait*s and *mohanth*s and guardians who are nominal, and others such as trustees, receivers and legal representatives of a deceased person or real parties. This distinction must be borne in mind before entering on the discussion on the point raised here. The term 'representatives' occurring in s. 47 includes not only legal representatives in the sense of heirs, executors or administrators but also representatives-in-interest, that is any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who so far as such interest is concerned is bound by the decree: see *Ishan Chunder Sirkar v. Beni Madhub Sirkar* (1), *Tara Prasanna Bose v. Nilmoni Khan* (2) and *Gauri Dutt v. D. K. Dowing* (3). It is therefore clear that Altaf Hussein and Mst. Hira who were sued as being in possession of the assets of Syed Ahmad Hussein were parties to the suit and that Muhammad Shibli the objector who claimed interest in the two houses by virtue of a sale deed, dated December 7, 1935 is their representative.

The next question is whether the claim made by him that the attached properties were not the assets of Ahmad Hussein but of Altaf Hussein and Mst. Hira involved a question relating to execution, discharge or satisfaction of the decree. On this point there is a mass of authority. In *Seth Chand Mal v. Durga Dei* (4) it was held that the question whether certain property belongs to the assets of the deceased or not

(1) 24 O 62; 1 O W N 36 (F B).

(2) 41 O 418; 25 Ind. Cas. 116; A I R 1914 Cal. 828.

(3) A I R 1934 Pat. 413; 151 Ind. Cas. 683; 13 Pat 735; 7 R P 111.

(4) 12 A 313; A W N 1890, 137 (F B).

are questions which must be determined in execution and not by a separate suit. It was pointed out that there was no distinction in this respect between the position of legal representatives added to the suit before and those added after the decree. It is only when the judgment-debtor claims to represent the interest of a third party in whom the property is vested that the case would fall outside the purview of s. 47. In such a case as this what the judgment debtor says is that although the property is vested in him it is so vested not beneficially but as trustee or executor for someone else. It is clear that in such a case the real objecting party is one who is a stranger to the suit and the objection having been made on his account his claim must be regarded as that of a third party and dealt with under O. XXI, r. 58. This case was followed in *Beni Prasad Kunwar v. Lukhna Kunwar* (5), *Kali Charan v. Jewat Dube* (6) and *Dulla v. Shib Lal* (7). The same view was taken in *Punchanin Bundopadhy v. Rabia Bibi* (8) which was followed in *Madhusudan Das v. Gobinda Pria Chowdhurani* (9), *Narayan Shridhar v. Pandurang Bapuji* (10), *Dinbai v. Bamanishaji* (11), *V. T. Arunachellam Chetty v. Maung San Ngwe* (12), *Ma Shwe Mra Pru v. Maung Ba On* (13), *Ishar Das v. Parma Nand* (14), *Vengapayyan v. Karimpanakal Parvati* (15) and *Rajah of Kärñethnagar v. Venkata Reddi* (16). In all these cases the judgment-debtor or his representative asserted his title to the property and claimed in his own right. On the other hand there are cases in which the objection was made by the judgment-debtors not in their own right but in that of a third party. It was held consistently that the proceeding was governed not by s. 47 but by O. XXI, r. 58: see *Murigeya v.*

Hayat Saheb (17), *Ramanathan Chettiar v. Levvai Marakayar* (18) and *Kartick Chandra Ghose v. Ashutosh Dhara* (19). In the first mentioned case Ranade, J., pointed out that when a legal representative objects on the ground that it is trust property a different set of issues arises which has no relation to the execution, discharge or satisfaction of the decree as between the parties to the suit. It is clear that in such cases the legal representatives really assert a *jus tertii*, that is rights of persons who are not parties to the decree or their representatives. In *Kartick Chandra Ghose v. Ashutosh Dhara* (19) the legal representative asserted that he was in possession as a *shebait* of a deity to whom the properties have been dedicated and it was held that the objection fell under by s. 278 of the Code of 1882 which corresponds to O. XXI, r. 58.

The learned Counsel for the appellant relied strongly on *Upendra Nath Kalamuri v. Kusum Kumari Dasi* (20) as an authority supporting his contention. In that case a decree for money had been passed against a person in his capacity as a *shebait* of a deity and he objected to the attachment on the ground that he was in possession of it not as a *shebait* of the deity but in his own right. It was held that the case did not fall within the scope of s. 47 of the Civil P. O., of 1908. It must be observed that the learned Judges who decided the case followed *Kartick Chandra Ghose v. Ashutosh Dhara* (19) and distinguished *Punchanin Bundopadhy v. Rabia Bibi* (8). The *ratio decidendi* was that the judgment-debtor having set up *jus tertii*, that is the right of a third party the case was not one between the parties to the suit so as to attract s. 47, Civil P. O. It is urged on behalf of the appellant that the principle of this decision should be extended to the present case for the reason that the judgment-debtors who are legal representatives in the present case are only representative parties in the same way as the *shebait* in the cited case was and that in that sense they should not be regarded as being parties to the suit. This argument ignores the fundamental distinction between the position of a legal representative of a deceased person and that of a *shebait* of a deity. A legal representative is not a

(17) 23 B 237.
(18) 23 M 195; 10 M L J 64.
(19) 39 O 298; 12 Ind. Cas. 163; 16 O W N 26; 14 O L J 435.
(20) 42 O 440; 27 Ind. Cas. 328; A I R 1915 Cal. 327; 20 O L J 485; 19 O W N 520.

(5) 21 A 323; A W N 1899, 104.
(6) 28 A 51; A W N 1905, 180.
(7) 39 A 47; 36 Ind. Cas. 281; A I R 1917 All. 460; 14 A L J 846.
(8) 17 O 711 (F B).
(9) 27 O 34; 4 O W N 417.
(10) 34 B 506; 6 Ind. Cas. 905; 12 Bom. L R 471.
(11) 58 B 513; 152 Ind. Cas. 168; A I R 1934 Bom. 296; 36 Bom. L R 608; 7 R B 130.
(12) 2 R 168; 83 Ind. Cas. 550; A I R 1924 Rang. 323.
(13) 5 R 659; 107 Ind. Cas. 856; A I R 1928 Rang. 29.
(14) 6 L 544; 93 Ind. Cas. 30; A I R 1926 Lah. 134.
(15) 28 M 501.
(16) 39 M 570; 29 Ind. Cas. 231; A I R 1916 Mad. 20; 29 M L J 96; (1915) M W N 334; 17 M L T 427.

mere figurehead as the *shebait* is. Legal representatives are persons to whom the rights and obligations of the deceased are transmitted. They are real parties to the suit although they represent the rights and liabilities of a deceased person. A *shebait* on the other hand is a nominal party who stands in Court as a physical representative of an ideal person, namely, the idol, as observed by their Lordships of the Privy Council in *Jagadindra Nath Roy v. Hemanta Kumari Debi* (21). While a dead person whose rights and liabilities in regard to his assets are represented by his legal representatives cannot conceivably be regarded as a party to the suit, the idol, which is a juridical person, although in an ideal sense, is, unquestionably a real party to the suit in the eye of the law. It is evident therefore that a *shebait* cannot, like the guardian of a minor, be regarded as a party to the suit. Consequently the objection made by a *shebait* asserting his own right is not an objection made by a party to the suit. On the other hand an objection made by a legal representative who is a real party to the suit is made by a party to the suit.

The objector Muhammad Shibli stands in the shoes of the judgment-debtors as his sale being subsequent to the attachment he is bound by the decree. When he claims the property to be his own in right of the judgment-debtors from whom he purchased and denies that it forms part of the assets of the deceased he is raising a question which relates to the execution of the decree in the suit. The case therefore falls to be governed by s. 47, Civil P. O., as has been rightly held by the lower Appellate Court.

There now survives the minor question as to the effect of the auction purchaser's non-joinder on the validity of the appeal. Reliance is placed on *Haridass v. Mofatlal* (22) but that was a case of an application made under O XXI, r 90, Civil P. O., and not one under s. 47 as in the present case. As pointed out in *Brijlal v. Manohar Prasad* (23) in a proceeding arising under s. 47 between the parties to the suit the auction purchaser is not a necessary party. The non-joinder of the auction purchaser

in the appeal was not therefore fatal to it.

The appeal is dismissed with costs. Counsel's fees Rs. 25.

s. *Appeal dismissed.*

PATNA HIGH COURT.

Appeal from Original Order No. 175 of 1939

March 13, 1940

FAZL ALI AND MEREDITH, J.J.

RAMP RATAP MARWARI—OPPOSITE

PARTY—APPELLANT

versus

LACHMAN MISTRI—APPLICANT—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Provincial Insolvency Act (V of 1920), ss. 18, 5—Ex parte insolvency order—Application to set aside, if can be entertained—Provincial Insolvency Act (V of 1920), ss. 79, 19 (2)—Rules under s. 79—R. 5—Publication of order fixing date of hearing of petition under s. 19 (2), only in Government Gazette, if enough.

Order IX, r. 13 of the Civil P. O., is applicable to proceedings under the Insol Act also. Consequently an application for setting aside an insolvency order passed on a petition by the debtor, which was made *ex parte* can be entertained.

Rule 5 framed under s. 79, Insol. Act, nowhere provides that mere publication of the notice of order fixing date of hearing of petition under s. 19 (2) in the official Gazette will be enough. It distinctly provides that a copy of the notice should also be forwarded by registered letter to each creditor. Where the creditor has received no notice of either the application or the date of the hearing the Court must allow his petition for setting aside, the insolvency order passed *ex parte* and re-hear the matter. Mere publication in the *Govt. Gazette* of the notice is not enough. In such a case the question of prejudice is irrelevant.

A from an order of the District Judge of Manbhum, dated March 20, 1939.

Messrs. S. C. Mazumdar and Ramanugrah N. Sinha, for the Appellant.

Mr. R. S. Chatterji, for the Respondent.

Fazl Ali, J.—This is an appeal by a creditor from an order of the District Judge of Manbhum, rejecting his application praying that the order adjudging one Lachman Mistri as an insolvent be set aside and Lachman Mistri's insolvency petition be reheard.

Lachman Mistri made his application on June 18, 1938, in which he mentioned four creditors including the appellant. It appears that notices were issued to all the four creditors including the appellant, but in the notice which was issued to the appellant he was described as Ram Kumar

(21) 32 O 129; 31 I A 203; 8 O W N 809; 8 Sar. 698 (P C).

(22) 26 N L R 127; 121 Ind. Cas. 658; A I R 1930 Nag. 5; Ind. Rul. (1930) Nag. 114.

(23) 31 N L R 67; 150 Ind. Cas. 611; A I R 1934 Nag. 21; 7 R N 4 (2).

Marwari, and not as Rampratap Marwari. A notice stating that Lachman Mistri had made an application for being declared insolvent was also published in the *Bihar Gazette* on July 20, 1938. On July 23, 1938, the learned Judge passed an *ex parte* order granting the application of Lachman Mistri for being declared insolvent. On July 28, 1938, the appellant appeared in Court and made an application for setting aside that order on the ground that he had received no notice of Lachman's application. The learned Judge dismissed this application on March 20, 1939, and hence this appeal.

The first question to be decided is whether an application for setting aside an insolvency order, which was made *ex parte* can be entertained. It is contended on behalf of the respondent that such an application is not maintainable. Under the Insol. Act, and the learned Advocate appearing on his behalf contends that if such an application could be entertained, there would have been a provision in the Act similar to s. 25, cl. (1). In that clause it is provided that

"In the case of a petition presented by a creditor, where the Court is not satisfied with the proof of his right to present the petition or of the service on the debtor of notice of the order admitting the petition, or of the alleged act of insolvency, or is satisfied by the debtor that he is able to pay his debts, or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition."

It is pointed out that whereas the Act specifically provides that in the case of a petition presented by a creditor the petition may be dismissed if the Court is satisfied that there was no service on the debtor of notice of the order admitting the petition, no similar provision is made where a petition is presented by a debtor and the creditor is not served with a notice.

Section 18 of the Insol. Act provides that

"The procedure laid down in the Civil P. C., 1908, with respect to the admission of plaints, shall so far as it is applicable, be followed in the case of insolvency petitions."

Again, s. 5 of the Act runs as follows:—

"(1) Subject to the provisions of this Act, the Court, in regard to proceedings under this Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

(2) Subject as aforesaid, High Courts and District Courts, in regard to proceedings under this Act in Courts, subordinate to them, shall have the same powers and shall follow the same procedure as they respectively have and follow in regard to civil suits."

From these provisions it follows that O. IX r. 13 of the Civil P. C. is applicable to proceedings under the Insol. Act also and this view is supported by the decision of the Calcutta High Court in *Mool Chand Ram v. Sarjoog Pershad* (1) and certain observations made in *Umar Din v. Raghu Nath Sahai* (2). In my opinion, therefore, the learned Judge was competent to entertain the application made by the appellant before him.

As to the merits of the application, it has been pointed out on behalf of the appellant that even the learned Judge has held that no notice was actually served on the appellant. The learned Judge has relied on the fact that a general notice had been duly published in the *Bihar Gazette* to the effect that Lachman Mistri had applied for being adjudicated insolvent and July 23, 1938 had been fixed for hearing and he has held that in view of the notification the appellant must be presumed to have had sufficient notice of the insolvency petition as well as of the date of the hearing. Section 19 of the Insol. Act says that "Where an insolvency petition is admitted, the Court shall make an order fixing a date for hearing the petition" and "notice of the order shall be given to creditors in such manner as may be prescribed." As the rules, which govern the procedure in this province, are the same as those framed by the Calcutta High Court under s. 79 of the Act, it becomes necessary to refer to r. 5 framed by the Calcutta High Court as regards the publication of notice to be issued under s. 19. This rule runs thus:

"Notice of an order fixing the date of the hearing of a petition under s. 19 (2) shall be published in the local official Gazette and advertised in such newspapers as the Court may direct. A copy of the notice shall also be forwarded by registered letter to each creditor to the address given in the petition."

It is to be noted that this rule nowhere provides that mere publication of the notice in the official Gazette will be enough. It distinctly provides that a copy of the notice should also be forwarded by registered letter to each creditor. In the present case the registered letter never reached the appellant. The learned Judge has presumed that the appellant must have had notice of the insolvency petition, because it was published in the official Gazette, but I find that the names of the creditors who were mentioned in Lachman

(1) 7 C L J 268.

(2) A I R 1932 Lah. 522; 138 Ind. Cas. 377; Ind. Rul. (1932) Lah. 498; 33 P L R 698.

Mistri's petition were not published in the *Gazette*, and the notice was published as late as July 20, 1938, that is, only three days before the date fixed for the hearing of the application. The appellant has stated on oath that he had no notice of either the application or the date of the hearing, and in my opinion whatever presumption might arise from the fact of the publication of the notice in the *Gazette* has been rebutted by the one-sided evidence given in this case. That being so, the learned District Judge ought to have allowed the petition of the appellant and reheard the matter. The learned Judge has endeavoured to show that the appellant has not been in any way prejudiced. He has stated in his order that even if it is assumed that the appellant is the only creditor, his own decree against the insolvent amounts to more than Rs 1,665, and that there is nothing to show that the insolvent had so much assets as to enable him to pay up this amount. In my opinion, however, the learned Judge has in this matter misread the petition filed by the appellant before him. However that may be, under the law as it stands the question of prejudice appears to me to be irrelevant. The appellant has shewn that he had not received the notice issued under s. 19 of the Act, and as that provision is mandatory the learned Judge ought to have reheard the matter.

In these circumstances I would allow this appeal. The order of the learned Judge is set aside. There will be no order as to costs.

Meredith, J.—I agree.

D.

Appeal allowed.

FEDERAL COURT

Appeal from the Patna High Court

March 18, 1940

GWYER, C. J., SULAIMAN AND

VARADACHARIAR, J.J.

JAIGOBIND SINGH AND OTHERS—

APPELLANTS

versus

LACHMI NARAIN RAM AND OTHERS—

RESPONDENTS

Federal Court—Appeal—Point not constitutional—No certificate on point under Civil Procedure Code (Act V of 1908), O. XLV, r 2—Point, if can be argued as of right—Leave under s. 205 (2), Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42)—Bihar Money-lenders Act, (III of 1938), s. 12—High Court using discretion—Interference

by Federal Court—Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7—Interest pendente lite—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 11.

In an appeal before the Federal Court where the ground taken is not a constitutional ground at all; and the appellants neither have appealed for nor obtained the certificate referred to in O. XLV, r. 2, Civil P. C., they are not entitled to argue it as of right. The Federal Court may, however, grant leave under s. 205 (2) of the Government of India Act.

The word "may" in the opening portion of s. 12 of Bihar Act VII of 1939 has not the meaning of the word "shall." Obviously by the use of the word "may" it is intended that the Court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section. The use of the word "may" indicates that the Court is not bound to exercise at least one of the powers, and may well not exercise any of the powers at all. The language as it stands can mean only this that the Court has the discretion to exercise all or any or none of the specified powers.

When the question is one of a discretion of the High Court under old s. 12, of the Bihar Money-lenders Act, the Federal Court cannot in appeal interfere with the way in which the discretion is exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law. If there can be no legal objection to the way in which discretion has or has not been exercised by the High Court, then the Federal Court would not in appeal substitute its own discretion for that of the High Court. 45 Ind. Cas. 568 (2), relied on.

Rule 11 of O. XXXIV, Civil P. C., which removes any conflict that there might have been between s. 34 and O. XXXIV, rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest *pendente lite* and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918, 140 Ind. Cas. 104 (5) and 185 Ind. Cas. 294 (6), relied on.

It may not be quite in harmony with the new provisions of the Bihar Money-lenders (Regn. of Transactions) Act, to go back to the old practice or the old standard of high rates of interest, which were freely allowed. It may even be contrary to the spirit of the Bihar Act now to allow compound interest at a high contractual rate not only during the pendency of the suit but even up to six months after the preliminary decree to be passed hereafter. Of course, whether the Court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case. The opinion of the High Court on such a matter must carry weight, where, being conscious of its discretionary power under s. 8, it has considered the case not to be a fit one for the exercise of such power.

(The *pendente lite* interest was reduced to 12 per cent. per annum simple). 187 Ind. Cas. 476. (7), followed.

Mr. Raghbir Singh (Advocate Federal Court) with Messrs. A. C. S. Chari (Advocate Federal Court), Sarju Prasad and Rameshwar Misra Advocates, Patna High Court instructed by Mr. T. K. Prasad, Agent, for the Appellants.

Mr. Raj Kishore Prasad (Advocate, Federal Court) instructed by Mr. Tara-chand Brijmohanlal, Agent, for the Respondents.

Sulaiman, J.—This appeal arises out of a suit brought to enforce two simple mortgage-deeds, dated October 4, 1923, and April 24, 1930, for Rs. 2,500 and Rs. 1,800 respectively, carrying interest at Rs. 1-1-0 per cent. per mensem. compound every year. Most of the points which arise in this case are fully covered by our decision in *Surendra Prasad Narain Singh v. Sri Gajadhar Prasad Sahu Trust Estate Case No. 9 of 1939 (1)* decided today. It is therefore, necessary to deal with only the new points which have been raised in this appeal and which deal principally with the liability for interest. On behalf of the appellants it has been argued that the findings of the Courts below as regards legal necessity for the rate of interest are inadequate. In the first place, strictly speaking this is not a constitutional ground at all, and as the appellants neither appealed for nor obtained the certificate referred to in O. XLV, r. 2, Civil P. C., they are not entitled to argue it as of right. This Court may, however, grant leave under s. 205 (2) of the Act. In the second place there are at any rate by implication, concurrent findings of both the Courts that there was legal necessity for the rate of interest agreed upon.

The trial Court dealt with the question of legal necessity under issue No. 4, relating to the legal necessity for the debt, without expressly considering whether legal necessity for the rate of interest also had been established. It considered the rate of interest under issue No. 5, relating to the question of its being excessive and penal. The finding was against the defendants. The High Court also did not consider this matter under the head legal necessity, but considered it under the head rate of interest. As regards the first mortgage deed, it was pointed out that the earlier mortgage-deed and bonds carried compound interest at Rs. 1-8-0 per cent. per mensem, with yearly rests. There was only one earlier promissory note for Rs. 50 carrying simple interest at Rs. 1-8-0 per

(1) 187 Ind. Cas. 512; 6 B.R. 508.

cent, per mensem. In the opinion of the High Court the fresh transaction at compound interest; at Rs. 1-1-0 per cent. per mensem with yearly rests, was quite a prudent one. It was further pointed out that in the plaint the plaintiffs had claimed compound interest at the rate of Rs. 1 per cent. per mensem. As regards the second mortgage, the High Court pointed out that the plaintiffs' evidence showed that the usual rate of interest had varied from 1 to 2 per cent. per mensem, compoundable every year, which received support from the earlier transactions, and that there was no reliable evidence on the defendants' side to prove that such compound interest was excessive. No doubt, strictly speaking, the Courts when dealing with the question of legal necessity should have recorded an express finding that there was legal necessity not only for the amounts borrowed, but also for the rate of interest agreed upon. The burden did not in the first instance lie on the defendants to show that the rate of interest was necessarily excessive. But presumably the case was not argued before the High Court from this standpoint, and in any case it appears that the High Court was satisfied that the first transaction was quite prudent and therefore, the second transaction also, which involved the same rate of interest, was equally good. The trend of the High Court's opinion seems to be that there was legal necessity for the rate of interest agreed upon.

It is pointed out on behalf of the appellants that the original amount of the first mortgage deed, which had also included interest for a previous period, was only for Rs. 2,500 while the plaintiffs claimed over Rs. 11,000 at the date of the suit. Similarly they were claiming about double the amount on the second deed. The trial Court had no occasion at all to consider the re-opening of the transaction under the old s. 12, as the Act came into force after the case was decided by it. It is, therefore, contended that the High Court was wrong in not applying s. 12 of the old Money Lenders Act on the ground that it had "a complete discretion." It is argued that discretion is not arbitrary but must be exercised judicially. The High Court has however, said that upon the facts of this case there is nothing which would justify the Court, in the exercise of its discretion, in re-opening the accounts. It, therefore, appears that the High Court did consider this point but did not think

it fit to re-open the transaction. The grounds which might have influenced the High Court were probably those discussed earlier when considering the rate of interest. When the question was one of a discretion of the High Court we cannot in appeal interfere with the way in which the discretion was exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law. If there can be no legal objection to the way in which discretion has or has not been exercised by the High Court, then we would not in appeal substitute our own discretion for that of the High Court. *Rehmatnissa Begam v. Price* (2).

It is then argued that the High Court had really no discretion in the matter and should have acted under the old s. 12 to which s. 8 of the new Act applies. It is argued that the word "may" in the opening portion of the section has the meaning of the word "shall" and that the Court has the option of exercising all or any of the three powers mentioned therein, but has no power not to exercise any of the three powers at all. This contention cannot be accepted. While the word "may" occurs in the opening portion of the section, the word "shall" occurs in the Proviso, and these two words must have distinct meanings. It also appears that the legislature has advisedly used the word may in some sections like 10 and 11, while it has deliberately used the word "shall" in sections like 4, 5, 6 and 7 and also 13 and 14. The policy of the Act clearly appears to be to prohibit rate of interest in excess of 9 per cent. per mensem for secured loan advanced after the Act came into force (s. 5) and to prohibit compound interest altogether for loans advanced after the Act (s. 6). On the other hand, as regards previous loans, s. 7 creates a bar against interest exceeding the principal, and s. 8 gives a discretion to the Court to give other reliefs according to circumstances. Obviously by the use of the word "may" it is intended that the Court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three

powers mentioned in the section. Had the intention been as contended for on behalf of the appellants, the language would have been 'the Court shall exercise all or any of the following powers.' The use of the word "may" indicates that the Court is not bound to exercise at least one of the powers, and may well not exercise any of the powers at all. The language as it stands can mean only this that the Court has the discretion to exercise all or any of none of the specified powers.

A further point has been urged on behalf of the respondents that the new s. 7 is *ultra vires* of the Provincial Legislature. The argument is as follows: Quite apart from any question of repugnancy, which is cured by the assent of the Governor-General, s. 7 has been enacted to reduce interest on all loans including loans based on a document. Now a loan based on cheques, bills of exchange, promissory notes and other like instruments, would be a loan based on a document within the meaning of the section and would be governed by the prohibition contained in it. But "cheques, bills of exchange, promissory notes and other like instruments" fall under List I, Entry No. 28, of the Seventh Schedule, and are within the exclusive powers of the Federal Legislature. By virtue of s. 10 read with s. 316, it follows that the power of the Provincial Legislatures to make enactments in respect of these documents is wholly excluded. If the provisions of s. 7 would be void in such particular cases, then the whole section must be deemed to be altogether void.

Although one of the previous debts had in part been based on a promissory note, the present suit is based on a mortgage deed and not on a promissory note and the field is therefore apparently clear. The period of limitation being short, s. 7 would rarely apply to suits on promissory notes. It is accordingly unnecessary to consider the objection in detail in this case, particularly as the point does not directly arise, nor has it been fully argued before us. Even the Full Bench case of the Madras High Court, *Mada Nagaratnam v. Puvadda Seshayya* (3) was not cited at the Bar.

Lastly, a question has been raised whether we are bound to allow the contract-

(2) 45 I A 61; 45 Ind. Cas. 568; 22 C W N 601; 16 A L J 513; 27 O L J 623; 5 P L W 25; 23 M L T 400; 8 L W 53; 20 Bom. L R 714; 35 M L J 262; 42 B 380; 12 Bur. L T 91 (P O).

(3) (1939) 1 M L J 272; 180 Ind. Cas. 994; (1939) M W N 192 (2); A I R 1939 Mad. 361; 49 L W 257; 11 R M 760; 1 L R (1939) Mad. 151.

ual rate of interest *pendente lite*. Prior to 1929 the position was that there was the general s. 34, Civil P. O., under which in a decree for payment of money the Court had full discretion to order interest at such rate as it deemed reasonable to be paid on the principal sum adjudged from the date of the suit onwards. Then there were rr. 2 and 4, of O. XXXIV, which applied to a mortgage suit, and the Court had to order an account to be taken of what was due to the plaintiff at the date of such decree for principal "and interest on the mortgage." According to s. 57-A of the T. P. Act, mortgage money also included the interest on the principal secured by the mortgage. The special provision in O. XXXIV had to be applied in preference to the general provision in s. 34. Till the period for redemption expired, the matter was considered to remain in contract and the interest had to be paid at the rate specified in the contract. *Jagannath Prosad Singh Chowdhury v. Surajmul Jalal* (4).

By Act XXI of 1929, O. XXXIV was amended, and a new r. 11 was inserted, which deals specially with interest, and provides that the Court "may" order payment of interest to the mortgagee up to the date fixed for payment at the rate payable on the principal. It follows that this special provision, which removes any conflict that there might have been between s. 34 and O. XXXIV, rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest *pendente lite* and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918. See *Sripat Singh v. Naresh Chandra Bose* (5) although in this case when considering O. XXXIV, r. 2, the Privy Council case of *Jagannath Prosad Singh Chowdhury v. Surajmul Jalal* (4) was overlocked. In *Jagdish Jha v. Aman Khan* (6) interest after the institution of the suit was ordered by this Court to be

paid at the rate of 6 per cent. per annum on the principal amount till the date fixed for payment. In my opinion the view then taken as to the power of a Court to reduce interest *pendente lite* was not contrary to law.

The Bihar Legislature, as shown by the Preamble of Act III of 1938, in order to give relief to debtors has inaugurated a new policy by regulating Money-lending transactions. Section 6 makes any contract for the payment of compound interest after the Act came into force altogether void. Section 7 disallows interest up to suit in excess of the amount of the principal. Section 8 gives power to the Court to re-open the whole transaction and give relief in respect of interest in excess of 9 per cent. simple per annum in the case of a secured loan notwithstanding any contract to the contrary. The power of the Court to reduce interest in Bihar has, therefore become much wider than that under the Usurious Loans Act. It may not be quite in harmony with these new provisions to go back to the old practice or the old standard of high rates of interest, which were freely allowed. It may even be contrary to the spirit of the Bihar Act now to allow compound interest at a high contractual rate not only during the pendency of the suit but even up to six months after the preliminary decree to be passed hereafter.

Of course, whether the Court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case. The opinion of the High Court on such a matter must carry weight, where, being conscious of its discretionary power under s. 8, it has considered the case not to be a fit one for the exercise of such power. Just as in Case No. 13 decided today *Subbanand Chandra v. Apurba Krishna Mitra* (7) the *pendente lite* interest should be reduced to 12 per cent. per annum simple.

Varadachariar, J.—I wish to add a few words, with reference to the argument urged on behalf of the appellants as to the manner in which s. 7 of Bihar Act VII of 1939 should be applied to one of the loans sought to be recovered in this case. The appellants also sought to invoke the aid of s. 8 of that Act, with a view to re-open the settlement of accounts made at the time of the execution of the mortgage bond. *Ex. V.* But, as held by the High Court, that section (7) 127 Ind. Cas. 436; 6 B R 499.

(4) A I R 1927 P O 1; 99 Ind. Cas. 686; 25 A L J 23; 4 O W N 46; 31 O W N 390; 52 M L J 373; 38 M L T 73; 54 I A 1; 54 O 161; 29 Bom. L R 752; 45 O L J 279; 25 L W 655; 8 P L T 173 (P O).

(5) A I R 1932 Pat. 332, (334); 140 Ind. Cas. 104; 13 P L T 545; Ind. Rul. (1932) Pat. 278.

(6) (1939) F L J 7, (9); 185 Ind. Cas. 294; 6 B R 194; 12 R F O 16; 19; O O L R 1; A I R 1940 F O 3; 21 P L T 142; 71 O L J 55.

only gives a discretionary power and we have not been shown sufficient reason for interfering with the refusal of the High Court to exercise that power in the circumstances of this case. It is true that in the particular paragraph dealing with this question, the learned Judges have not assigned their reasons; but the reasons are fairly gatherable from the rest of the judgment.

The suit comprised claims under two mortgage bonds, Ex. V dated October 4, 1923 and Ex. V (a) dated April 24, 1930. The interest due under Ex. V (a) up to the date of the institution of the suit did not amount to a sum equal to the principal amount of the bond; no question therefore arises under s. 7 of Bihar Act VII of 1939, in respect of that bond. The earlier bond, Ex. V, had been executed to secure repayment of a sum of Rs. 2,500 and it provided for the payment of compound interest with annual rests at Rs. 1-10 per cent. per mensem. This amount of Rs. 2,500 was made up of a sum of Rs. 1,500 received in cash to pay off another creditor of the mortgagors and a sum of Rs. 1,000 treated as paid to the mortgagees themselves in discharge of antecedent debts due to them from the mortgagors. The bond gave particulars of the antecedent debts; and after reciting that, the amount due up to that date for principal and interest in respect of those debts was Rs. 1,047, it provided for the payment of Rs. 1,000 out of the mortgage loan towards that amount.

With reference to Ex. V, the learned Counsel for the appellants contended that, even under s. 7 of Act VII of 1939, the Court must re-open the account in respect of the antecedent debts referred to in Ex. V and limit the interest claimable by the plaintiffs up to the date of the suit, in respect of this portion of the mortgage debt, to the amount of principal due under the antecedent transactions. I am unable to accede to this contention. The case is certainly one of a "loan based on a document;" and under the concluding words of s. 7, interest is in such a case claimable up to the "amount of loan mentioned in the document." The loan document must in this case be taken to be Ex. V and not the earlier documents referred to in it, because the definition of "loan" in s. 2 (f) includes a "transaction on a bond executed in respect of past liability." How exactly this definition and the provision of s. 7 are to be applied to ordinary cases of "renewals" it is not necessary for the purposes of this

case to decide. Where however, as in the present case, the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, it seems to me that the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment [see observations of Greer L.J., as he then was, in *Lyle v. Chappell* (8), referred to with approval by the Judicial Committee in *S. R. M. S. Chethambaram Chettiar v. Loo Thon Poo* (9).]

The appeal is allowed and the decree of the Courts below modified to this extent, viz., that the interest payable to the plaintiffs up to the date of the institution of the suit in respect of Ex. V will be limited to Rs. 2,500. The question of interest *pendente lite* has been dealt with in Case No. 13 of 1937. On both the bonds, the principal amounts will carry simple interest at 12 per cent. per annum from the date of the institution of the suit to the date fixed for payment in the revised decree to be passed by the High Court. After that date, there will be interest at 6 per cent. per annum on the aggregate amount of principal, interest and costs up to date of realisation. The case will be remitted to the High Court for a revised decree being passed on the above basis. The plaintiffs-respondents will retain the costs awarded to them by the decrees of the High Court and of the trial Court. There will be no order as to costs in this Court.

The appellants' learned Counsel applied for an order under s. 10 of the Bihar Act of 1939 permitting payment by instalments. The appellants will be at liberty to make the application before the High Court which has to pass the decree.

Gwyer, C.J.—I concur and have nothing to add.

D.

Order accordingly.

(8) (1932) 1 K B 691; 101 L J K B 185; 146 L T 236; 48 T L R 119.

(9) (1939) 1 M L J 68, (72); 187 Ind. Cas. 445; A I R 1940 P O 60 (P O).

CALCUTTA HIGH COURT

Application in Suit No. 637 of 1923

December 7, 1938

McNair, J.

GANESH PROSAD AGARWALLA

AND ANOTHER—APPLICANTS

versus

**MONOHAR LAL MULLICK AND ANOTHER—
OPPOSITE PARTY.**

Civil Procedure Code (Act V of 1908), s. 152—Power to rectify errors in decree—Personal decree passed against legal representative—Error, if can be rectified in execution by Court passing decree—Will—Construction—Sons' interest held contingent and could not be attached.

Where a decree on the face of it shows that a person sued in his representative capacity has been burdened with a liability which is not consonant with that capacity, the error is obviously that of a ministerial officer. In such a case the Court which made the decree and which is empowered by s. 152, Civil P. C., to rectify its error at any time, is not debarred from exercising its powers under the section, merely because that error has been brought to its notice in the course of an application, in which the decree-holder is seeking to execute the decree in a manner which the Court could never have intended when it passed the decree. *In re Swire, Mellor v. Swire* (1), relied on. 142 Ind. Cas. 60 (2), distinguished.

A will stated "I give and devise my real and personal property to my beloved wife for life and after her death to vest in my sons or their heirs who may then be in existence. It is my wish that my sons hereinbefore mentioned will not be entitled to my estate during the lifetime of my said wife".

Held, that the intention of the testator was that the estate was only to vest (i. e., to vest in interest) after the death of the wife. Hence the interest of the sons was contingent and was not attachable. *In re Deighton's Settled Estates* (3), referred to.

Mr. H. C. Majumdar, for the Applicants.

Messrs. P. C. Ghosh and S. K. Bose, for the Opposite Party.

Order.—This is an application by mortgagees for execution of a decree dated March 20, 1928. The decretal amount was Rs. 24,632-12-9. The mortgagors were three of the sons of Kanailal Mullick, who died on December 31, 1898. Kanailal, by his will, gave a life interest in his property to his widow with remainder to his sons and their heirs. One of the mortgagors, Gokul Lal Mullick, died in 1925, and one of his sons, Hariharlal is contesting this application. The widow Uttommoni died on May 22, 1938. In May 1930, the mortgagees attached the share of the defendants in the compensation money lying with the President of the Calcutta Improvement Tribunal by reason of the compulsory acquisition of Nos. 33 and 33½, Ratan Sircar Garden Street. In September 1933 the right, title and interest of the judgment-debtors in

the compensation money was sold and the proceeds of sale were applied in part satisfaction of the decree. Part of the compensation money was invested in Govt. promissory notes and the balance in landed property in 67-B Raja Naba Krishna Street and 21-A Shib Shanker Mullick Lane and was held on behalf of Uttommoni as executrix of Kanailal's estate. Uttommoni died in May 1938, and the decree holders now seek to attach the judgment-debtors' interest in these properties, and in the Govt. promissory notes in the custody of the President of the Calcutta Improvement Tribunal. Gokul Lal Mullick's sons object to the attachment on the ground that they are only liable to the extent of their father's property which came into their hand as his legal representatives and they contend that Gokul Lal had only a contingent and not a vested interest in his father's estate during the life of Uttommoni.

Mr. Majumdar for the attaching creditors relies first on the words of the decree. Monohar and Harihar are defendants described in the cause title as "sons, heirs and legal representatives of Gokul Lal Mullick, deceased," and in the body of the decrees: "It is ordered and decreed that the defendants personally do pay to the plaintiffs the said sum, etc." Mr. Majumdar contends that the word "personally" attaches a personal liability to each and every defendant and being unqualified it cannot be confined to the liability of Monohar and Harihar in their representative capacity and only to the extent of assets that have come into their hands. On the other hand, it is suggested that the decree does not express the real order of the Court and I am invited to use my powers under s. 152 to rectify the decree on the ground that the suggested alteration is correcting what is really a mistake of the ministerial officer by whom the decree or order was drawn up.

There is no doubt that the Court has the power under s. 152 to correct an error or omission in the decree and this seems to me to be clearly a case in which that power should be exercised. There was no judgment delivered in the case so that it cannot be said that the decree is not in conformity with the judgment but it is clear from the cause title that Harihar and his brother have been sued only in their representative capacity, and it is equally clear that in such capacity their liability is limited to the assets of the person whom they represent which have come into their hands. There has in my opinion been an accidental omission

sion in the operative part of the decree which provides for personal liability, in failing to limit the liability of Gokul's sons. It has been held both in Bombay and in Lahore that the passing of a personal decree against the legal representatives is an accidental slip, which may be corrected under this section, and, with respect, that is a view in which I concur. The objection is raised that this is an application in execution and that this Court as an executing Court is not entitled to go behind the actual words of the decree even if it has that power under s. 152. In *In re Swire, Mellor v. Swire* (1) Bown, L. J., said :

"Every Court has inherent power over its own records so long as those records are within its power, and it can set right any mistake in them. It seems to me perfectly shocking if the Court could not rectify an error which is really the error of its own minister."

The power to rectify such error can be exercised at any time, and although it is true that the present application is an application in execution, yet the Court which is now invited to rectify the error is the same Court which passed the decree. The decisions in *Kali Charan Singha v. Bibhut Bhushan Singha* (2) and similar cases are distinguishable. There the question agitated in the executing Court was whether some other Court which had tried the suit has jurisdiction to make the decree and it was held that the executing Court could not go into the merits or the validity of the decree as made. Here there is no question of the validity of the decree of which execution is sought. The decree on the face of it shows that a person sued in his representative capacity has been burdened with a liability which is not consonant with that capacity. The error is obviously that of a ministerial officer. In the circumstances, I fail to see why the Court which made the decree and which is empowered by s. 152 to rectify its error at any time, should be debarred from exercising its powers under the section, merely because that error has been brought to its notice in the course of an application, in which the decree-holder is seeking to execute the decree in a manner which the Court could never have intended when it passed the decree. Reliance is also placed on the fact that an application for execution of this decree was made in 1930, when Harihar himself appeared and raised no objection to the form of the decree. This

(1) (1885) 30 Ch D 239; 53 L T 205; 33 W R 785.
(2) 60 O 191; 142 Ind. Cas. 60; A I R 1933 Oal 85; 36 O W N 1120; 57 O L J 390; Ind. Rul. (1933) Oal 210.

omission does not in my opinion operate as *res judicata*, and there is no ground for suggesting that the decree-holder has thereby altered his position to his detriment so as to introduce the doctrine of estoppel.

For the decree-holders it is further argued that all the defendants are liable because under Kanailal's will they took a vested interest in his estate at the date of his death. The testator by his will appointed his widow his executrix. He referred to his six sons by name and having empowered his widow to mortgage his estate for the marriage expenses of his daughters, he directs that such mortgage shall be binding in law upon his sons or their heirs who shall inherit his estate after the death of his wife. This is the first reference to his sons' estate. Later he says :

"I give and devise my real and personal property to my beloved wife ... for life ... and after her death to vest in my sons or their heirs who may then be in existence."

Later again he says :

"It is my wish that my sons hereinbefore mentioned will not be entitled to my estate during the lifetime of my said wife."

It will be remembered that only three of the testator's sons were the mortgagors. Harihar and Monohar are introduced on the death of their father Gokul and if their father's interest is only a contingent interest, which does not ripen into an estate of inheritance until Uttommoni's death, it is not liable to attachment. The general rule of law is in favour of the vesting of an estate, so that in the absence of any contrary disposition the estate of the testator's sons should vest immediately on the testator's death. The words of the will have provided that the sons shall inherit on the death of the testator's widow. The gift is of an estate in futurity and the question is whether the words used by the testator were intended to delay the vesting of the sons' interest or merely to delay their possession. Ordinarily, the words "after the death of the life tenant" operate to vest the estate both in the life tenant and in the remainderman on the death of the testator. It is argued that the words in the will providing that the sons shall not be entitled to the testator's estate "until" the marriage of the unmarried daughters, or "until" the youngest son attain the age of 25, are evidence of the desire to grant a vested interest and exclude the idea of a contingent gift, which would have been conveyed by some such expression as "if

and when" in place of the word "until." It is also clear on the authorities that the ordinary meaning of the word "vest" means "vest in interest." The testator here by his will devises his real and personal estate to his wife for life and "after her death to vest in his sons or their heirs who may be then in existence." The intention seems to me clear that the estate was only to vest (i.e., to vest in interest) after the death of the wife. As was said by James, L. J., in *In re Deighton's Settled Estates* (3) at p. 785 :

"The Court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period leaving a family, his children would take no benefit under the will; but there is no reason for departing from the fair meaning of the words of a testator in order to vest the shares of his children, when he has made a provision for all his descendants living when the fund becomes divisible."

The words "then in existence" strengthen my view that the testator was contemplating the period of vesting as being at a future date, viz. on the death of his wife; and the words later in the will in which the testator expresses his wish that his sons should not be "entitled" to his estate during the lifetime of his wife add further support to this construction. The applicant relies on s. 119, Succession Act, in support of his contention that the sons' interest is vested in them at the testator's death, and that possession alone is postponed; but s. 119, while it provides the general rule following the English Law, contains the words "unless a contrary intention appears by the will," and in my opinion Kanailal's will contains more than one expression which shows a contrary intention. Reliance has also been placed on the proceedings in connection with Uttommoni's application to be appointed guardian of her grand-daughter Umasasi, as an indication that the construction for which the applicant now contends has been the accepted construction of the will by the members of the family, including Gokul. Uttommoni made the application in 1924 and in para. 9 of her petition she stated :

"The abovenamed infant (i. e., Umasasi) is entitled to a vested interest in respect of one undivided sixth share in certain houses forming part of Kanailal's estate."

Gokul consented to the application, but his consent was only to the prayer of the petition that Uttommoni should be appointed

(3) (1876) 2 Ch D 783 (785); 45 L J Ch 825; 31 L T 81.

guardian. It cannot be said that he thereby accepted every statement or submission of law which the petition contained. His action does not in my view operate as any kind of estoppel so as to prevent him or his sons from putting forward their present contention as to the construction of the will. In the result, I hold that Harihar and Monohar are not personally liable for the unpaid balance of the mortgage money and their share is not liable to attachment in execution of the decree of March 20, 1928. The attachment will issue as prayed in respect of the interest of the judgment-debtors Naba Kumar Mullick and Baidya Nath Mullick. The decree will be amended by the addition of words indicating that Monohar and Harihar Mullick are only liable in their representative capacity. The decree was passed 10 years ago and had Harihar then sought to have it amended it is possible that the present somewhat protracted hearing would have been avoided. In the circumstances I consider the proper order to be that each party pay his own costs. Certified for Counsel. The applicant may add his costs to his claim. The *interim* orders and undertakings are dissolved.

s.

Decree amended.

BOMBAY HIGH COURT

Second Appeal No. 280 of 1937

October 12, 1939

BRAUMONT, C. J.

DASHARATH SUPADU LADSAKE—

PLAINTIFF—APPELLANT

versus

GOPAL BHILA GADHARI—DEFENDANT—

RESPONDENT

Limitation Act (IX of 1908), Art. 182—Decree for payment of money by instalments—Application to recover some of instalments then due—Whether step-in-aid of execution in respect of instalments not due.

If there is an application for execution of so much of the decree as is executable, that is a step-in-aid of execution of the decree and prevents time running in respect of the whole decree.

Hence where a decree is for payment of money by instalments and an application is made to recover some of the instalments then due, the application is a step-in-aid of execution even in respect of instalments not due at the time of the application. 67 Ind. Cas. 159 (1), distinguished, 175 Ind. Cas. 136 (2), referred to.

S. A. from a decision of the District Judge, East Khandesh at Jalgaon, in Appeal No. 43 of 1936.

Mr. M. G. Chitale, for the Appellant.

Judgment. — This is a second appeal

from a decision of the District Judge of East Khandesh raising a point of limitation. Unfortunately the respondents have not appeared and therefore I have not had the advantage of any argument in support of the judgment of the learned District Judge which confirmed that of the learned trial Judge. But the point is a very short one and depends entirely on the construction of para. 5 of Art. 182, Lim. Act. The facts which give rise to the difficulty are these:

In 1927 a mortgage decree was made for payment of a sum of money by four equal annual instalments. The first instalment was to be paid in December 1927, and the other instalments in December 1928, 1929 and 1930. In July 1929 a *darkhast* was issued to recover the two instalments then due and that *darkhast* was disposed of on April 20, 1932. The present *darkhast* was issued on June 5, 1935, but it was not disputed that by reason of the vacation of the Court that *darkhast* has to be treated as within three years from the date of the dismissal of the previous *darkhast*. Both the lower Courts held that the present *darkhast* being within three years from the dismissal of the previous *darkhast*, the first two instalments to which that first *darkhast* related were saved from limitation, but as the first *darkhast* did not relate to the two later instalments which were not due at the time of its issue, there was no step-in-aid of execution in respect of the last two instalments which were therefore time-barred.

It is, on the face of it, a rather singular result to arrive at, that the two earlier instalments are not timebarred, whilst the two later instalments are. Both the lower Courts regarded the decision of this Court in *Sitabai v. Keshavrao* (1) as governing the present case. But, in my opinion, that decision does not determine the question which arises here. In that case there was a decree for payment by instalments, and in 1918 there was a *darkhast* to recover the instalments due in 1911, 1912 and 1913 which were recovered, and in 1919 a *darkhast* to recover the instalments due in 1914 and 1915 was filed and it was held that the earlier *darkhast* was a step-in-aid of execution which kept the decree alive in respect of the instalments of 1914 and 1915, which were not covered by the earlier *darkhast*. The appellant contends that the decision

is in his favour, and not against him as the lower Courts suppose. But the distinction between that case and the present is that at the time of the earlier *darkhast* which was relied on as a step-in-aid of execution the later instalments were due although they were not sought to be recovered by that *darkhast* and at the conclusion of his judgment the learned Chief Justice said (p. 722*):

"... but we see no reason why a *darkhast* which asks for the assistance of the Court for the recovery of one of several instalments due at the date of the *darkhast*, should not be considered as a step-in-aid so as to start a new period of limitation with regard to all the instalments then due."

No doubt the decision is limited to the facts of that case in which all the instalments were due at the date of the earlier *darkhast*, and it does not cover a case, like the present, where the later instalments were not due. It may be contended that a *darkhast* cannot be regarded as a step in execution of a part of the decree which is not executable at its date, but one has to look to the actual language of Art. 182. That Article provides that for the execution of a decree time is to be three years from the alternative dates which are set out in the seven paragraphs in col. 3. For a second application like the one in the present case there is no doubt that it is para. 5 which applies, and that paragraph amounts to this, that where there is an application made in accordance with law to the proper Court for execution or to take some step-in-aid of execution of the decree or order, then time runs from the date of the final order passed on that application. At the date of the decision in *Sitabai v. Keshavrao* (1) time ran from the date of the application, and not of the final order, but that, I think, does not alter the nature of the problem to be determined. The point to notice is that if there is an application to take some step-in-aid in execution of the decree, then time runs from the final order made on that application. It seems to me, on the language of the Article that if there is an application for execution of so much of the decree as is executable that is a step-in-aid of execution of the decree and prevents time running in respect of the whole decree.

Mr. Chitale has also referred to the case in *Latafat Ali Khan v. Kalyan Mat* (2) which, I think, to some extent, assists him.

(2) 1 L R (1938) All. 342; 175 Ind. Cas. 136; A I R 1938 All. 210; (1938) A L J 117; 1938 A L R 378; 10 R A 650.

(1) 46 B 719; 67 Ind. Cas. 169; A I R 1922 Bom. 194; 24 Bom. L R 284.

In that case moneys were payable under a decree by instalments, and in 1925 there was a payment into Court in respect of the instalment due in that year, and that money was taken out of Court in 1928. It was held that taking the money out of Court in respect of the 1925 instalment was a step-in-aid of execution of the decree and kept the decree alive in respect of the 1926 and 1927 instalments. No doubt those instalments were due at the date of the step-in-aid of execution, but that step had nothing to do with the execution of the decree in respect of those two instalments. In my opinion, both the lower Courts have misunderstood the effect in *Sitabai v. Keshavrao* (1) and the appeal must be allowed with costs throughout and the *darkhast* must continue.

D.

Appeal allowed.

ALLAHABAD HIGH COURT

First Appeal No. 96 of 1938

December 4, 1939

BENNET AND VERMA, JJ.

GAYA PRASHAD AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

RAM CHARAN—DECREE-HOLDER—

RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Compromise of date subsequent to trial decree, if can be recorded under O. XXI, r. 2.

Compromise of a date subsequent to the final decree in a suit can be recorded under O. XXI, r. 2, in execution proceedings. 180 Ind. Cas. 378 (2), relied on.

F. A. from an order of the Civil Judge, Cawnpore, dated March 8, 1938.

Mr. C. B. Agarwala, for the Appellants.

Mr. G. S. Pathak, for the Respondent.

Bennet, J.—This is a first appeal by the judgment-debtors against an order of the Court below refusing to entertain an application to record an alleged compromise. The application was headed as an application under O. XXIII, r. 3. The sole ground for refusal was that the alleged compromise was of a date subsequent to the final decree in the suit and therefore as r. 4 of O. XXIII states that O. XXIII does not apply to execution proceedings the compromise could not be recorded under that Order. The judgment debtor in appeal points out that although O. XXIII will not apply O. XXI, r. 2 will apply and he asks that the Court below be directed to consider his allegations of a compromise under that rule. No ground has been

shown by learned Counsel for the decree-holder as to why this should not be done. Some argument was made in regard to *Gobardhan Das v. Dau Dayal* (1) which was a Full Bench ruling of this Court. Among other matters there is a statement by one learned Judge on p. 537:

The line of reasoning adopted in some cases is that a compromise in an execution Court is in the nature of an adjustment within the meaning of O. XXI, r. 2, and that, if certified, it can be enforced by the execution Court. But an adjustment within the meaning of that rule should be a transaction which extinguishes the decree as such in whole or in part and results in its total or partial satisfaction. A transaction by which parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution or vary the time when the decree becomes executable would really be a transaction attempting to vary the terms of the decree.

This point of view has been considered by their Lordships of the Privy Council in *Oudh Commercial Bank Ltd., Fuzabad v. Bind Basni Kuer* (2) at p. 487 where their Lordships observe as follows:

The authority relied upon by the learned Judges of the Chief Court is *Gobardhan Das v. Dau Dayal* (1) and the principle invoked is that the original cannot be altered or varied by the parties even with the sanction of the Court and that in any case mere consent of the parties cannot confer such a jurisdiction on the executing Court. This line of reasoning is not without support from other decisions of Indian High Courts though authority and practice to the contrary is also to be found. On this difficult and important question their Lordships are not in agreement with the view taken by the Chief Court. They do not consider that it takes sufficient account of the facts that the Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and that if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree the provisions of s. 47 involve that questions relating to such terms may fall to be determined by the executing Court.

It appears to us therefore that there is no bar in law to the recording of the alleged compromise under O. XXI, r. 2. Accordingly we allow the appeal, set aside the order of the Court below, and remand this case to the Court below to hear the evidence for the parties and dispose of the application on the merits and according to law. Costs hitherto in the Court below and here will abide the result.

D.

Case remanded.

(1) 54 A 573; 138 Ind. Cas. 583; A I R 1932 All 273; (1932) A L J 375; L R 13 A 199 Rev; Ind. Rul. (1932) All 487; 16 R D 293 (F B).

(2) (1939) A L J 481 (487); 180 Ind. Cas. 378; A I R 1939 P O 80; I L R (1939) Kar 136; 66 I A 84; 14 Luck 192; 1939 O L R 187; 11 R P O 176; 1939 O W N 313; 5 B R 476; 43 O W N 501; 1939 R D 208; (1939) 1 M L J 652; 69 O L J 317; 41 Bom. L R 708; 50 L W 39; (1939) M W N 692 (P O).

CALCUTTA HIGH COURT

Appeal No. 344 of 1938

May 19, 1939

B. K. MUKHERJEA AND LATIFUR RAHMAN, JJ.

PURNA CHANDRA BHOWMICK—

DEFENDANT No. 2—APPELLANT

versus

BARNA KUMARI DEVI w/o BIBHUTI
BHUSAN CHAKRAVARTY—PLAINTIFF

AND ANOTHER—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 3, 6—Defendant borrowing money from plaintiff to carry on money suit filed by him against X and executing mortgage in plaintiff's favour assigning decree that would be passed in his suit—Decree passed—Suit by plaintiff for mere declaration that he was entitled to recover his dues out of amount payable under decree—There was held transfer of actionable claim and not of mere right to sue—Suit held not bad under s. 42, Specific Relief Act.

An assignment of future or non-existing property is quite valid and the transfer becomes operative as soon as the property comes into existence. *Holroyd v. Marshall* (4), *Ogbyer v. Isaacs* (5), and *Palaniappa v. Lakshmanan* (6), relied on.

Defendant borrowed money from the plaintiff aggregating to Rs. 1,500, to carry on a money suit instituted by him against X and he executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in the money suit instituted by him. The stipulation was that the plaintiff would be entitled to realize out of the decretal amount the sum of Rs. 1,500 due to him together with interest at the rate mentioned in the document. Subsequently a decree was passed in favour of defendant in the money suit for a certain sum. On appeal this sum was reduced. The plaintiff brought a suit for a declaration that on the strength of the mortgage bond he was entitled to have his dues realized out of the amount payable under the decree:

Held, that what was transferred was the claim to a debt and as such would come within the definition of 'actionable claim' as given in s. 3, T. P. Act. The mere fact that the claim was reduced by the Court did not make, any difference. What was transferred was not a mere right to sue:

Held, also that the plaintiff was an assignee of the decree for the purpose of realizing the amount due on the mortgage bond and was competent under the terms of the bond itself to institute proceedings for recovery of the amount.

Held, further that all that the plaintiff could want possibly was a declaration that he was an assignee of the decree, and if he got a declaration it would be open to him to apply for execution of the decree under O. XXI, r. 16, Civil P. O. No other consequential reliefs, by way of injunction or otherwise could or should have been prayed for by the plaintiff in the suit and the suit for mere declaration without consequential relief was not bad, under s. 42, Specific Relief Act.

A, from the appellate decree of the District Judge, Murshidabad, dated December 10, 1937.

Messrs. Surajit Chandra Lahiri and Amarendra Chandra Roy, for the Appellant.

Mr. Narendra Kumar Basu, for the Respondents.

B. K. Mukherjea, J.—This appeal is on behalf of defendant No. 2 and it arises out of a suit commenced by the plaintiff for a declaration that as an assignee of a decree passed in money suit No. 258 of 1928 he was entitled to realize the decretal amount amicably or by execution of the decree. The facts lie within a narrow compass and are for the most part undisputed. Defendant No. 1 filed a suit, being Money Suit No. 258 of 1928, in the Court of the Subordinate Judge of Berhampur against the London Mission Society and another person, for recovery of a sum of Rs. 7,997 0-5 only. Defendant No. 1 borrowed money at different dates from the plaintiff aggregating to Rs. 1,000, to carry on this litigation and on August 23, 1932, he executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in the money suit instituted by him. The stipulation was that the plaintiff would be entitled to realize out of the decretal amount the sum of Rs. 1,500 due to him together with interest at the rate mentioned in the document. On March 8, 1934, a decree was passed in favour of defendant No. 1 in the money suit for a sum of Rs. 2,566-10-0 only. On appeal to this Court preferred by the defendants it was further reduced to Rs. 1,743-2-0. The judgment of this Court is dated December 22, 1936. The plaintiff now wants a declaration that on the strength of the mortgage bond mentioned aforesaid she is entitled to have her dues realized out of the amount payable under the decree mentioned aforesaid. As defendant No. 2 purported to be a subsequent transferee of the same decree under a conveyance executed on April 20, 1934, he was made a party to the suit as it was necessary to have the declaration in his presence. Defendant No. 1 did not contest the suit. It was contested by defendant No. 2 alone. His contention in substance was that the plaintiff was a mere *benamiar* of defendant No. 1 and there was no consideration for the alleged mortgage bond. It was further pleaded that the plaintiff acquired no rights under the decree passed in Money Suit No. 258 of 1928 which was sold to defendant No. 2, for money due to the latter by defendant No. 1 who was stated to be a partner in the former's business. The trial Court dismissed the plaintiff's suit primarily on the finding that the mortgage bond upon which the plaintiff rested his case was a *benami* document which was not supported by any consideration. On appeal the judgment was re-

versed. The District Judge who heard the appeal held on evidence that the mortgage bond was for a consideration and that the plaintiff as an assignee of the decree was entitled to execute it. It is against this decision that the present second appeal has been preferred.

Mr. Lahiri who appears for the appellant has urged a number of points in support of his appeal. His first contention is that as a decree for a definite sum of money was not in existence at the date when the mortgage bond was executed in favour of the plaintiff, she was an assignee only of a right to sue which is not alienable under the T. P. Act. The plaintiff therefore has not acquired any rights under the decree and cannot claim to execute it. In support of this contention the learned Advocate has relied upon certain decisions of this Court which are to be found in *Abu Mahomed v. S. C. Chunder* (1), *Jewan Ram v. Ratan Chand Kissen Chand* (2) and *Khetra Mohan Das v. Biswa Nath Bera* (3). I do not think that this contention is sound. It is true, as was laid down in all these decisions that the right to sue for damages of an unascertained amount resulting from a breach of contract could not be transferred. What is assignable is the benefit of the contract before any breach occurred. As the breach discharges the contract nothing remains after that but the mere right to sue for damages which is not assignable in law. This principle however is of no assistance to the appellant in the present case. Here the plaintiff in the money suit did not sue for damages arising out of a breach of contract. He did certain building works for the defendants in the suit and some bills were unpaid. A suit was brought to recover the money due on these unpaid bills. In my opinion, what was transferred was the claim to a debt and as such would come within the definition of 'actionable claim' as given in s. 3, T. P. Act. The mere fact that the claim was reduced by the Court did not make, in my opinion, any difference. It cannot be disputed that an assignment of future or non-existing property is quite valid and the transfer becomes operative as soon as the property comes into existence; *Holroyd v. Marshall* (4), *Collyer v.*

Issacs (5) and *Palaniappa v. Lakshmanan* (6). Here the mortgage must be deemed to have attached itself to the decree which was for a definite amount as soon as a decree was passed and I am unable to agree with the appellant that what was transferred was a mere right to sue.

The second argument that is put forward is that the plaintiff was at best a mortgagee in respect of the rights under the decree and unless she purchased the entire rights of the decree-holder she could not rank as an assignee of the decree and was not entitled to execute it as such. The assignment was undoubtedly by way of mortgage and not of the entire rights of the assignor. What the assignee was entitled to under the terms of the instrument was to realize the sum of Rs. 1,500 together with interest on the decretal amount and she was to pay the balance, if any, to the assignor. She was therefore an assignee of the decree for the purpose of realizing the amount due on the mortgage bond and she was competent under the terms of the bond itself to institute proceedings for recovery of the amount. I think there is nothing wrong in the form of the relief that has been granted to her by the Court below. The third ground put forward by the appellant is that the suit which was one for a pure declaration was bad under s. 42, Specific Relief Act, and the plaintiff ought to have prayed for consequential relief in the shape of a permanent injunction restraining defendant No. 2 from executing the decree. This argument is manifestly untenable. All that the plaintiff could want possibly at the present stage was a declaration that she was an assignee of the decree, and if she gets a declaration it would be open to her to apply for execution of the decree under O. XXI, r. 16, Civil P. C. No other consequential reliefs, by way of injunction or otherwise could or should have been prayed for by the plaintiff in the present suit. The last argument of the appellant is directed against the finding of the lower Appellate Court that the mortgage bond was not a *benami* transaction and was supported by consideration. This is a finding of fact even though there is no other evidence except that of the plaintiff's husband in support of it. In my opinion, the Court of Appeal below has given reasons for this finding and the finding being based on evidence is unassailable in second appeal.

(1) 36 O 345; 1 Ind. Cas. 827; 13 O W N 384.

(2) 26 O W N 285; 70 Ind. Cas. 498; A I R 1921 Cal 795.

(3) 51 O 972; 82 Ind. Cas. 411; A I R 1924 Cal 1047; 40 O L J 79; 28 O W N 894.

(4) (1864) 10 H L C 191; 33 L J Ch 193; 9 Jur. (N. S.) 213; 7 L T 172; 11 W R 171.

(5) (1882) 19 Ch D. 342; 51 L J Ch 14; 45 L T 567; 50 W R 70.

(6) 16 M 429.

It may be that defendant No. 2 is himself duped by defendant No. 1 but there is no reason why another innocent person should suffer. In the result we dismiss the appeal but, regard being had to the circumstances, we make no order as to costs.

Latifur Rahman, J.—I agree.

s.

Appeal dismissed.

ODUH CHIEF COURT

Criminal Revision Application No. 24
of 1940

April 2, 1940

HAMILTON, J.

AKHTAR HUSAIN AND OTHERS—

APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE
PARTY

Criminal Procedure Code (Act V of 1898), s. 106—Order under, when can be passed—Conviction under s. 323, Penal Code (Act XLV of 1860), set aside and one under s. 342, Penal Code maintained—Order under s. 106, if can be passed.

One has to see not whether on the facts the persons against whom an order under s. 106, Criminal P. C., is passed did commit a breach of the peace but whether they were convicted of an offence which necessarily involves a breach of the peace. If the offence is one in which a breach of the peace may have been committed in the circumstances of the case but which in other circumstances does not necessarily involve a breach of the peace, an order under s. 106 of the Criminal P. C., cannot be passed. Where the Judge has set aside the conviction under s. 323, I. P. C., leaving only the conviction under s. 342, I. P. C., an order under s. 106, Criminal P. C., cannot be passed. 135 Ind. Cas. 691 (2), followed, 71 Ind. Cas. 879 (1), referred to.

Or. R. App. of the order of the Sessions Judge of Fyzabad, dated November 19, 1939.

Mr. Nasirullah Beg for Mr. Hakimuddin for the Applicants.

The Govt. Advocate, for the Crown.

Judgment.—This is an application in revision on the part of seven persons Akhtar Husain, Wajid Khan, Riasat Khan, Jan Mohammad Khan, Sheikh Nasir, Mithoo, and Nizam Uddin who have been convicted under s. 342 of the I. P. C., and against whom an order under s. 106 of the Criminal P. C., has also been passed. These persons at first had also been convicted under s. 323 of the I. P. C. but that conviction was set aside by the learned Sessions Judge on appeal.

The facts are not contested, namely, that the applicants with others at the time

when feelings between the Hindus and Muhammadans ran high, pursued a number of Hindus one of them being Ram Niranjan and took him to the Police Station accusing him of theft. Ram Niranjan was beaten with *lathis* but the learned Sessions Judge came to the conclusion that it was not possible to say that the injuries had been caused by the present applicants in revision.

The only point raised in this application by the learned Counsel for the applicants is that the order under s. 106 of the Criminal P. C. cannot be sustained once the conviction under s. 323 was set aside and only that under s. 342 maintained by the learned Sessions Judge. The learned Counsel bases his argument on *Mahomed Afzal v. Emperor* (A. I. R. 1924 Lahore 311) (1) and on *Lodha Ram v. King-Emperor* (8 O. W. N. 1286) (2) which referred to that decision. In the Lahore case where the conviction was under s. 342, I. P. C. it was held that the offence under which persons have been convicted must be one of which a breach of the peace is in law a necessary ingredient. It is clear that a breach of the peace is not necessarily an ingredient of wrongful confinement which is punishable under s. 342 as for instance a person who is in a room might be wrongfully confined in it by some one locking him in without touching him in the slightest. *Lodha Ram v. King-Emperor* 8 O. W. N. 1286 (2) dealt with a conviction under s. 504 of the I. P. C., and not one under s. 342 of the I. P. C. but this Lahore case was referred to and it was pointed out that an offence punishable under s. 504 of the I. P. C. does not necessarily involve a breach of the peace though it involves an intention to provoke a breach of the public peace or knowledge that the provocation given is likely to cause a breach of the public peace. On this prior decision of this Court which is a decision of a Bench by which I am bound, one has to see not whether on the facts the persons against whom an order under s. 106 is passed did commit a breach of the peace but whether they were convicted of an offence which necessarily involves a breach of the peace. If the offence is one in which a breach of the peace may have been committed in the circumstances of the case but which in other circumstances

(1) A I R 1924 Lah. 311; 71 Ind. Cas. 879; 24 Cr. L. J. 371.

(2) 8 O W N 1286; 135 Ind. Cas. 691; A I R 1932 Oudh 33; 33 Cr. L. J. 193; Ind. Rul. (1932) Oudh 51; (1932) Cr. Cas. 65.

does not necessarily involve a breach of the peace, an order under s. 106 of the Criminal P. O., cannot be passed. I am bound by the decision of the Bench, and as the learned Sessions Judge set aside the conviction under s. 323 leaving only the conviction under s. 342, I must set aside the order under s. 106.

I, therefore, allow the application to this extent that the order under s. 106 of the Criminal P. O., is set aside.

D. *Application allowed.*

BHOPAL HIGH COURT

Second Appeal No. 38 of 1939

July 7, 1939

M. A. KHAN, C. J. AND P. C. BIRDI, J.

MADAN MOHANLAL AND

ANOTHER—PLAINTIFFS—

APPELLANTS

versus

ZAHIRUDDIN AND ANOTHER

—DEFENDANTS—RESPONDENTS

Plaint—Amendment—When allowed—Suit on instalment bond with default clause that on default of any one of instalments creditor would recover whole amount—Plaint stating that first two instalments were paid on due dates—Objection by defendant—Plaintiff by amendment seeking to mention real dates of payment and pleading waiver of right to sue for whole amount—Amendment held did not interfere with defendant's right to plead limitation and should be allowed—Bond—Instalment bond—Waiver—Default clause—Acceptance of overdue instalments amounts to waiver—Minor—Payment by, towards debt—Validity.

No amendment can be allowed which has the effect of depriving the defendant of any right already acquired by him or of altering the cause of action in any suit. Amendment of every other kind is permitted. An amendment which deprives the defendant of his existing right is really against the spirit of the procedure, but such an amendment must always be permitted by which the defendant's plea of limitation against the suit might entirely fall to the ground. A right which the defendant has already acquired is one thing, and a mere right to raise the plea is quite another. Confusion is apt to arise when these two entirely different ideas are mixed up. The plaintiff shall not be allowed to add any new relief by way of an amendment which on account of the efflux of time he could not claim at that time, but the plaintiff's request to plead waiver in his suit is neither a new relief nor it has the effect of depriving the defendant of any right already acquired by him. The nature of the suit is not in the least altered thereby. In fact the plaintiff is trying by this amendment to explain that his suit was within time, and such an amendment is permissible at any stage. If the plaintiff has made a mistake in stating the date of payment of money and then by amendment requests to correct the same, he by doing so is not in any way depriving the defendant of any right whatsoever which he had so far acquired. A mistake of fact of this nature can always be corrected in pleadings by any party without injuring any right of his adversary.

It would clearly be against the principle of amendment laid down in O. VI, r. 17 of the Civil P. O., to refuse an amendment in respect of a *bona fide* mistake regarding the mere date of any transaction. [p. 810, col. 2; p. 811, col. 2; p. 812, col. 1.]

[Case-law discussed and relied on.]

A default clause contained in an instalment bond gave the plaintiffs a right to recover the whole amount in the event of failure of any one instalment. On default of the third instalment plaintiffs sued on the bond and originally stated in the plaint that the first two instalments were paid on due dates but on defendants' objection as to the dates of payment the plaintiffs sought to amend the plaint by mentioning the real dates on which both the instalments were actually received. In respect of the first instalment the due date did not coincide with the actual date of payment, therefore by way of explanation in this connection the plaintiffs pleaded that an acceptance by them of the first overdue instalment amounted to a waiver of their right to sue for the whole amount:

Held, that the plaintiffs had full right to amend the plaint and plead a waiver of their right to sue. That the amendment did not in any way interfere with the defendant's right to plead limitation. [p. 812, col. 1.]

In the case of an instalment bond with a default clause that on default of any one of the instalments the creditor would have a right to sue for the whole amount, mere acceptance by the creditor of payment of overdue instalment amounts to waiver of his right to recover the whole amount and in such a case the time does not begin to run from the date on which the instalment was due.

A minor can validly pay any amount towards his debt and such a payment towards any instalment due under an instalment bond would be a good payment to prove that the said instalment was discharged. 107 Ind. Cas. 392 (9), *Maharaja of Benares v. Nandram* (10) and *Jadavchander Bakshi v. Bharat Chandra Chakrabarti* (11), relied on [p. 812, col. 2.]

R B. G. P. Jaiswal, and Mr. Horeylal, for the Appellants.

Mr. Nasiruddin, for the Respondents.

M. A. Khan, C. J.—This appeal arises out of a suit filed by the plaintiffs-appellants on foot of a registered bond in the Court of the Subordinate Judge of Bhopal, who dismissed the same as time-barred. Plaintiffs appealed to the High Court and failed. Now this appeal is filed under cl. 9/1 of the Letters Patent. The plaintiffs brought a suit for Rs. 4,841 on the basis of an instalment bond dated February 8, 1930, according to which the first instalment was to be paid on April 30, 1930, and the following instalments every year on the same date. A default clause contained in the said bond gave the plaintiffs a right to recover the whole amount in the event of failure of any one instalment. The plaintiffs came to Court on May 1, 1937, with a claim of Rs. 4,841 alleging that the first instalment was paid in time and the second which fell due on April 30, 1931.

was paid on May 7, 1931. The third instalment falling due on April 30, 1932, was never paid giving the plaintiffs a right to sue for the whole amount due to him up to date. The defendants pleaded that on April 30, 1930, they never paid any thing towards the first instalment, nor did they make any payment on April 7, 1931. Therefore on the failure of the very first instalment of April 30, 1930, the plaintiffs had become entitled, according to the terms of the bond in suit, to sue for the whole amount and consequently their suit was time-barred. The plaintiffs were served with interrogatories asking the mode and place of payment of the first two instalments and whether the said payments were evidenced by their account books. Thereupon the plaintiffs admitted that the date of payment of the first instalment was incorrectly stated in their plaint as April 30, 1930, and the error was due to a mere accident. The first instalment was in fact paid on May 18, 1930, at Sehore in the following manner. Zahiruddin, defendant No. 1 handed to Madan Mohanlal, plaintiff, a cheque for Rs. 1,142-4-11 drawn on Sehore Tehsil Treasury which the said plaintiff cashed and kept only Rs. 500 towards the first instalment returning the value of Rs. 642-4-11 to the defendant. This transaction was duly entered in the plaintiffs' cash book on May 21, 1930. The second instalment was paid by the defendant on May 7, 1932, at the plaintiffs' shop and entry thereof appears to have been made in the firm's account books on the same date. The cash book was produced in evidence and both the entries were satisfactorily proved. The plaintiffs in order to remove this discrepancy applied for an amendment of their plaint with respect to the dates of payment of the first two instalments pleading further that these instalments not having been paid on due dates were accepted a few days later and by so doing the plaintiffs had clearly waived their right of suing for the whole amount. Therefore time did not begin to run against them before a default was made in respect of the third instalment. The plaintiffs also pleaded minority stating that Madan Mohanlal had attained majority on September 18, 1933, and Ratanlal on May 9, 1933, therefore their suit being brought on May 1, 1937, was within time. The learned Subordinate Judge allowed an amendment of the plaint in respect of the plea of minority but did not

allow the plaintiffs to set up waiver, holding that the latter plea was an after-thought and an amendment of that nature if allowed would interfere with the rights of the defendants. This view was upheld in appeal, therefore, the plaintiffs are now before this Court. The main argument of the Court below hinges on *Byash-chandra Roy v. Ajodhyanath Deb*, 137 Ind. Cas. 39 (1) and it is contended that by such an amendment the plaintiffs tried to introduce fresh matter in their plaint. First of all it is to be decided whether the plaintiffs' application for amendment was rightly disallowed. The judgment relied upon by the lower Court is a single Judge ruling of the Rangoon High Court in the above mentioned case which lays down that no such amendment could be allowed as might introduce new matter into the suit whereby the defendants were deprived of the benefit of their statutory defence set up by virtue of the Lim. Act. The learned Judge has no doubt laid down a sound principle of law, but without mentioning the facts of the case the learned pronouncement does not materially help us in deciding the point in issue in the present suit. Reference has been made therein to a famous English case of *Weldon v. Neal* (2) in which Lord Esher has held that such an amendment could not be allowed as would prejudice the rights of the opposite party as existing at the date of that amendment. In order to explain and appreciate the underlying principle of this decision it is necessary to study the point in the light of other judgments of the various High Courts in India. It is generally accepted that no amendment can be allowed which has the effect of depriving the defendant of any right already acquired by him or of altering the cause of action in any suit. Amendment of every other kind is permitted. In *Ruliaram v. Ramchander Dass* (3) this principle of amendment has been fully elucidated. The plaintiff in that case had brought a pre-emption suit on the basis of contiguity, and on the defendants' pleading a similar right he sought to amend his plaint after the time for filing the suit had lapsed, basing his suit on a right of easement over the property in dispute. This amendment was disallowed simply

(1) 137 Ind. Cas. 39; 10 R. 74; A I R 1932 Rang. 26; Ind. Rul. (1932) Rang. 89.

(2) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

(3) A I R 1933 Lah. 774 (1); 144 Ind. Cas. 822; 6 R. L. 30; 14 L. 807; 35 P. L. R. 96.

because the cause of action was being materially altered thereby after the period of limitation for filing the suit had expired. In *Bhimrao v. Gangarao* (4) it was held that the plaintiff who had not originally sued for mesne profits could not after the expiry of the period of limitation add that plea by way of amendment, for the simple reason that by so doing he would deprive the defendants of a valuable objection which could be raised against that claim on the score of limitation. In *Parbhudas Girdhardas Shah v. Lallubhai Khushal Mehta* (5) the learned Bench disallowed an amendment of the plaint in which defendants Nos. 1 to 3 were impleaded as members of a joint Hindu family with the allegation that goods were delivered to defendant No. 1 as *karta*, and by way of amendment the plaintiff desired to implead all the defendants as partners of a firm who had jointly and severally been benefitted by the goods supplied. In the above mentioned cases we have seen that an amendment of plaint was disallowed because it offended against the principle decided in *Weldon v. Neal* (2) cited above, and in the following instances it will be noted that amendment of every other kind has been allowed with characteristic freedom of the Civil Courts. In *Muthammal v. Gurusami Nayakkan* (6) a pro-note executed in 1934 formed the basis of a suit brought in 1932 in which the plaintiff had alleged that a part of the debt having been paid on August 18, 1930 gave a fresh start of limitation from that date. The plaintiff during the pendency of the suit asked permission for adding a further plea that the defendant had also acknowledged liability of the debt. No date of acknowledgment was mentioned and for the sake of argument it was taken to be more than three years previous to the date of the application for amendment. Even then the learned Court saw no reason to disallow the amendment. It was held that the amendment did neither introduce a new cause of action nor was any new relief added thereby. This case is very much similar to a Bombay ruling reported in *Gunnaji Bhawaji v. Makanji Khushalchand* (7) in which the plaintiff was allowed to amend his plaint after the expiry

(4) A I R 1931 Nag. 74; 131 Ind. Cas. 417; Ind. Rul. (1931) Nag. 81; 27 N L R 291.

(5) A I R 1932 Bom. 117; 137 Ind. Cas. 710; 34 Bom. L R 35; Ind. Rul. (1932) Bom. 340.

(6) A I R 1935 Mad. 158; 154 Ind. Cas. 707; 67 M L J 921; 7 R M 487 (2).

(7) 34 B 250; 3 Ind. Cas. 169; 10 Bom. L R 969.

of limitation and permitted to raise the plea of an acknowledgment by defendant and to prove the same. In *Latif Husain v. Seth Gopaldas* (September 28, 1936) the same principle was applied by this Court holding that the plaintiff who, in support of his claim, had produced documents written and signed by the defendants, could be permitted to prove acknowledgment of debt by the defendant even after the expiry of time for his suit. It was further held that such an amendment had no effect on the nature of the suit or on the rights already acquired by the defendant, and the Courts in order to do justice between the parties were bound to give full latitude for amendment of pleadings. The learned Privy Council in *Charan Das v. Ameer Khan* (8) has at least in one instance considered it just to allow even the addition of a new relief by way of amendment. Where the plaintiff in a suit for pre-emption had prayed for a mere declaration, to which s. 42 of the Specific Relief Act was a bar, the Court in second appeal had allowed the plaintiff to amend his plaint by adding a further relief for possession. The learned Privy Council fully supported this view of the learned Judicial Commissioner who had held that however carelessly the defendant's suit might have been framed, the suit was really for the enforcement of his right of pre-emption, and its cause of action would remain the same whether the relief for possession was asked or not.

An amendment which deprives the defendant of his existing right is really against the spirit of the procedure, but such an amendment must always be permitted by which the defendant's plea of limitation against the suit might entirely fall to the ground. A right which the defendant has already acquired is one thing, and a mere right to raise the plea is quite another. Confusion is apt to arise when these two entirely different ideas are mixed up. The plaintiff shall not be allowed to add any new relief by way of an amendment which on account of the afflux of time he could not claim at that time, but in the present case the plaintiffs' request to plead waiver in his suit is neither a new relief nor it has the effect of depriving the defendant of any right already acquired by him. The nature of the suit is not in the least

(8) A I R 1921 P O 50; 57 Ind. Cas. 606; 47 I A 255; 48 O 110; 39 M L J 195; 28 M L T 149; 2 U P L R (P O) 124; 18 A L J 1095; 32 Bom. L R 1370; 3 L W 49; 25 O W N 289; 3 F W R 1921 (P O).

altered thereby. In fact the plaintiff is trying by this amendment to explain that his suit was within time, and such an amendment is permissible at any stage. If the plaintiff has made a mistake in stating the date of payment of money and now requests to correct the same, he by doing so is not in any way depriving the defendant of any right whatsoever which he had so far acquired. A mistake of fact of this nature can always be corrected in pleadings by any party without injuring any right of his adversary. It would clearly be against the principle of amendment laid down in O. VI, r. 17 of the Civil P. C., to refuse an amendment in respect of a *bona fide* mistake regarding the mere date of any transaction. As a result of all this discussion we hold that the plaintiffs in this suit have a full right to amend the plaint and plead a waiver of their right to sue. We have therefore allowed the plaint to be amended and consequently permitted the plaintiff to argue on the point of waiver. We might also add that the real nature of the plaintiffs' amendment has not been carefully considered by the Courts below. Taking a broad view of the case it can be said that the amendment in respect of the dates of payment was never asked by the plaintiff to enable him to add a new plea of waiver. Originally the plaintiffs had stated that the first two instalments were paid on due dates but on defendants' objection as to the dates of payment the plaintiffs mentioned the real dates on which both the instalments were actually received. In respect of the first instalment the due date did not coincide with the actual date of payment, therefore by way of explanation in this connection the plaintiffs pleaded that an acceptance by them of the first overdue instalment amounted to a waiver of their right to sue for the whole amount. The amendment with regard to the date of payment of the first instalment did not in any way interfere with the defendants' right to plead limitation. It lay heavily on the plaintiffs to prove the receipt of the first instalment and on their failure to do so the defendants' plea of limitation was bound to succeed. It is evident that if the plaintiffs succeeded in proving that the first instalment was received on the due date, the defendants' plea would become futile, and again if it could be proved by the plaintiffs that the first instalment was actually received by them some time after the due date, which amount-

ed to a waiver of their right to sue for the whole amount, the defendants position would not be affected. Now on the evidence on record we have to find whether the plaintiffs had really waived their right to sue for the whole amount or not. The plaintiffs have proved by oral and documentary evidence of a most reliable nature that defendant No. 1 had endorsed a cheque for Rs. 1,142-4-11 in favour of the plaintiffs. This cheque has been produced in Court and the endorsement thereon appears to be in the handwriting of defendant No. 1. The cash book of the plaintiffs' firm also corroborates this evidence and defendant No. 1 had not the courage to go into the witness-box to contradict the plaintiffs on this point. The lower Courts has no reason to disbelieve this fact of payment, therefore, it is established beyond doubt that the first instalment of Rs. 500 was paid by the defendants on May 18, 1930. An objection as to Madan Mohanlal's minority does not affect this payment in any manner. A minor can validly pay any amount towards his debt and such a payment towards any instalment would be a good payment to prove that the said instalment was discharged. It has been held by a Full Bench of this Court in *Kanayyalal v. Zalimsingh* on March 23, 1939 that failure of any instalment has the effect of causing limitation to run against the whole amount on account of the provisions usually contained in a default clause occurring in simple money bonds. If, however, the plaintiffs prove that they had waived their right which accrued to him on the failure of any instalment, such a waiver must be clearly established and circumstances must be proved which lead to the conclusion that the plaintiffs had in fact waived their right. In *Gopal Mal v. Firm Gopal Singh Hira Singh* (9) it was held by the Lahore High Court that at the time of receiving an overdue instalment the creditor must clearly express his intention of reserving the right of suing for the whole amount otherwise mere receipt of money towards the discharge of an overdue instalment would mean that he had waived his right of suing for the whole amount. The Allahabad High Court in *Maharaja of Benares v. Nandram* (10) has likewise clarified this point and held that a mere receipt of an overdue instalment amounts to waiver. Such a waiver has the same significance as in the case of a *zamindar*;

(9) A I R 1928 Lah. 378; 107 Ind. Cas. 392.

(10) 29 A 431; 4 A L J 336; A W N 1907, 139.

who having acquired a right to eject his tenant for non-payment of rent, accepts rent that had remained unpaid and thereby waives his right of ejectment. Similarly in *Jadavchander Bakhshi v. Bharat Chander Chakrabarti* (11) it has been laid down that mere abstinence from bringing a suit did not amount to waiver while on the other hand acceptance of an overdue instalment had such an effect. In short, rulings in favour of this view are not wanting, whereas there are hardly any judicial pronouncement deserving of consideration which have ruled otherwise. The Allahabad decisions contained in *Ajudhia v. Kunjal* (12) and *Mohan Lal v. Tika Ram* (13) have ceased to be good law on account of having been overruled by the later decisions of the same Court. There is also a Single Judge ruling of the Judicial Commissioner's Court at Peshawar reported in *Gopi Chand v. Mohammad Umar Khan*, 160 Ind. Cas. p. 134 (14) on which defendant's learned Counsel has also relied. In this judgment neither any reference has been made to the mass of case-law on the subject nor the arguments advanced are sufficiently strong to support a view which is in direct conflict with the opinions of all the superior Courts in India. We are therefore unable to deviate from the established practice of this Court, and to differ from the reasoned view taken by British Indian High Courts as mentioned above. We, therefore, hold that by accepting payment of the first instalment after its due date the plaintiffs clearly waived their right of suing for the whole amount and time against them did not begin to run from April 30, 1930. The second instalment was received on May 7, 1931 and this fact has been proved by reliable evidence on record. The plaintiffs' account books are regularly kept and the writer thereof was dead long before the present suit was instituted. Entry relating to the receipt of second instalment is clearly made and does not admit of any doubt under the circumstances. The owners of this firm were minors and business was carried on on their behalf by their certificated guardian who could not be suspected of having made any false entry. The defendants have not attempted to prove otherwise nor have they even specifically

(11) 31 O 297.

(12) 23 A 123; 5 A L J 72; A W N 1908, 36.

(13) 41 A 104; 7 Ind. Cas. 926; 16 A L J 929; A I R 1918 All. 55.

(14) 160 Ind. Cas. 134; A I R 1935 Pesh. 179; 8 R. Pesh. 100.

denied payment of any of these instalments. Second instalment having thus been paid and received did not cause limitation to run even in 1931. When the third instalment fell due in 1932 and was not paid, time did begin to run against the whole amount and the present suit was brought well within the period of limitation.

As regards the plea of the plaintiffs' minority, the learned Judge held that the plaintiff No. 1 came of age on December 18, 1933, and could bring the present suit within three years from that date. We have held that time began to run on the failure of the third instalment from April 30, 1932, therefore the present suit which was brought on May 1, 1937, was clearly within the statutory period of limitation. No question of plaintiffs' minority could therefore arise under these circumstances. Defendant No. 2 has been impleaded in her capacity as surety. Her only objection to the plaintiffs' suit was based on the plea of limitation, which, as has already been decided, has fallen to the ground. The suit against both the defendants is clearly within time and the surety is as much bound by the decree as the principal debtor, therefore, it is ordered that the plaintiffs appeal be accepted and the claim for Rs. 4,841 be decreed against defendants Nos. 1 and 2 with joint and several liability. Costs of this Court and the Courts below shall be paid by the defendants respondents to the plaintiffs-appellants.

Birdl, J.—I agree.

S.

Appeal allowed.

ALLAHABAD HIGH COURT.

First Appeal No. 154 of 1938

December 7, 1939

BENNET AND VERMA, JJ.

DHANESHWAR NATH TEWARI—

APPELLANT

versus

GHANSHYAM DHAR MISRA—RESPONDENT
Civil Procedure Code (Act V of 1908), s. 151,
O. XXXIX—Power of Court to pass temporary injunction for preservation of property in respect of which person has filed plaint and has applied for leave to sue as pauper.

Apart altogether from O. XXXIX of the Code, the Court has ample jurisdiction to pass an order providing for the protection and security of the property which is the subject-matter of the litigation. It can pass a temporary injunction for the preservation of property in respect of which a person has filed a

plaint and has applied for leave to sue as pauper. 55
Ind. Cas. 403 (2), relied on.
[Case-law referred to]

F. A. from the order of the Civil Judge, Gorakhpur, dated June 2, 1938.

Messrs. N. P. Asthana and K. B. Asthana, for the Appellant.

Mr. Sankar Saran for the Respondent.

Verma, J.—This is an appeal against an order directing a temporary injunction to issue against the appellant restraining him "from transferring the properties in dispute except so far as may be necessary for ordinary enjoyment of the same," and restraining him "from receiving the amounts in dispute from the post office and the Court of Wards till August 6, 1938" which date was fixed for hearing the objections of the Post Office and the Court of Wards to whom notices were directed to issue.

The matter has arisen thus. One Nath Prakash Dhar Misra died some years ago leaving him surviving a widow *Mst. Moharmani Kunwari*. Nath Prakash Dhar Misra seems to have been possessed of considerable property, movable and immovable. His widow died on August 23, 1935. The respondent, Ghanshyam Dhar Misra, on April 28, 1938, presented a plaint in the Court of the Civil Judge of Gorakhpur claiming the property left by Nath Prakash Dhar Misra on the allegation that he was the reversioner and that the succession had opened to him on August 23, 1935, when *Mst. Moharmani Kunwar* died. Ghanshyam Dhar Misra alleged that he was a pauper and was unable to pay the court-fee prescribed by the law on the plaint and prayed for leave to sue as a pauper. On May 30, 1938, Ghanshyam Dhar Misra presented an application praying that an injunction be issued to the appellant restraining him from damaging or alienating and removing the properties in suit and from doing various other things. The appellant is named in the plaint as defendant No. 1, and it is averred by Ghanshyam Das Misra that defendant No. 1 has without any right and title taken possession of the estate of Nath Prakash Dhar Misra on the false allegation that he is an adopted son of Nath Prakash Dhar. He has also alleged that the appellant was anxious to alienate the properties and to remove and appropriate the movables and the cash. This application for an injunction being issued to the appellant was taken up for hearing by the Court below before the question of the plaintiff's pauperism had been

decided. The application was contested by the appellant. He did not however file any written reply to the application of the respondent dated May 30, 1938. The main objection which seems to have been taken by the appellant before the Court below was that as the question of pauperism had not yet been decided the application was not maintainable. The Court below has overruled this objection and has passed the order mentioned above.

The learned Counsel for the appellant has referred to the provisions of O. XXXIX, Civil P. C., and has urged that there must be a 'suit' before the Court can have jurisdiction to issue an injunction. His contention is that until the application for leave to sue as a pauper has been granted, or the necessary court-fee has been paid by the respondent on his plaint, there is no suit. It has, on the other hand, been argued by the learned Counsel for the respondent that the Court below had jurisdiction to pass the order complained of at the stage at which the proceedings were in the Court below when that order was passed. The question that has been raised is not free from difficulty. The word 'suit' has not been defined in the Code. Order XXXIII, r. 1 lays down that "any suit may be instituted by a pauper" subject to the provisions which follow. Rule 2 of that Order directs that

"every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits...and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings."

It is provided by r. 8 that

"Where the application is granted it shall be numbered and registered and it shall be deemed the plaint in the suit and the suit shall proceed in all other respects as a suit instituted in the ordinary manner except that the plaintiff shall not be liable to pay any court-fee"

On the one hand, it is clear that when the application is so numbered and registered, the suit shall be deemed to have been instituted on the date on which the application for leave to sue as a pauper was presented. On the other, the contention of the learned Counsel for the appellant that until the application has been granted and has been numbered and registered, there is strictly speaking, no regular 'suit' is not quite without force. We do not however consider it necessary to express any opinion on the question whether there was or was not a 'suit' before the Court below on the date on which the order appealed against was passed. The Court below does not purport to have acted

under O. XXXIX. It has been urged on behalf of the respondent that the Court below has really passed the order in question in the exercise of its inherent powers under s. 151 of the Code. It is not necessary to consider the question whether in these circumstances an appeal lies to this Court against the order of the Court below and whether it would not be more appropriate to treat the appeal as a petition for revision for, having heard learned Counsel, we have come to the conclusion that no sufficient grounds have been made out for interference with the order of the Court below, whether we treat the petition of the appellant as an appeal or as a revision.

It seems to us that, apart altogether from O. XXXIX of the Code, the Court below had ample jurisdiction to pass an order providing for the protection and security of the property which is the subject-matter of the litigation. It has been held in this Court that the Civil P. C., is not exhaustive: *Durga Dehal Das v. Anoraji* (1), at p. 31. This view has been followed in the other High Courts. The Courts have therefore in many cases, where the circumstances require it, to proceed upon the assumption of the possession of inherent power to act *ex debito iustitiæ* and to do that real and substantial justice for the administration of which alone they exist. It is obvious that the law cannot make express provisions against all contingencies, and it has therefore been held that it is the duty of the Court to apply the provisions of the law not only to what appears to be regulated by them expressly but to all the cases to which a just application of them may be made and which appear to be comprehended either within the express sense of the law or within the consequences that may be gathered from it. This topic has been the subject of numerous decisions given in cases arising out of a variety of circumstances. So far as this question of the power to issue temporary injunctions is concerned, we would refer to the decision of the High Court at Lahore in *Manohar Lal Mahabir Pershad v. Jainarain Babu Lal* (2). Reference is made in the judgment of that case to the decision of Calcutta High Court in *Hukum Chand Boid v. Kamalanand Singh* (3). The observations of Woodroffe, J., at p. 930 *et seq* and

Mookerjee at p. 910 *et seq*, are in point. We need only quote this observation of Woodroffe, J.

"For my part I am always slow to believe that the Court's powers are unequal to its desire to order that which it believes to be just."

The Lahore High Court has consistently followed the rule laid down in *Manohar Lal Mahabir Pershad v. Jainarain Babu Lal* (2), mentioned above: *vide Kanshi Ram v. Sharfdin* (4), and *New Delhi Theatres Ltd. v. Kailas Chand* (5). The Madras High Court, on the other hand, is inclined to the view that unless the matter comes strictly within the provisions laid down in O. XXXIX, of the Code, a Court has no power to issue an injunction: *Varadacharlu v. Narasimha Charlu* (6), and *Ayyamperumal Nadar v. Muthuswami Pillai* (7). They are both decisions of single Judges. It is to be noted however that in both of these cases the question that arose for decision was whether the Court should have granted an injunction restraining the execution of a decree passed by a competent Court. Reference has also been made to the case in *Periakaruppan Chettiar v. Ramaswami Chettiar* (8), which is a Bench decision. But the question which arose for decision in that case was whether a subordinate Court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court, and it was observed that it was doubtful whether such a power existed. So far as this Court is concerned, only three cases have been cited. One of them is *Muhammad Inam-ullah Khan v. Narain Das* (9). It was assumed there that "it was intended to give the Court powers outside the orders and rules in exceptional cases," and the case was decided on the merits and it was held that on the facts the order could not be justified. The other case is that in *Harnand Lal v. Chaturbhuj* (10). An interpretation of a far-reaching character was placed on s. 151 in that case. The principle underlying the decision of Mahmood, J., in *Beni Prasad v. Gomta Kuar* (11) is in favour of

(4) A I R 1923 Lah. 144; 73 Ind. Cas. 909.

(5) A I R 1933 Lah. 73; 140 Ind. Cas. 843; 34 P L R 51; Ind. Rul. (1933) Lah. 41 (2).

(6) A I R 1926 Mad. 258; 92 Ind. Cas. 615; 23 L W 85; (1925) M W N 886.

(7) A I R 1927 Mad. 687; 102 Ind. Cas. 700; 38 M L T 358.

(8) A I R 1928 Mad. 491; 109 Ind. Cas. 281; 27 L W 418.

(9) 37 A 423; 29 Ind. Cas. 601; A I R 1915 All. 277; 13 A L J 565.

(10) 48 A 356; 93 Ind. Cas. 285; A I R 1926 All. 212; 24 A L J 375.

(11) A W N 1890, 167.

(1) 17 A 29 (31); A W N 1894, 190.

(2) A I R 1920 Lah. 436; 55 Ind. Cas. 403; 2 Lah. L J 283.

(3) 33 C 927 (930 and 940); 3 C L J 67.

the view that the Court below had the power to grant the injunction. It would thus appear that there is no case in this Court which runs counter to the decisions of the High Court at Lahore which support the contention put forward by the respondent. Apart from the Madras cases mentioned above, no authority has been cited in support of the proposition that the Court below was powerless to pass such orders as it considered necessary for the preservation of the property in respect of which the respondent had filed a plaint and had applied for leave to sue as a pauper, and which in the opinion of the Court below were necessary in the interests of justice. We agree with the view that has been taken in Lahore. In our opinion, therefore, the Court below had jurisdiction to make the order complained of.

On the merits it has been suggested that the order restraining the appellant from receiving the money which the Bettiah Court of Wards pays periodically would operate harshly against him. No materials have however been placed before us to show that the decision of the Court below is wrong. As stated above, the appellant did not even file a written reply to the application of the respondent, who had not only filed a written application stating facts which, according to him, entitled him to the injunction claimed, but had also filed an affidavit in support of that application. The position, thus is that the allegations made by the respondent in his application and affidavit have not been controverted. Consequently it is not possible for us to say that the Court below was wrong. We cannot therefore interfere. We have no doubt however that if the appellant applies to the Court below for a modification of the order with regard to the payments by the Bettiah Court of Wards, the Court below will give to the application such consideration as it deserves. For the foregoing reasons we dismiss the appeal with costs.

D.

Appeal dismissed.

MADRAS HIGH COURT

Appeal No. 81 of 1935.

March 30, 1939.

PANDRANG ROW AND ABDUL RAHMAN JJ.

LAKSHMADU—APPELLANT

versus

RAMUDU AND OTHERS—RESPONDENTS

Hindu Law—Debts—Father—Mortgage of ancestral land—Suit against father—Sons not impleaded—Father dying after preliminary decree—Sons brought

on record—Question regarding alienability and binding nature of debt not allowed to be raised—Sons, if in separate suit can dispute the existence of debt—Civil Procedure Code (Act V of 1908), ss. 53, 47—S. 53, scope of—Objection that suit is barred under s. 47 can be allowed to be raised for first time in appeal—Sons, if can challenge decree or mortgage by father on basis of which decree is passed in execution—Limitation Act (IX of 1908), Art. 12—Plaintiff's interest not sold or sale found void—Art. 12 does not apply—Inam—Desabandam inam—Alienability.

The pious duty of a son which makes him liable to pay his father's debt assumes the existence of certain debts which have to be paid. The question of illegality or immorality would only arise when the debts were in fact incurred. It is only when a debt is proved to exist and found not to have been incurred for immoral or illegal purposes, that the father could be said to have been sued in a representative capacity. So where in a suit against father on mortgage of ancestral property the sons are not impleaded but are brought on record after the death of the father after the passing of the preliminary decree and are not allowed to raise the question regarding alienability of the mortgaged property and binding nature of the debt, the sons, in a separate suit, are not precluded from disputing the existence of debt itself.

[Case-law referred to.]

Section 53, Civil P. O., assumes the existence of a debt and declares in effect that the property which was liable under Hindu Law for payment for a debt incurred by the ancestor would, despite his death, continue to remain liable in the hands of his descendant as his legal representative. It was not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in the section that the entire property belonging to a joint family of which the father was *karta*, would be necessarily liable for payment of debts incurred by him.

Since the objection that a certain suit is barred under s. 47, Civil P. O., is purely a question of law, it can be allowed to be raised for the first time in appeal even if it was not raised in written statement.

Section 47, applies to matters which arise after a decree has been passed and not to those which were in existence even at the time when the suit was instituted. If objections regarding the correctness or the validity of a decree are raised by a person who was a party to the suit or by one who must be deemed to have been a party, these will be barred not by s. 47, but by some other provision of law. If, on the other hand, these are being raised by a third party and are of a nature which go to the root of the matter and attack the decree itself, they could not be gone into in execution proceedings for the simple reason that an execution Court cannot be asked to go behind the decree. If persons who were no parties to the suit on mortgage against father and who have been already found not to be represented by their father, desire to challenge the decree or the mortgage on the basis of which the decree was passed, they cannot do so in execution proceedings. 62 Ind. Cas. 905 (17), dissented from. *T. Sundarappa v. B. Sreeramulu* (18) and 15 Ind. Cas. 25 (19), relied on.

Article 12, Lim. Act, would apply only if the sale is held to be binding on the plaintiffs. If the plaintiff's interest is, on the other hand, found not to have been sold or the sale is held to be void against them, this Article cannot be permitted to stand in their way and they will be entitled to the relief

claimed by them. Where the debt by the father is found not to have been due or to have been incurred for purposes which were immoral or illegal, a decree obtained in respect of such a transaction would not bind the sons and the sale held in execution could not be held to be binding on them so as to necessitate a prayer for setting it aside particularly when the property was purchased by either the decree-holder himself or even by a stranger having knowledge of the circumstances in which the debt was contracted. Article 12 has no application to such a case. 34 Ind. Cas. 288 (20), distinguished. 98 Ind. Cas. 31 (21), dissented from.

Where the lands were granted to the plaintiff's ancestors by way of *desabandam inam* and the burden of keeping the tank, apparently an irrigation source, in repair was transferred to the *inamdar*, an alienation of such an *inam* is against public policy and void. 153 Ind. Cas. 817 (1), 163 Ind. Cas. 724 (2), 70 Ind. Cas. 466 (3) and 162 Ind. Cas. 1008 (4), relied on. [p. 818, col. 1.]

A. against the decree of the Sub-Judge Salem in O. S. No. 40 of 1932.

Mr. N. Sivaramakrishna Iyer, for the Appellant.

Mr. K. P. Ramakrishna Iyer, for the Respondents.

Abdur Rahman, J.—This is a plaintiff's appeal. It arises out of a suit for recovery of possession of several items of property sold in execution of a decree passed on the basis of a mortgage deed executed by the plaintiff's father, Appanna, and their cousin, defendant No. 1 in favour of defendant No. 2. The facts which have contributed to the present litigation may be briefly stated. It appears that defendant No. 2 claimed to have purchased the *jaghir* of Mugalapalli in a Court auction and to have obtained possession of the same in 1904. Relying on his purchase he called upon Appanna and defendant No. 1 to maintain the Mugalapalli tank in good condition and to effect necessary repairs, a service which they were bound to render in terms of *desabandam inam* granted to their ancestors. This, according to defendant No. 2 they had failed to perform and the *inam* was consequently resumed by defendant No. 2 in 1907 and a *ryotwari patta* issued. Having done this, defendant No. 2 instituted several suits for the recovery of rent in Revenue Courts and obtained decrees. In consideration of these decrees which amounted to Rs. 600 in 1915 and of a further sum of Rs. 200 stated to have been advanced to Appanna and defendant No. 1, a mortgage deed comprising lands granted to Appanna's ancestors by way of *desabandam inam* and some other ancestral properties was executed by them in favour

of defendant No. 2. This was followed by a suit (O. S. No. 38 of 1916) (O. S. No. 21 of 1919) instituted on behalf of Appanna and defendant No. 1 praying for a declaration to the effect that the *desabandam inam* lands were held by them free of rent and their resumption by defendant No. 2 was ineffectual. They had also asked for a declaration that the decrees for rent, passed by the Revenue Courts, were invalid on account of fraud.

The Subordinate Judge of Salem who had tried the suit decreed the claim on December 20, 1920 (Ex. C) to a large extent. He held that defendant No. 2 was not a *jaghir* and was not entitled to resume the *desabandam inam* granted to the plaintiff's ancestors. The decrees by the Revenue Courts were however not found to have been obtained by fraud and were not declared to be invalid. Ignoring the decree passed by the Subordinate Judge of Salem, defendant No. 2 instituted a suit for sale on the basis of his mortgage (O. S. No. 101 of 1922) against Appanna and defendant No. 1 but they failed to appear and contest it. An *ex parte* preliminary decree was therefore passed. Appanna died shortly after and his sons, the present plaintiffs, were brought on the record as his legal representatives. They tried to attack the mortgage deed and question the alienability of the *inam* lands in these proceedings but were not permitted so to do. A final decree was consequently passed in terms of the preliminary decree and the properties covered by the mortgage deed were brought to sale in execution in 1927 and purchased by defendant No. 2 himself. He succeeded in obtaining possession of the same in September 1929. Having been thus dispossessed, the plaintiffs instituted the present suit. Two schedules were attached to the plaint. Sch. A comprised properties which were claimed to have been granted as *desabandam inam* and Sch. B contained properties which were alleged to be ancestral. The alienation of these properties effected by their father and cousin, defendant No. 1, by way of mortgage in 1915 and their subsequent sale were challenged in the plaint as void and inoperative. The mortgage deed executed by Appanna and defendant No. 1 was also attacked as invalid for want of consideration. The validity of the mortgage deed was also impugned on the ground of coercion as it was alleged to have been secured at the time

when Appanna and defendant No. 1 were under arrest in consequence of a warrant issued at the instance of defendant No. 2 in execution of his decree passed by the Revenue Court.

Defendant No. 2 denied these allegations and contended that the mortgage deed was for consideration, valid and binding and that the plaintiffs who were represented by their father and impleaded in the mortgage suit, were not entitled to raise the question of its validity or that of the sale. It was also alleged that the suit was barred by limitation. The Subordinate Judge in a judgment, which is very perfunctory and has been of no use to us in deciding this appeal, held the mortgage to be for consideration and the decree in O. S. No. 101 of 1922 to be binding on the present plaintiffs. The alienation of the *inam* lands comprised in Sch. A was not held to be void and that of the properties described in Sch. B, although found to be ancestral was held to be justified and binding. The suit was also found to be barred by Art. 12, Lim. Act. It was therefore dismissed. The plaintiffs appeal. The first question which has to be determined in this appeal is whether the mortgage of 1915 and the sale in execution are binding on the plaintiffs, being in respect of properties which were alienable in character and for a valid consideration.

As stated above the mortgaged properties consisted of *inam* lands and ancestral property. So far as *inam* lands are concerned, the question depends on the nature of the grant under which they were granted to the plaintiff's ancestors. If the grant were made for public service or for purposes of public utility, it could not have been assigned for the simple reason that its assignment would defeat the object for which it was granted. The lands comprised in Sch. A were, as the certified copy of the *inam* title deed (Ex. A) would show granted to the plaintiff's ancestors by way of *desabandam inam* and the burden of keeping the tank, apparently an irrigation source, in repair was transferred to the *inamdar*. That an alienation of such an *inam* is against public policy and void admits of no doubt and is concluded by authority: see *Scora Ramakrishnamma v. Pasumarihi Venkotasubbrah* (1), *Ramanathan Chettiar v. Kalidas Karondan* (2), *Anjaneyalu v.*

Sri Venugopala Rice Mills Ltd. (3), and *Gokavarapu Swami v. Manda Sateyya* (4). The learned Subordinate Judge has overruled the plaintiffs' contention in a few words by saying that since the alienation of a village *inam* was valid during the lifetime of the alienors, it could not be set aside at the plaintiffs' instance. How he could have held it to be so when he had admitted in the preceding sentence of his judgment that an *inam* of this kind was inalienable is incomprehensible. Moreover he lost sight of the fact that the mortgage was created by the plaintiffs' father who had died and not by the plaintiffs themselves.

In view of the decided cases Mr. Ramakrishna Iyer, learned Counsel for the respondent, was unable to support the lower Court's judgment in this respect. We must therefore hold that both the mortgage of the properties described in Sch. A and their sale in the execution of the decree were a nullity and must be disregarded.

This was however not the only objection raised against the alienations. The binding character of the mortgage deed was also questioned on behalf of the plaintiffs on the ground that it was not supported by any legal consideration. It might have been unnecessary to go into this question, if all the properties comprised in the mortgage deed were service tenure lands. But the decision of this question has become necessary as the properties mentioned in the 'B' Schedule were claimed by the plaintiffs and have been found by the lower Court to be ancestral. This finding was not challenged before us by the learned Counsel for the respondent. We must therefore now consider the question if there was a legal consideration for the mortgage deed executed by the plaintiffs' father and defendant No. 1. The consideration for this mortgage was said to consist of a sum of Rs. 600 which was alleged to have been due to defendant No. 2 on account of certain rents due to him after the *inam* rights were attempted to have been resumed by him. It is true that defendant No. 2 had secured decrees in Revenue Courts for this amount but in the view of the finding in O. S. No. 38 of 1916 that the lands were

(1) 58 M 389; 153 Ind. Cas. 817; A I R 1935 Mad. 252; 68 M L J 46; (1934) M W N 1407; 40 L W 918; 7 R M 377.

(2) 71 M L J 398; 163 Ind. Cas. 724; A I R 1936 Mad. 559; 9 R M 56; (1936) M W N 982; 44 L W 505

(3) 45 M 620; 70 Ind. Cas. 466; A I R 1922 Mad. 197; 42 M L J 477; 15 L W 513; 30 M L T 255; (1922) M W N 307.

(4) 59 M 354; 162 Ind. Cas. 1008; A I R 1936 Mad. 283; 70 M L J 266; (1936) M W N 88; 43 L W 235; 8 R M 1074 (F B).

held by the plaintiffs' father and defendant No. 1 as rent free and defendant No. 2 was not legally entitled to resume them or charge any rent therefor it must be held that the same could not have formed a valid consideration for the mortgage deed. Let us now examine if the balance of Rs. 200 was paid to the mortgagors at the time when his mortgage deed was executed. The statement made by D. W. No. 1, who happens to be a grandson of defendant No. 2, makes it clear that this sum of Rs. 200 was not advanced to Appanna and defendant No. 1 in cash but was taken into account to quote his words "for effecting repairs to the tank and for expenses of the criminal case." There is no evidence on the record that any money was spent by or on behalf of defendant No. 2 in effecting repairs to the tank or that he was entitled to do so on behalf of the mortgagors. Nor do the mortgagors appear to be liable for the expenses of any criminal case filed against them by defendant No. 2. The only criminal case in regard to which a copy has been produced on behalf of defendant No. 2 (Ex. 2) was filed in 1907. The suggestion apparently is that the expenses incurred by defendant No. 2 in filing and prosecuting this complaint were recovered in the manner from the mortgagors. But were they liable to pay them? Even if the facts were otherwise defendant No. 2, although he might have been held entitled to recover the value of 50 cocoanuts which were alleged to have been stolen by defendant No. 1 in tort from him he could not be justified in recovering the costs incurred for filing the complaint and conducting the prosecution which resulted in defendant No. 1's conviction. But when the facts of this case, as disclosed by the judgment (Ex. 2), were looked into it transpired that these cocoanuts were growing on the *inam* land which defendant No. 2 was trying to resume and which Appanna and defendant No. 1 were trying to resist. It was found, as stated above in O. S. No. 38 of 1916, that defendant No. 2's action was wholly unjustified. In view of that finding it is impossible to hold that these expenses could have been either legally or justly recovered from Appanna who was no party to the complaint or from defendant No. 1 who was.

It was impossible for us to overlook the circumstance that shortly before the execution of the mortgage deed a warrant for defendant No. 1's arrest was issued by the Sub-Collector, Hosur, in the execu-

tion of the decree for rent passed in defendant No. 2's favour (Ex. B). Looking at the variety of ways in which Appanna and defendant No. 1 were being harassed by defendant No. 2 who was apparently a man of influence and means, it is not surprising to find that he did succeed in getting the mortgage deed executed in his favour from these helpless persons. In the circumstances it is unnecessary to give a finding whether the mortgage deed was vitiated by coercion; but we cannot but hold that there was absolutely no consideration for the mortgage deed executed by Appanna and defendant No. 1 and the same must be held to be not binding on the present plaintiffs. The question then is if the decree passed on the basis of the mortgage is binding on the plaintiffs. They were not impleaded when the suit was instituted and were brought on the record as legal representatives of their father after the preliminary decree had been passed against him. They tried to raise the questions regarding the alienability of the property mortgaged and the binding nature of the debt but were not permitted to do so. This course was adopted by the Court on account of the provisions contained in O. XXII, r. 4 (2), Civil P. O. It may be that for certain purposes the suit might be deemed to have been pending and not disposed of until a final decree was passed but there is no doubt that the whole of the trial had come to an end and the points which the present plaintiffs wished to raise then could not have been gone into at that stage. Moreover the defences which they wished to raise were not such as to be called appropriate to their character as Appanna's legal representatives. They could not have assailed the decree which had been passed against their father during his life-time. It would therefore follow that the decree cannot be held to be binding on them in their individual capacity in which the present suit was brought.

It has been contended however that, although it might have been possible for the plaintiffs to institute a suit on account of the transaction being immoral or illegal (a proposition which the learned Counsel for the respondent appeared to contest later and which will have to be examined subsequently) the mortgage cannot be impugned by the plaintiffs for want of consideration particularly when they had been impleaded before the final decree was passed. We have already tried to show that the fact of the plaintiffs having been impleaded after

the preliminary decree had been passed could not have debarred them from raising it in a separate suit. But the argument is that although the father might have been debarred from raising a question of his immorality or illegality, yet he was not debarred from raising the question of the want of consideration and as a decree, either *ex parte* or otherwise, was passed against Appanna, it was no longer open to his sons, the present appellants, to contest that there was no consideration for the mortgage deed. Had the decree not been passed against the father who occupied a special position as a *karta* of joint Hindu family with regard to his sons, the answer would have been simple enough. But the contention is that a Hindu father represents his sons even when they have not been impleaded so far as the factum of the debt is concerned and that they cannot dispute the existence of the debt after the decree had been passed against their father. The contention is in our opinion unsound and must be repelled. It assumes in the first instance that the father was sued in a representative capacity.

We do not see any reason why the father should be held to have represented his sons in any greater degree in regard to the factum of the debt than he could have done in case the debt had been attacked as immoral or illegal. We are not concerned here with what the father could or could not have done, but with how far are the sons to be bound by his action or inaction? The question is not how far was the father liable for the debts which he might have incurred or acknowledged but the question is how far are his sons liable? They cannot be held to be so unless it is shown that the father was being sued in a representative capacity. In the absence of an express declaration that he was being sued in that capacity, this can only be established by proving that a debt existed in point of fact. The sons, it must be remembered, were no parties to the action. If the sons are not allowed to question the existence of the debt in a subsequent suit how and when would it be possible for them to contend that the debt was never actually incurred by their father? We are not concerned here with the question of onus of proof but with the question if a plea denying the existence of a debt is available to the sons. It is only after the debt has been proved to exist and found not to have been immoral or illegal that the father could be said to have been sued in a representative capacity. As

long as these questions remain undecided, in spite of the challenge by the sons, it cannot be said that the father had been sued in a representative capacity. It must not be forgotten that the sons are not being proceeded against as heirs of their father but their own share of the property which belonged to them even when their father was alive is also in danger of being lost.

In view of s. 53, Civil P. O., they may not be able to contend that their father's share is not liable or that it devolved on them on his death as survivors, but by what rule of law may one well ask are they debarred from contending that the decree was not passed against their father in a representative capacity and did not bind them? Is the case to be decided against them without giving them even one opportunity of questioning the transaction if they wished to contest it? The pious duty of a son which makes him liable to pay his father's debt assumes the existence of certain debts which have to be paid. The question of illegality or immorality would only arise when the debts were in fact incurred. If the debts were found not to be due it would be impossible to contend that the sons were liable to discharge what was not really a liability of their father. The power of a Hindu father is limited when he is dealing with ancestral property or when he is doing something by which the son's rights in the ancestral property may be affected. If a father mortgages a property to another person in consideration of a debt which does not exist, the mortgage would be more or less in the nature of a gift. It cannot be contested that the father is incapable of making gifts of ancestral property except in very special circumstances and to a very limited extent. If a decree is subsequently passed against the father on the basis of such a mortgage and the property sold in execution of that decree and the sons have no right to show in, what must in the nature of things be a separate suit, that they had rights in the property which could not have been alienated by their father, they must be held to have been extinguished on the ground that their father was competent to make a gift of their share in the property as well. We hope this is not the law and we are convinced that it is not so.

This question has been considered in a number of cases. The first case to which reference may be made is that in *Ramasamayyan v. Virasami Iyer* (5), where (5) 21 M 222; 8 M L J 126.

Shepherd, J., observed as follows :

"It is argued on behalf of the appellant that the only question which the son of a Hindu debtor can raise is as to the nature of the debt, and that he cannot question the existence of a debt which forms the foundation of a decree against his father. According to this contention it would be open to the father by confessing judgment to procure by indirect means the sale of the entire estate when he could not lawfully alienate it by a voluntary conveyance. The limitation which is imposed by Hindu Law on the father's power of alienation would become illusory.

But this is clearly not the law. Whether the sale is a voluntary or an enforced sale, its validity depends upon the existence of a just debt in satisfaction of which the sale is effected."

This was followed by another in *Ramasami Nadan v. Ulaganatha Goundan* (6), in which similar observations are to be found in the judgments written by no less eminent Judges than Subramania Ayyar, J. and Benson, J. at pp. 66 and 67 of the report. The same view was taken in *Thiruvankata Mudaliar v. Muthu Iyer* (7), *Malayandi v. Subbaraya* (8), *Bhagwant v. Tursi Ram*, 51 Ind. Cas. 130 (9), *Kasturi Mal v. Lajja Ram*, 60 Ind. Cas. 751 (10), *Beni Pershad v. Pura Chand* (11). An observation made by their Lordships of the Privy Council in *Nanomi Babuasin v. Modhun Mohun* (12), also shows that a plea of this nature was available to the sons. It would have been unnecessary to discuss this point in such detail, had it not been for an observation in Edn. 10 of Mayne's Hindu Law (in the note at p. 431) where it has been observed by the learned Editor that in a suit upon a debt against the father he represents the sons when they are not made parties so far as the factum of the debt is concerned and the judgment against the father itself creates a debt. A number of cases have been cited for this proposition but we have not been able to find any observation in these cases that such a plea is not open to the son. It is true that a statement is to be found in most of them that the only defences open to the sons are those of immorality or illegality but there is no specific reference that the son is not entitled to question the existence of the debt itself. In the absence of clear decision we cannot hold that the learned Judges were laying down the law

differently. The only decision out of the cases cited which discusses the point is the one reported in *Indar Pal v. Imperial Bank* (13). This does not support the contention for which it has been cited. Indeed, it contains an observation to the contrary at p. 218 of the report. The dictum by that eminent Judge, Bashyam Ayyangar, J., in *Periasami Mudaliar v. Seetharama Chettiar* (14), to the effect that the judgment against the father creates a debt was not really necessary for the disposal of that case and does not need to be examined here when we find s. 53 added to the Civil P. O., to surmount the difficulties of a father's creditors in realizing their decree out of the properties which had devolved on the sons by the rule of survivorship. We are aware that in this and other cases like *Mohan Lal v. Bala Prasad* (15), *Abdul Karim v. Ram Kishore* (16) it has been observed by the learned Judges that the only defences open to the son were those of illegality or immorality. But having gone through the judgments we are of opinion that it was more or less assumed by them that the debts existed in point of fact and it was therefore unnecessary for them to state in view of that assumption that the son could also challenge the factum of the debt. With great respect to the learned Editor we cannot agree with him that the sons cannot dispute the father's liability except in respect of the nature of the debt regarding which the father could not represent the sons. There appears to be no reason to hold why he should be held to be representing the sons in regard to the factum of debt.

The next contention raised by Mr. Ramakrishna Iyer was that after the addition of s. 53 to Civil P. O., it would not be possible for a son or other descendant, whether he had been impleaded in the suit or not, to object to the sale of the property held in execution of a decree passed for debts incurred by his deceased ancestor. There is no doubt that the property in the descendant's hands would be, for the purposes mentioned in the section, deemed to be the property of the deceased ancestor and the son or other descendant

(6) 22 M 49 (66, 67); 8 M L J 312 (F B).

(7) 14 M L J 431.

(8) 21 M L J 521; 8 Ind. Cas. 854; (1911) 1 M W N 50; 9 M L T 163.

(9) 51 Ind. Cas. 130; A I R 1919 All. 378.

(10) 60 Ind. Cas. 751.

(11) 23 C 262.

(12) 13 C 21; 13 I. A. 1; 4 Sar 662; 10 Ind. Jur. 151 (P O).

(13) 37 A 214 (218); 38 Ind. Cas. 593; A I R 1915 All. 126; 13 A L J 211.

(14) 27 M 243; 14 M L J 84 (F B).

(15) 44 A 649; 69 Ind. Cas. 754; A I R 1922 All. 310.

(16) 47 A 421; 86 Ind. Cas. 837; A I R 1925 All. 327; 23 A L J 196.

must be, in spite of the rule of survivorship, regarded to be a legal representative; but it must not be overlooked that the section assumes the existence of a debt and declares in effect that the property which was liable under Hindu Law for payment for a debt incurred by the ancestor would, despite his death, continue to remain liable in the hands of his descendant as his legal representative. The ancestor's death could not have the result of improving a creditor's position. The section was enacted to take away a possible plea by the descendant that the property held by his ancestor during his lifetime had devolved on the former by survivorship and was not liable for the payment of the latter's debts. At the same time it was not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in s. 53, Civil P. O., that the entire property belonging to a joint family of which the father was *karta*, would be necessarily liable for payment of debts incurred by him. The question would depend for its answer on the application of principles contained in Hindu Law. If in a given case, the debt taken by a father is found to have been incurred for purposes and objects binding on the whole of the family of which he is the head or even for his own personal benefit provided it was not for an immoral or illegal purpose, the entire coparcenary property in his son's or other descendant's hand would, according to those principles, be liable for payment. This is due to the fact that the debt was contracted by the father either in the capacity as manager and head of the family for family purposes in which case the descendants must have had its advantage or at least be assumed to have had it or even when it was done for the father's own personal benefit, the obligation of religion and piety makes them liable to discharge the same. In these circumstances the family property would be taken to have devolved on the descendants as legal representatives and it would be useless for them to plead that the property did not belong to their ancestor or that as joint tenants they had an interest in the property which could not have been burdened, or alienated by their ancestor. But if the debt did not exist in fact or it was illegal or immoral and the property has not been purchased by a stranger, they could raise these questions and if they succeeded in establishing their contentions

or rather if these contentions were found in their favour, their shares in the joint family property would not be taken to have devolved on them in their capacity as legal representatives and would not be liable to be sold and could be even if sold recovered by them. Briefly speaking, these principles have been imported into s. 53, Civil P. O., by the words "which is liable under Hindu Law for the payment of the debt of a deceased ancestor." But we do not find any provision in this or any other section of the Code which may justify us to hold that the descendant's right to contest the existence of the debt or the illegality and immorality of its character has been taken away even when they were not impleaded in the suit and had no occasion to challenge the debt or alienation contracted or made by their ancestor and to show that he had not represented them in the suit.

The property in Appanna's hands which was mortgaged by him has been found to be ancestral property and the debt in respect of which it was mortgaged held to be non-existent and in any case not binding on the present plaintiffs. The mortgage and the sale in execution must therefore be held not to have passed their interests in the property. Appanna's share however which he had in the properties before his death stands on a different footing. He had mortgaged the property himself and had allowed a decree for sale to be passed against himself without contesting it. So far as his share is concerned, it must be deemed to be Appanna's property and to have been held by the plaintiffs in their capacity as his legal representatives.

It was next contended by Mr. Ramakrishna Iyer that these pleas, if available at all to the plaintiffs, should have been taken by them in execution proceedings particularly when the sons were impleaded as legal representatives of their father before the final decree had been passed, and that a separate suit was barred under the provisions of s. 47, Civil P. O. For this contention reliance was placed on a case reported in *Shank Karoo v. Rameshwar Rao* (17). This objection was not taken in the written statement and has been taken before us for the first time. Since this is purely a question of law, we have permitted it to be argued here. A short answer to this contention is that s. 47, Civil P. O., applies to matters which arise after a decree has been passed and not to those

(17) A I R 1923 Pat. 143; 62 Ind. Cas. 905; 6 P L J 451; 3 P L T 43.

which were in existence even at the time when the suit was instituted. If objections regarding the correctness or the validity of a decree are raised by a person who was a party to the suit or by one who must be deemed to have been a party, these will be barred not by s. 47, Civil P. C., but by some other provision of law which we need not pause to consider here. If, on the other hand, these are being raised by a third party and are of a nature which go to the root of the matter and attack the decree itself, they could not be gone into in execution proceedings for the simple reason that an execution Court cannot be asked to go behind the decree. Section 47, Civil P. C., provides that questions relating to execution, discharge and satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. If persons who were no parties to the suit and who have been already found not to be represented by their father, desire to challenge the decree or the mortgage on the basis of which the decree was passed, they could not do so in execution proceedings. In fact the plaintiffs tried to raise these contentions, which they have now made in the present suit as soon as they were impleaded as legal representatives of their father. The Court which had passed the preliminary decree was prepared to go into these matters to a certain extent. But on an appeal preferred by defendant No. 2 (Appeal Suit No. 61 of 1924) the District Judge of Salem set aside the order and made the following remarks :

"The mortgage money not having been paid within the time prescribed by the preliminary decree the appellant applied for a final decree; but his application was opposed not only by defendant No. 1 but also by the sons of the deceased defendant No. 2 who had been brought on the record as his legal representatives. The lower Court has observed that defendants Nos. 4 to 6, i. e., the legal representatives of defendant No. 2 attacked the hypothecation bond and the preliminary decree *in toto* but that at the hearing of the application the main contention of these defendants was that out of the seven items of the property covered by the hypothecation bond and the preliminary decree, Nos. 1, 2, 3 and 4 were service *inam* lands and consequently inalienable. It is perfectly obvious that these defendants were not entitled to attack the hypothecation bond or the preliminary decree and the contention which the lower Court did permit them to put forward amounted substantially to a claim that they had a title independent of that of the mortgagors. Such a contention would certainly have been outside the scope of a mortgage suit at any stage. In dealing with an application under O. XXXIV, r. 5, the only question which the Court has to consider is whether the mortgage money has been paid. If it has not, the Court is bound to give the applicant a final decree in terms of the

preliminary decree already passed. What the Court orders to be sold is the right, title and interest of the mortgagors in the hypothecated property; and it is not the business of the Court in a mortgage suit to inquire into the nature of the right, title and interest at the instance of any claimants or for the benefit of possible purchasers. In modification therefore of the final decree passed by the lower Court I direct that the appellant be given a final decree in the terms of the preliminary decree passed by the lower Court."

In view of what was contended on behalf of defendant No. 2 in the above appeal, he should be held to be precluded from taking this objection in this Court. But even if we do not rest our decision on this ground, we must hold that the grounds raised by the plaintiffs in the suit do not fall within the ambit of s. 47, Civil P. C., and could not have been inquired into by the executing Court. As for the Patna decision in *Shaik Karoo v. Rameshwar Rao* (17) it is true that it does take the view that a separate suit for the determination of the liability of the sons for the debt covered by the decree passed against their father would be barred by s. 47, Civil P. C. But this decision was based on the construction placed on s. 53, Civil P. C., which has been considered by us to some extent in an earlier portion of this judgment, and is based on the assumption that the sons had no independent rights in the property and were represented by their father in the suit. There appears to be no warrant for holding that a processual amendment in the Civil P. C., was meant to deprive the Hindu sons of their rights in the property or to increase the representative capacity of the father to an extent not authorized by Hindu Law.

When the sons attack the decree on the ground that the debt did not exist or that it was immoral they are attacking the validity of the decree so far as they are concerned and the liability of the ancestral property to be sold in execution. Both these questions are interdependent and one cannot be decided without the other. If the debt did exist and was of a nature which could have been incurred by the father so as to make it a pious duty of the sons to discharge, the ancestral property would be liable to be sold and not otherwise. As stated above, a person cannot be permitted to attack the validity of the decree in execution proceedings—except in cases where it has been passed against a dead person and is an absolute nullity. If the execution Court cannot be asked to go behind and question the validity of the decree the question of the liability of the property which

is mixed up with the first question cannot also be decided in execution. It was not possible for the plaintiffs to make an application under O. XXI, r. 58 firstly because it was a mortgage decree and secondly because they were impugning the mortgage effected by their father and the validity of the decree passed on the basis of that mortgage.

We must, therefore, although with great deference, disagree with the view expressed in the Patna decision. There are cases which have taken a contrary view and there is no reason why we should not follow them when they correspond with our own view: see *T. Sundarappa v. B. Sreeramulu* (18) and *Ala Singh v. Wasawa*, 15 Ind. Cas. 25 (19).

The last question which has to be decided here is one of limitation. It has been contended that the suit was barred under Art. 12, Lim. Act. This Article would apply only if the sale is held to be binding on the plaintiffs. If the plaintiffs' interest is, on the other hand, found not to have been sold or the sale is held to be void against them, this Article cannot be permitted to stand in their way and they will be entitled to the relief claimed by them. The plaintiffs, as stated before, were no parties to the suit and were impleaded as Appanna's legal representatives after the preliminary decree had been passed. Were they represented then by Appanna during his lifetime? If they were so, they would not be able to get the relief unless the sale is first set aside. We have already observed that there is nothing to show on the record that the suit was brought against Appanna as a manager or *karta* of the family. Nor was the debt alleged by defendant No. 2 in his plaint to be binding on the joint family. The consideration for which the mortgage was executed by Appanna has not been found to be binding even on him—although in view of the decree passed against him, it is no longer open to the plaintiffs as his legal representatives to question the decree. But this does not mean that the decree has to be held binding on the plaintiffs as well in their individual character. Is the sale then to be held binding on them in their personal capacity? We are not of that opinion. When they were not represented by their father in the suit and the objections raised by them to the validity of the mortgage could not be and were not entertained

by the Court, the decree and the sale could not be held to be binding on them, in the capacity in which the suit has been now brought. The sale being thus void, it was unnecessary for them to sue for setting it aside. Moreover, their cause of action arose on their dispossession of the property in 1929. Had they not been dispossessed, it would not have been really necessary for them to institute the present suit. The sale did not really affect their title and it could have been safely ignored by them.

It might be stated here that the sale of service tenure lands was a nullity and the plaintiffs were fully justified in not taking any notice of it. Learned Counsel for the respondent however relies on two cases, one of Patna and the other of this Court and contends that in similar circumstances, Art. 12, Lim. Act was held to be a bar. The first case on which reliance has been placed is reported in *Bhola Jha v. Lalakali Prasad* (20). The facts of that case were that some properties belonging to a joint Hindu family were mortgaged by the father who was the *karta* of that family. The mortgagees sued the father on the basis of their mortgage, obtained a decree, brought the properties to sale and purchased them themselves. The sons then instituted a suit for the recovery of possession of these properties and asked for a decree for redemption in the alternative. The trial Court held the plaintiffs—and this is important—to be bound to pay the debts contracted by their father but granted them a decree for redemption. When the case came up before the High Court, it was urged that since the plaintiffs were held bound by the mortgages and the decree, the sale of the properties had got to be set aside before they were allowed to redeem. The learned Judges accepted their contention and held that if a suit for redemption was held to be maintainable, the sale would have to be set aside before the plaintiffs were allowed to redeem. The decree for redemption was considered to be inconsistent with the sale already held and rightly so if we may say that with respect. The suit was therefore dismissed as being barred by Art. 12, Lim. Act. If the plaintiffs in the present suit were held bound by the mortgage effected by their father or if the decree was held to be binding on them in their individual character, they could not have been held entitled to maintain this action and their suit would have been also

(18) 30 M 402; 17 M L J 288.

(19) 15 Ind. Cas. 25; 14 P R 1613; 228 P L R 1912; 175 P W R 1912.

(20) 1 P L J 180; 34 Ind. Cas. 288; A I R 1917 Pat 693.

barred by limitation. But fortunately for them they have not been held to be so bound or represented by their father in the suit and the decision has therefore no application to the facts of this case.

The next case on which reliance was placed was decided by a Division Bench of this Court and is reported in *Narayana Naicken v. Venkatasami Naicken* (21). In that case it was held that the sale in a decree against a father would not be void as against the sons but only voidable at their option. The question whether the debt incurred by the father was of such a nature as to be binding on his sons was not gone into. It was more or less assumed that the sale of property in pursuance of a decree passed against a Hindu father would necessarily involve the sale of the son's rights as well. As the matter has already been discussed by us in this judgment it is unnecessary to examine this proposition again. The matter in our view would have to depend on the finding whether a debt was contracted by the father as the manager of the joint Hindu family so as to be binding on the sons which it would be their legal or pious obligation to repay. If on the other hand the debt is found not to have been due or to have been incurred for purposes which were immoral or illegal, a decree obtained in respect of such a transaction would not bind the sons and the sale held in execution could not be held to be binding on them so as to necessitate a prayer for setting it aside particularly when the property was purchased by either the decree-holder himself or even by a stranger having knowledge of the circumstances in which the debt was contracted. We are with great deference unable to agree with this decision and must hold that the suit was not barred by Art. 12, Lim. Act.

The appeal must be for the above reasons accepted and is hereby allowed. The decree of the lower Court is set aside and the suit instituted by the plaintiffs decreed to the extent of the property comprised in the 'A' Schedule which they take along with defendant No. 1 and to the extent of 3/8th share in the property covered by the 'B' Schedule with mesne profits at the rate found by the lower Court. The plaintiffs will get their costs here and in the Court below from the contesting respondents. The court-fee payable on the plaint as well as on the memorandum of appeal should be paid to the Govt. by

(21) 51 M L J 845; 98 Ind. Cas. 31; A I R 1926 Mad. 190; (1926) M W N 767; 24 L W 475.

respondent No. 5 out of the estate in his hands left by defendant No. 2 deceased.

N.D.

Appeal allowed.

PATNA HIGH COURT

Government Appeal No. 4 of 1939 (Outtack)

March 12, 1940

HARRIES, C. J. AND VARMA, J.

THE ADVOCATE-GENERAL, ORISSA

—APPELLANT

versus

BHIKHARI CHARAN MAHANTI

AND ANOTHER—RESPONDENTS

Penal Code (Act XLV of 1860), ss. 379, 23 and 24—Bona fide claim—Servant believing property to be his master's taking it away—Offence, if theft—Criminal trial—Criminal Courts—Complicated questions relating to property, power to decide.

The Criminal Court should not convict of theft any person who asserts a claim of right unless it is in a position to say that that claim is a mere pretence. [p. 829, col. 2.]

A person cannot be said to act dishonestly, that is with an intention of causing wrongful gain to himself or his master or wrongful loss to another, when he takes movable property which he believes to belong to himself or his master. In short, if the person taking any movable property does it under a bona fide claim of right, then he cannot be found guilty of the offence of theft unless the claim is a mere pretence. 5 Ind. Cas. 794 (5), 36 Ind. Cas. 136 (7), 39 Ind. Cas. 475 (8) and 119 Ind. Cas. 346 (9), relied on. [p. 828, col. 2.]

A servant may well be in a stronger position than his master, because a servant might, in certain circumstances, honestly believe that his master was the owner of certain property, whereas the master might well know that he was not. A servant should not be held guilty of the offence of theft when what he did was at his master's bidding, unless it should have been shown that he participated in his master's knowledge of the dishonest nature of the acts. *Hari Bhushan v. Emperor* (6), relied on. [p. 829, col. 2.]

A Criminal Court is not an appropriate tribunal to decide complicated questions relating to rights of property such as game birds between landlord and tenant.

Govt. A. from a decision of the District Magistrate of Balasore, dated June 5, 1939.

The Public Prosecutor, for Orissa, for the Appellant.

Messrs. P. C. Manuk and G. C. Das, for the Respondents.

Harries, C. J.—This is an appeal by the Advocate-General of Orissa on behalf of the Prov. Govt. from an order of the learned District Magistrate of Balasore acquitting the respondents upon a charge of theft.

The respondent Purna Chandra Singh was charged under s. 379, I. P. C., while the respondent Bhikari Charan Mahanti was charged under s. 379, read with s. 114, I. P. C.,

for abetting the commission of the offence of theft by Purna Chandra Singh. Both the respondents pleaded not guilty; but a learned Magistrate of the second class found them guilty of the offence with which they were charged and convicted and sentenced each of them to pay a fine of Rs. 25 and in default of payment to undergo rigorous imprisonment for a period of one month. The respondents appealed to the Court of the learned District Magistrate, Balasore, where they were found not guilty and acquitted. At the conclusion of his judgment the learned District Magistrate made the following observation :

"But in view of the importance to the administration of the District that the doubts regarding the law relating to *feræ naturæ* should be made clear in the case of a conflict between a landlord and his tenant, this is, in my opinion, a fit case to go before the Hon'ble High Court for an authoritative ruling on the subject."

Presumably acting on this observation, the Prov. Govt. have preferred this appeal from the order of acquittal

The facts of the case can be shortly stated as follows :—

The respondent Bhikari Charan Mahanti is a Circle Officer in the Kanika Raj, whereas the respondent Purna Chandra Mahanti is a Forest Jamadar in the Raj. The complainant is a tenant within the Kanika estate and is a member of the Orissa Legislative Assembly. The subject-matter of the alleged theft is a dead bird worth about one rupee.

On December 3, 1938, a tenant of the Raj, one Mayadhar Naik (P. W. No. 2) together with Apurna Munjet (P. W. No. 3) went to a paddy plot No. 98 in village Garkola and there Apurna Munjet shot two *gadargadira* birds which were eating the paddy. They were accompanied by a servant Ohintamani Barik (P. W. No. 6) and the latter was ordered to take back the birds to Mayadhar Naik's house and to hand them over to the complainant Ohakradhar Behera (P. W. No. 1) who was staying with Mayadhar. Ohintamani Naik took the birds to Ohakradhar, and the latter ordered him to take one of the birds to Ohakradhar's home which was in a village called Haldia, some distance away. Ohintamani took the bird, and on his way he passed the Panchutikri Kachahri of the Kanika Raj. There he was stopped by the respondent Charan Mahanti and asked who had shot the bird. Ohintamani Barik said that Apurna Babu had shot the bird and that he was taking it to the house of Ohakradhar Babu. The respondents claimed that Apurna had no

right to shoot the bird and that the dead bird belonged to the estate. It is said that Apurna refused to give up the bird, whereupon Purna Chandra Singh upon the orders of Bhikari Charan Mahanti snatched the bird from Ohintamani Barik and took it away. Ohintamani Barik returned to Mayadhar's house and there reported the matter to the complainant Ohakradhar Behera.

On their return from plot No. 8, Mayadhar and Apurna passed the Raj Kachahri and Apurna was stopped and questioned. Bhikari Charan Mahanti asked him if he had killed the bird and Apurna replied that he had killed two. He was taken to task and told that he had no right to shoot any birds without the permission of the Raj. His name, address and gun number were taken, and he was asked to submit a written apology. Apurna Manjet refused and said that he had all along been shooting in the Kanika Raj without permission granted by the Raj authorities.

It appears that on the day in question the Sub-Divisional Officer of Bhadrak was camping outside the village of Panchutikri, and Ohakradhar Behera immediately went to him and made a complaint. He filed a written complaint supported by a solemn affirmation which is printed at pp. 1 and 2 of the paper-book. He sets out the facts of the case and in the solemn affirmation he says that the respondent told Ohintamani Barik that the birds were killed without permission and that he would not be allowed to take away the birds. Thereupon Purna Chandra Singh snatched away the bird under the orders of the Circle Officer Bhikari Charan Mahanti. It is quite clear from this petition and solemn affirmation that the two respondents claimed that as the bird had been shot without permission granted by the estate authorities no one had a right to it and that it would have to be given up to the estate.

Shortly after Ohakradhar Behera had made this complaint, the respondent Purna Chandra Singh appeared before the Sub-Divisional Officer with the dead bird and reported that the bird was shot without authority. The Sub-Divisional Officer directed Purna Chandra Singh to file a complaint, and this was done in due course.

In that complaint, which is printed at pp 72 and 73 of the paper-book, it is alleged that the two *gadargadira* birds were shot on the *abadi khasra* land of the estate bearing plot No. 43. It is alleged that Apurna and Mayadhar entered the land-killed the birds without

permission and after having killed them misappropriated the same. The complainant states that he protested and that Chintamani Barik took over one of the birds when told to do so. It is prayed that proceedings might be taken against Chakradhar Behera, Apurna Munjet, Chintamani Barik and Parikhit Naik for shooting and taking away the birds without the permission of the Raj.

The case against the respondents was heard by a Magistrate of the Second Class. He held that the birds were shot on plot No. 98 of village Garkola and not on the *anabadi* plot No. 43 of village Panchkutti as alleged by the defence. He further held that there was no custom in the Raj forbidding tenants to shoot birds or beasts on their holdings, and he accordingly held that the birds, when they were shot, belonged to the tenant. He further held that the bird had been forcibly snatched away from Chintamani Barik, and as the respondents had no right whatsoever to it he convicted them of theft and abetment of theft and fined each of them Rs. 25.

The learned District Magistrate on appeal was satisfied that the birds were shot on plot No. 98 of village Garkola and not on *anabadi* land of the Raj. The learned Magistrate did not consider whether any custom existed in the Raj relating to the right to take game or wild birds. He, however, was of opinion that all wild birds on the Raj belonged to the proprietor, and that being so the respondents who were the servants of the Raja Bahadur, could not be guilty of theft in taking the Raja's own property. He accordingly set aside the convictions and acquitted both the respondents.

On behalf of the Prov. Govt. it has been contended that the decision of the learned District Magistrate is clearly erroneous. It is contended that the right to take and kill all game and wild animals belongs to the tenant and not to the landlord unless such right to take and kill game etc., has been reserved expressly or by implication or unless by custom the proprietor and not the tenant is entitled to get the game and wild animals. It is admitted in this case that Mayadhari Naik (P. W. No. 2) was an occupancy tenant of the Raja Bahadur, and there is no suggestion in the case that at the creation of the tenancy the landlord reserved to himself the sole right of killing game, wild animals and birds. It is contended that the right to kill game, wild animals and birds is an incident to posses-

sion of property and that, apart from the circumstances which I have indicated, such right is given to the tenant upon the creation of a tenancy. Mayadhar Naik, though an occupancy tenant of plot No. 98 of village Garkola, was not in possession of this plot when these birds were shot. Mayadhar Naik in evidence stated that at that time the entire plot was cultivated by Sridhar Mahanti of Khidarpur and Bhramarbar Padhari of Daulatpur on the *sanja* system. In short the plot had been let to the cultivators on payment of a fixed quantity of paddy. It would appear, therefore, that Mayadhar Naik was not the tenant in actual possession of the plot. There is no suggestion, however, that on the day in question he was on the plot without the consent of his sub-tenants though there is no evidence of such consent. However, in my view it is not necessary in this case to consider the precise position of Mayadhar Naik with regard to this plot.

Mr. G. P. Das, the Public Prosecutor for Orissa, who has argued the case with great force on behalf of the Prov. Govt. has relied upon a number of authorities to establish the proposition that the right to take game belongs to the tenant and not to the landlord. He has pointed out that at common law in England the tenant is entitled to take and kill all wild animals on the land unless such right is reserved expressly or by implication by the landlord. He has contended that the English Common Law is correctly stated in Woodfall's Landlord and Tenant, Twenty-third Edition, at p. 904. There it is stated:—

"At common law the right to take and kill game (in which, as in all animals *feræ naturæ*, there is no property) belongs to the tenant, and to the landlord, by virtue of the tenant's property in the land. It is and has long been very common, however, for the landlord to reserve the right to the game in the contract of tenancy, and the Game Act, 1831, which did away with the numerous restrictions and qualifications whereby a tenant was almost invariably prevented, even in a case where the game did not happen to be reserved to the landlord, from enjoying his right to it, has specially protected such reservation."

According to Mr. Das, such a rule is more appropriate to Indian conditions than English conditions because an occupancy tenant has a far greater interest in the land than a mere agricultural tenant in England who is in most cases a tenant from year to year, whose tenancy can be terminated by a year's notice to quit. In India the occupancy tenant cannot be ejected by a mere notice to quit. He has a right in the land which is heritable and

now transferable as long as he continues to pay his rent and use the land for the purpose for which the tenancy was created, and after his death his descendants cannot be ejected therefrom. If the Law of England gives a tenant from year to year a right to take and kill game and wild animals, *a fortiori* the Indian tenant should have such a right.

It has been urged that the right of the tenant to take and kill game has been recognized by the Indian Courts, and reliance has been placed on a number of cases, namely, *Mahanth Unni Moyi v. Malabar Kandepunni Nair* (1), *Raja Kishore Chandra Mardaraj v. Radha Gobind Das*, 49 Ind. Cas. 198 (2), *Emperor v. Artu Rautra* (3), and *Messrs. Henry Hill & Co. v. Sheoraj Rai* (4). It is to be observed that only the last case cited deals with the respective rights of landlord and tenant, and the case of *Messrs. Henry Hill & Co. v. Sheoraj Rai* (4), deals not with game and wild animals and birds but with the right to take fish.

In my view it is not necessary in this case to express any opinion as to the rights of either landlord and tenant to game, because this case can be disposed of upon other grounds. In any event a Criminal Court is not an appropriate tribunal to decide difficult and complicated questions relating to rights of property. It appears to me upon the plain facts of this case that the respondents cannot be convicted of the offence of theft.

In the solemn affirmation made by the complainant Chakradhar Behera (P. W. No. 1), it is clearly stated that the respondents took the bird from Chintamani Barik, because they claimed that the bird belonged to the Raj as it had been shot without authority. It is also clear from the evidence of Apurna Munjet (P. W. No. 3) and Chintamani Barik (P. W. No. 6) that the respondents as officers of the Raj claimed the bird as belonging to the Raj because it had been shot without authority. If the two respondents took the bird believing that it belonged to the Raj as it had been shot without authority, then they could not be guilty of the offence of theft.

(1) 4 M 268.

(2) 49 Ind. Cas. 198; A I R 1919 Pat. 400; (1918) Pat. 232; A I R 1919 Pat. 400.

(3) 3 Pat. 549; 81 Ind. Cas. 82; 25 Cr. L J 594; A I R 1924 Pat. 564.

(4) 3 P L T 53; 64 Ind. Cas. 546; A I R 1922 Pat. 9.

"Theft" is defined in s. 378, I. P. C., and the definition is in these terms:—

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."

It is to be observed that the essential ingredient of theft is an intention to take dishonestly. Without such intention the taking of movable property does not amount to theft. The word "dishonestly" is defined in s. 24, I. P. C., in these terms:—

"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."

"Wrongful gain" and "wrongful loss" are defined in s. 23, I. P. C. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled." "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled."

In my view, a person cannot be said to act dishonestly, that is with an intention of causing wrongful gain to himself or his master or wrongful loss to another, when he takes movable property which he believes to belong to himself or his master. In short, if the person taking any movable property does it under a *bona fide* claim of right, then he cannot be found guilty of the offence of theft.

The defence of *bona fide* claim of right has been recognized by all Courts in India, and Mr. Manuk who has argued the case with great ability and fairness on behalf of the respondents has cited a large number of cases.

In *Dhirendra Mohan Gossain v. Emperor* (5), a Bench of the Calcutta High Court (Jenkins, C. J. and Woodroffe, J.) held that if an accused asserts a claim to a thing alleged to have been stolen by him, he should not be convicted unless the Court is in a position to say that the claim is a mere pretence. At p. 403* Jenkins, C. J. observed:—

"In this case it is clear that the petitioners who have convicted assert a claim, and one who asserts a claim should not be convicted of theft, unless the Court is in a position to say that the claim is a mere pretence. This is the law as laid down in *Hari Bhumali v. Emperor* (6). Here it is impossible to say that the claim is a mere pretence. Indeed, the lower Appellate Court contemplates that there must be a civil suit about the tank which has given rise to the present criminal proceedings.

The result is that the rule must be made absolute, and the conviction and sentence set aside."

(5) 14 O W N 408; 5 Ind. Cas. 794; 11 Cr. L J 248.

(6) 9 O W N 974.

*Page of 14 O. W. N.—[Ed.]

A similar view was taken by Mookerjee and Sheepshanks, JJ. in *Arfan Ali v. Emperor* (7). It was held in that case that the removal of property in the assertion of a *bona fide* claim of right, though unfounded in law and fact, does not constitute theft. But a mere colourable pretence to obtain or keep possession of property does not avail as a defence. Whether the claim is *bona fide* or not must be determined upon all the circumstances of the case, and a Court ought not to convict unless it holds that the claim is a mere pretence. In this case the learned Judges cited and followed a statement of Sir Matthew Hale in his *Pleas of the Crown* (Vol. I pp. 508 and 509):

"It is the mind that makes the taking of another's goods to be a felony or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact, and though these circumstances are various and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case. If, A, thinking he hath a title to the horse of B, seizes it as his own, or supposing that B holds of him, distrains the horse of B without cause, this regularly makes it no felony, but a trespass, because there is a pretence of title, but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it."

The learned Judges also cited with approval Sir Edward Hyde East's statement of the law in his *Pleas of the Crown* Vol. II, p. 659):

"In any case, if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the Court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to bring men's lives into jeopardy."

This view of the law was followed in this Court by Atkinson, J. in *Sadasiv Singh v. Emperor* 39 Ind. Cas. 475 (8). In that case the learned Judge laid down that

"a man who honestly believes that he is taking away property from his own land cannot and ought not to be convicted of theft."

The learned Judge went further and held that "if a claim of title to property is honestly made and is not merely colourable, then the jurisdiction of the Criminal Court is ousted." It was perhaps unnecessary to deal with the question as to whether the jurisdiction of the Court is ousted when a *bona fide* claim of right is made. It appears to me sufficient to say that if such a claim is honestly made, then no

conviction for theft can possibly be made.

In a later case of this Court, *Ram Brich Lal v. Emperor* (9), Dhavle, J., also gave effect to the defence of a *bona fide* claim of right.

In the present case the supposed owner, namely the Raja Bahadur of Kanika, did not himself claim the bird and the claim was made by his servants acting on his behalf. A servant may well be in a stronger position than his master, because a servant might, in certain circumstances, honestly, believe that his master was the owner of certain property, whereas the master might well know that he was not. The position of a servant was considered by a Full Bench of the Calcutta High Court in the case of *Hari Bhumali v. Emperor* (6). In that case it was held that the Criminal Court should not convict of theft any person who asserts a claim of right unless it is in a position to say that that claim is a mere pretence. It was further held that a servant should not be held guilty of the offence of theft when what he did was at his master's bidding, unless it should have been shown that he participated in his master's knowledge of the dishonest nature of the acts. There must be some evidence before the Court from which such knowledge on the part of the servant can be inferred.

It appears to me that these cases clearly establish that if the present respondents honestly believed that the bird belonged to the Raj they cannot be convicted of theft. As I have stated earlier, the witnesses for the prosecution make it clear that the bird was taken from Ohintamani Barik because the respondents claimed that it belonged to the Raj as it had been shot without authority. That is even admitted in the solemn affirmation filed with the petition.

It is clear that the Kanika Raj has over a long period of time claimed the sole right to kill and take wild animals on Raj lands. The Raj has claimed the right to forbid the killing and taking of such animals without permission and has from time to time made known its views. As far back as the year 1907 a notice (Ex.-O) was published in a local paper called "The Star." This notice is printed at p. 32 of the paper-book and was actually issued on February 1, 1907. The notice is

(7) 44 O. 66; 36 Ind. Cas. 136; 20 C W N 1270; 17 Cr. L J 456; A I R 1917 Cal. 648.

(8) 39 Ind. Cas. 475; 1 P L W 155; (1918) Pat. 47; 15 Cr. L J 507; A I R 1917 Pat. 40.

(9) 16 P L T. 645; 159 Ind. Cas. 346; A I R 1935 Pat. 472; (1935) Cr. Cas. 1174; 2 B R 77; 8 R P 272; 37 Cr. L J 91 (1).

in these terms :—

"The public are hereby informed that shooting without permission, within the limits of Killah Kanika is strictly prohibited. The jungle in lands named 'Kalibhanja Dian' and 'Baguli Dian' are reserved and persons entering them, without permission, on any account, will be dealt with as trespassers.

Any gentleman wishing to visit the estate for sporting purposes should apply for permission to the Manager at Ganja, the-quarters of the estate."

It is not denied that such a notice was issued, but it is contended that the notice applies only to strangers. There can be no doubt, however that the person who issued the notice must have been under the impression that all game belonged to the Raj. The public were informed that shooting without permission within the limits of the Raj was strictly prohibited, that is shooting on either land in the Raja's possession or in the possession of tenants. The wording of the notice is wide enough to cover all types of land in the Raj. Shooting on all such land is forbidden, and even if the notice was intended to apply to strangers it is clear that the Raj claimed the right to the shooting on land in the occupation of tenants. If the tenants were entitled to grant permission, then obviously the Raj could not insist on its right to give permission. The form of the notice suggests clearly in my view that even as early as 1907 the Raja of Kanika claimed the sole right to take and kill game within the Raj.

In the trial Court a large number of documents were adduced in evidence on behalf of the respondents with a view to showing that the Raj insisted that no one was entitled to shoot within the confines of the Raj without express permission. The rules of the Forest Department of the Raj were put in evidence and also a number of applications for licenses and the licenses granted. It was urged in the Court below that these documents showed that by custom the Raja Bahadur had the sole right to take game. Mr. Manuk has not asked us to hold that the documents established any custom, but he has asked us to hold that these documents show that for a long period of time the Raja Bahadur of Kanika has rightly or wrongly claimed to have the sole right to take and kill all game and wild animals within the Raj.

In my judgment, the evidence adduced in this case undoubtedly shows that the owner of the Kanika Raj has always claimed the game. Such a claim may or

may not be well founded, and I express no opinion whatsoever upon it. It is sufficient in this case for me to hold that such a claim has been and is now being put forward. There is nothing whatsoever to suggest that such a claim is not *bona fide*. That being so, it is impossible to hold that the respondents who were Raj servants were claiming this bird dishonestly. As servants of the Raj, they knew that the Raj claimed all game shot without permission, and it appears to me that they took this bird believing that the Raj was entitled to it. They said so when they took the bird, and I have no reason whatsoever to doubt that their action was due to the undoubted claim of the Raj.

It was contended that the defence put forward on behalf of the respondents clearly shows that they were not actuated by a *bona fide* claim of right when they took the bird. One of the defences was that the bird was not shot on Mayadhar's plot but on *anabadi* or uncultivated land of the Raj. Uncultivated land of the Raj would, of course, be in the Raj's possession, and *prima facie* he would be entitled to shoot all wild animals upon it. It has been urged that the very fact that this defence was put up shows that the respondents were not acting honestly. It is true that both the Courts found that this defence was not established; but in my view the important point of time is the actual moment the bird was taken from Ohintamani Barik. At that moment did the respondents believe that the bird really belonged to the Raj? If they did, then it must be held that their claim was a *bona fide* one. Nothing that occurred afterwards can really affect the matter. In my judgment the evidence for the prosecution establishes that these respondents did nothing more than seize property which they honestly believed belonged to their master. That being so, they could not be convicted of theft.

It appears that this point was never raised before the Courts below. Had such a point been taken, there would in all probability have been no appeal. In my judgment the respondents in this case acted under the honest belief that the bird belonged to the Raj and that concludes the matter.

Again I wish to make it clear that I express no opinion whatsoever upon the question as to whether the Raj's claim to game wild birds and animals on the

land of occupancy or other tenants is or is not well founded in law. That is a matter which can only be determined in appropriate proceedings in another Court.

For the reasons which I have given, I would dismiss this appeal.

Varma, J.—I agree.

Mr. G. P. Das, the learned Public Prosecutor for Orissa, has tried to show that the acquittal was wrong by urging that neither the Raj nor its servants could have any rights to the birds shot by Apurna Munjet (P. W. No. 3) on plot No. 98 which was an occupancy holding of Mayadhar Naik (P. W. No. 2). The Criminal Court is not the proper forum to establish the relative rights of a landlord and a tenant to game birds, and it is not necessary on the materials before us to go into that complicated question. In this case we have to see whether a case of theft has been made out. "Theft" as defined in s. 378, I. P. C., is committed when property is removed dishonestly from the possession of another person. It is evident, therefore, that if the removal of the property is not dishonestly made, the charge of theft cannot sustain.

In this case, whether the taking of the birds, worth about one rupee, was dishonest or not can be gathered from what the complainant himself stated on solemn affirmation. He stated that the accused asked Chintamani Barik from where he had received the birds, and

"Chintamani Barik told them that he received the bird from me and that he was taking it to my house. On hearing this they said that the bird was killed without their permission from the estate and they should not allow him to take that bird. Under orders of the Circle Officer, Purna Chandra Singh snatched away the bird from Chintamani Barik and took it to their Kutcherri house."

It is clear from this statement that the accused asserted a right to the bird as servants of the Raj. A petition of complaint was also subsequently filed by the Forest Jamadar of the Raj on December 10, 1938, against Chakradhar Behera (the complainant in this case), M. Apurna and Chintamani Naik, and it was alleged in this petition that these persons took the dead bird from land owned and held by the Raj and misappropriated the same and therefore they should be summoned and tried. It was further stated therein that the Sub-Divisional Officer had already been informed of the incident on the date of the occurrence and the delay in filing the petition was due to the fact that

permission of the Raj had to be obtained beforehand. Taking the two complaints together, it is clear that the assertion of the right of the Raj to game birds is a fact supported by the statements of the complainant himself in this case. This assertion of right is a very old one, and in this case the accused asserted that right as servants of the Raj. In such circumstances they cannot be said to have removed the dead bird dishonestly unless it be held that the assertion was a mere pretence. On the evidence to which reference has been made in the judgment just now delivered, coupled with the statements of the complainant of this case and the Forest Jamadar of the Raj, I am of opinion that the case falls within the principle laid down in *Hari Bhuniali v. Emperor* (6). The acquittal of the accused in this case cannot, therefore, be recalled, and I would dismiss the appeal.

D.

Appeal dismissed.

CALCUTTA HIGH COURT

Appeal No. 205 of 1937

March 13, 1939

R. C. MITTER AND KHUNDKAR, JJ.

Smt. GUMTI DEBI, WIDOW OF KAMTA

PROSAD SUKUL AND OTHERS—

JUDGMENT-DEBTORS—APPELLANTS

versus

Babu JUGAL KISHORE BAISYA—

DECREE-HOLDER—RESPONDENT

Limitation Act (IX of 1908), Arts. 132 (5), 182, ss. 19, 21—Plaint in suit in Court passing decree, for declaration that property is liable to be attached in execution, whether application to take step-in-aid—Application for transfer of decree, if step-in-aid—Held that written statement by mother on behalf of minor sons amounted to acknowledgment of decretal debt—Execution petition on personal decree held within time.

A plaint in a suit filed in the Court passing the decree, for declaration that certain property is liable to be attached in execution of the plaintiffs decree against his judgment-debtor, is not an application to take some step-in-aid of execution within the meaning of Art. 182 (5), Lim. Act. *Raghunandan Persad v. Bhugoo Lal* (2), approved.

An application for transfer of a decree to a *mufassil* Court which has passed the same is a step-in-aid of execution within the meaning of Art. 182 (5), Lim. Act. 132 Ind. Cas. 149 (4), relied on.

Held, on facts that the execution application upon the personal decree was within limitation as the written statement filed by the mother on behalf of her minor sons amounted to an acknowledgment of the decretal debt.

A. from the original order of the Sub-Judge, First Court, Tippera, dated March 30, 1937.

Messrs. A. C. Gupta, U. K. Roy, Nani Gopal Das and Ajit Kumar Dutta, for the Appellants.

Mr. Jatindra Mohon Ghose, for the Respondent.

R. C. Mitter, J.—This appeal is on behalf of the judgment-debtor and the principal point raised is one of limitation. The facts bearing upon the said point are as follows: One Kampta Persad, a person governed by the Mitakshara School of Hindu Law mortgaged 12 annas share of some properties situated at Unao in the United Provinces of Agra and Oudh to the respondent on August 12, 1920, for Rs. 60,000. He had at that time two sons of the names of Sheo Gobind and Tribhut Nath. Sheo Gobind had separated from him. Two more sons were born later, Biswambar and Biseswar, the latter being a posthumous one. In 1923, the mortgagee instituted his suit in the Court of Subordinate Judge at Unao to enforce the mortgage. Tribhut Nath was then dead, and Biseswar was not then born. The defendants were Kampta Persad and Biswambar, a minor, represented by his mother Gumti Debi as guardian *ad litem*. The preliminary decree was passed on April 12, 1924 and the final decree on January 17, 1925. The mortgaged properties were eventually sold for Rs. 59,354 leaving Rs. 31,234 odd as unsatisfied. For this amount together with subsequent interest a decree under O. XXXIV, r. 6, Civil P. C., was passed on November 21, 1925 (for Rs. 31,727 odd). This is the decree which is now under execution. Before obtaining this personal decree the decree-holder applied for and obtained on September 12, 1925 an order for attachment before judgment of some properties including the Tipperah properties which are the subject-matter of this appeal. Before however the attachment could be effected Kampta Persad executed two deeds. The first was a deed executed on September 15, 1925 by which he dedicated to an idol some of the Tipperah properties. The second was a lease for 50 years which he executed on October 26, 1925 in favour of his brother-in-law Uday Bhan by which he reserved to himself, it is said, a small rent. Later on, Kampta Persad died on January 16, 1926, and shortly after his death his third son Biseswar was born.

In 1928 the decree-holder instituted a suit in the Court of the Subordinate Judge at Unao, Suit No. 9 of 1928, for a declara-

tion that the aforesaid two deeds, namely the deed of the endowment and the indenture of lease represented fictitious transactions, intended to defeat him and other creditors of Kampta Persad. The two surviving minor sons of Kampta Persad, namely Biswambar and Biseswar, represented by their mother Gumti Debi as guardian and the adult and separated son of Kampta Persad, named Sheo Gobind, were made defendants. In that suit Gumti Debi filed on February 22, 1928 a written statement (Ex C-2) on behalf of her minor sons. This is a very important document in the case. This suit terminated in a decree on September 21, 1928 passed against the minor sons of Kampta Persad. The said two deeds were declared invalid and the properties covered by them were declared to be liable to attachment of the respondent's decree passed under O. XXXIV, r. 6. Sheo Gobind was discharged, as he disclaimed all interest in the litigation. Later, on November 24, 1929 the personal decree passed under O. XXXIV, r. 6 was adjusted but nothing turns upon this adjustment. The mortgagee decree-holder reduced his claim subject to certain conditions. The first application was made by the decree-holder in the Unao Court on August 1, 1929. It was for transfer of the decree to the Court at Comilla. It is admitted by the appellant's Advocate that that application is to be taken as a step-in-aid of execution. An order was passed by the Unao Court for transfer of the decree to the Comilla Court, but nothing further was done by the decree-holder. He again applied for transfer of the decree on October 27, 1933 within three years of the order passed on his first application for transfer and obtained the necessary order on November 4, 1933. Nothing further was also done this time. He again applied for transfer in 1935 and after obtaining the order prayed for and the certificate of non-satisfaction from the Unao Court he applied in the Comilla Court for execution on May 9, 1935. As Biswambar had died in the meantime the application for execution was filed against Biseswar represented by his mother Gumti Debi as guardian who filed an objection under s. 47, Civil P. O. Many objections were raised to the execution but all were negatived by the Subordinate Judge by his order dated May 5, 1937. The appellant's Advocate has given up all the points, save two. Those two points are: (i) that the decree was incapable of execution as it

was already barred when the first application by the decree-holder to take a step-in-aid of execution was made (August 1, 1929), that application being more than three years of the decree under execution; (ii) that the Subordinate Judge ought to have kept the question as to the validity of the deed of endowment open in these proceedings. The first point was overruled by the Subordinate Judge on two grounds, namely (a) that the plaint and decree passed in suit No. 9 of 1928 saved the decree-holder's application dated August 1, 1929 (b) that the written statement (Ex. C-2) filed by Gumti Debi on behalf of the minor judgment-debtor in Suit No. 9 of 1928 which was within three years of the decree under execution amounted to an acknowledgment of liability within the meaning of s. 19, Lim. Act, and the first application of the decree-holder (dated August 1, 1929) being within three years of that date was in time.

Both these reasons given by the learned Subordinate Judge are challenged as unsound by Mr. Gupta, the learned Advocate for the appellant. It is admitted by him that if the application of the decree-holder dated August 1, 1928 was in time, the present application for execution cannot be thrown out as not maintainable, for within three years of the order made on that application the decree-holder again took steps in aid of execution. Mr. Gupta does not challenge before us the correctness of the decision of Mukherjee and Mitter, JJ. in *Sreenath Chakravarti v. Priya Nath Bandopadhyā* (1), so far as it held that an application for transfer of a decree to a *muffasil* Court which had passed the same is a step-in-aid of execution within the meaning of Art. 182 (5), Lim. Act. Mr. Gupta however submits that Art. 182 (5) speaks of an application to take some step-in-aid of execution made to the proper Court, that is the Court whose duty it is to execute the decree (Explan. II to Art. 182). He submits that the plaint filed in the Unao Court, cannot be regarded as an application within the meaning of that Article. The contention of Mr. Gupta is supported by the observation made by a Division Bench of this Court in *Raghunandan Persad v. Bhugoo Lal* (2), at p. 211. That was a case decided under the Lim. Act of 1877, but so far as this question is concerned there is

no difference between Art. 179 (4) of the former Act and Art. 182 (5) of the Act of 1908 as finally amended. In other High Courts however a wider meaning has been assigned to the word "application" used in Art. 182 (5). The word has been construed to mean "request to a Court" and that Court need not be the Court of execution. It would, in that sense, include a plaint in a suit for declaration that certain properties are liable to be attached in execution of the plaintiff's decree against his judgment-debtor, the defendant, an act or deed of the latter which had the effect of impending execution being challenged and sought to be nullified in the suit. We do not propose to examine the cases in detail bearing upon this point, as we are basing our judgment on another ground. We may however, say that we prefer to follow the view expressed in *Raghunandan Persad v. Bhugoo Lal* (2) as it gives the natural meaning to the word "application" and the other Courts have not given proper consideration to the phrase "proper Court" used in Art. 182 (5) and defined in Explan. II to Art. 182.

Mr. Gupta's next argument is that Ex. C (2), the written statement filed by Gumti Debi on behalf of her minor son in Suit No. 9 of 1928, is not an acknowledgment of liability within the meaning of s. 19, Lim. Act. He subdivides his argument into three parts. He says: (i) there was in it in fact no acknowledgment of an existing liability to the respondent, (ii) even if there was an admission in it by Gumti Debi that the amount due to the respondent under the decree passed in his favour under O. XXXIV, r. 6, such an admission cannot in law amount to an acknowledgment of liability by the judgment-debtor Biseswar as (a) Gumti Debi being only guardian *ad litem* cannot bind him by any statement which goes beyond the scope of the suit in which she was his guardian *ad litem* (b) even if Gumti Debi be regarded as the natural guardian of Biseswar, she cannot bind her ward by her acknowledgment of liability, unless it can be shown by the decree-holder that the said acknowledgment was made for the benefit of her ward. We cannot give effect to any of these contentions of Mr. Gupta. The respondent in his plaint of Suit No. 9 of 1928 made the statement that he had obtained against Kamta Persad a decree for Rs. 31,727-12-0 of November 21, 1925. He further stated that Kamta Persad had notice of the order for attach-

(1) 58 C 832; 132 Ind. Cas. 149; A I R 1931 Cal. 312; 52 O L J 569; 35 O W N 77; Ind. Rul. (1931) Cal 533.

(2) 17 C 268.

ment before judgment of the properties at the time when he executed the deed of endowment and the indenture of lease and that he did execute them with the fraudulent object of depriving him and his other creditors, and that the remaining properties which Kamta Persad had were not sufficient to meet his claim under the said decree. He accordingly prayed for the declaration that those two deeds were null and void. Gumti Debi as guardian of her minor sons Biswambar and Biseswar filed the written statement on February 22, 1928. In paras. 17 and 19 she made the clear statement that the decree of the respondent was still unsatisfied. The plea she took can be summarized thus. True the respondent's decree was still unsatisfied but Kamta left considerable properties outside the deed of endowment and the lease which were more than sufficient to satisfy the respondent's decree and that (he the respondent) was not intentionally proceeding against those properties. There was in the written statement not only an acknowledgment of liability by Gumti Debi but that her statements regarding respondent's claim on his decree were relevant to the suit, being her defence to the charge of fraudulent alienation by Kamta Persad made in the plaint. If she could have substantiated the fact that Kamta Persad left properties outside the lease to his brother-in-law and the deed of endowment, which were sufficient to satisfy the respondent's claim on his decree, these two transfers would probably have been saved from the respondent's attack. Grounds Nos. (i) and (ii) (a) as urged by Mr. Gupta stated above are accordingly without substance and must be overruled.

In support of his ground (ii) (b) Mr. Gupta submits that an acknowledgment of liability by a guardian to be effective against the minor must be by his lawful guardian and for his benefit. Lawful guardian means a person who in law represents the minor. The phrase does not include a *de facto* guardian. But the person need not be appointed by the Court under the Guardians and Wards Act. If by the personal law of the minor a person is indicated as his guardian then that person is his lawful guardian. Here as the father was dead the mother, Gumti Debi, was the lawful guardian of her minor sons at the time she filed the written statement in Suit No. 9 of 1928. She cannot be taken to have momentarily ceased to be

the legal guardian of her minor sons because she was appointed their guardian *ad litem*. The acknowledgment of liability made by her in paras. 17 and 19 of the said written statement must be taken to have been made by her as lawful guardian of her minor sons. The period of limitation for execution against them accordingly started from the date of the written statement, namely February 22, 1928, and the application of the decree-holder to the Unao Court dated August 1, 1929 was accordingly in time. This is the plain effect of s. 19 read with para. 1 of s. 21, Lim. Act of 1908.

In support of his contention that the acknowledgment of liability by a lawful guardian to have effect against a minor must be for his benefit, Mr. Gupta cites a number of cases. The relevant statements in the written statement Ex. C-2 being relevant to the suit were certainly made for the benefit of the minor. But apart from the said fact we cannot accept Mr. Gupta's contention on this point of law. The cases he cites are *Annapa Gauda v. Sangadyapa* (3), *Ram Charan Dass v. Gaya Prosad* (4), *Wajibun v. Kadir Baksh* (5) and *Chidambaram Pillai v. Veerappa Chettiar*, 43 Ind. Cas. 865 (6). The first three cases were decided under the Lim. Act of 1877. In that Act there was no provision corresponding to s. 21 (1) of the Act of 1908. An acknowledgment of liability to be effective had to be signed by the debtor or by his authorized agent. The question raised in those cases was whether a lawful guardian of a minor was his authorized agent. It was held in those cases that he was not but would be so regarded only if he acted for the benefit of the minor in making the acknowledgment of liability. The addition of the para. 1 to s. 21 in the Lim. Act of 1908 has in our judgment, made away with the said distinction. A lawful guardian is now under the statutory definition an authorised agent of the minor within the meaning of s. 19, Lim. Act. The new provision of s. 21, Lim. Act of 1908 was made to make the law clear and to place a lawful guardian in the same position as an authorized agent of an adult debtor. In the last case cited by Mr. Gupta *Chidambaram Pillai v. Veerappa Chettiar* (6) the change in the law by the Legislature

(3) 26 B 22; 3 Bom L R 817.

(4) 30 A 422; 5 A L J 375; A W N 1908, 175 (F B)

(5) 13 C 292.

(6) 1917 M W N 744; 43 Ind. Cas. 865; A L R 1919, Mad 993; 22 M L T 380; 6 L W 640.

was not considered and s. 21 (1) was not even noticed in the judgment.

With regard to the last contention raised by Mr. Gupta that the finding on the deed of endowment, arrived at by the learned Subordinate Judge ought to be set aside, we are of opinion that his contention is sound. The idol has not preferred any claim in the execution proceedings and we are of opinion that in the absence of the idol, the question as to whether the deed of endowment creates a valid *debutter* or not, ought to be left open in these proceedings. With this modification the appeal is dismissed with costs, hearing fee two gold *mohurs*.

Khundkar, J.—I agree.

s. *Appeal dismissed.*

OUDH CHIEF COURT

Application No. 83 of 1937

April 4, 1940

YORKER AND KADHA KRISHNA, JJ.

M. MOHD. IHTISHAM ALI—DEFENDANT

--APPLICANT

versus

L. LACHHMAN PRASAD AND ANOTHER

--PLAINTIFFS--OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 115, 10—Trial which ought to have been stayed under U. P. Encumbered Estates Act not stayed—Order of revisable—U. P. Encumbered Estates Act (XXV of 1934), s. 9 (5)—Liability of debtors joint and several—S. 9 (5), if applies.

An order allowing continuation of the trial of a suit which had been stayed and which ought to have remained stayed under s. 10 of the Civil P. C., is a "decided case" within the meaning of s. 115 of the Code and is capable of being revised by the High Court. 111 Ind. Cas. 161 (1), followed. 158 Ind. Cas. 958 (2), 149 Ind. Cas. 176 (3) and 63 Ind. Cas. 15 (4), not followed. [p. 836, col. 1.]

Section 115 of the Civil P. C., gives the Chief Court a discretion to make such order in the case as it thinks fit where it is of opinion that the Subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. Where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the Encumbered Estates Act, and it elects none the less to proceed with the hearing of the suit, it acts with material irregularity; and it cannot be said that when the Court passes such an order, it is any less a case decided because the decision is not with reference to s. 10 but with reference to the provisions of the Encumbered Estates Act. [p. 838, col. 2.] Section 9 (5), U. P. Encumbered Estates Act, applies to joint and several debt. 180 Ind. Cas. 114 (6), referred to.

The more general sense should be given to the term "joint debt" and whatever injury may thereby be done to the rights of creditors under the general law the intention of this Act is to limit the rights of creditors even in the case of debtors who are not

entitled to the protection of the Act by giving to the Special Judge deciding claims under that Act an exclusive jurisdiction to apportion the liability under joint debts as between those debtors who have applied under the Act and those who have not. Whatever may be the position in regard to the "institution" of suits against non-applicant joint debtors in the ordinary Civil Courts, those suits cannot go forward unless and until the Special Judge has exercised his special jurisdiction to distribute the amount of the debts. Sub-section (5) (b) of s. 9 has been a part of the Act from the very beginning and the wording of that sub-section makes it clear that in the ordinary Civil Courts a creditor can only recover from a non-applicant joint debtor such amount as may be determined by the Special Judge to be due by him. [p. 838, col. 1.]

App. for revision of the order of the Civil Judge, Mohanlalganj, Lucknow, dated June 2, 1937.

Messrs. M. H. Kidwai and Abraham, for the Applicant.

Messrs. L. S. Misra and Kashi Pershad Saksena, for the Opposite Party.

Judgment.—This is an application in revision under s. 115 of the Civil P. C., by Mohammad Ihtisham Ali defendant.

This application has arisen in the following circumstances:

The plaintiffs Lachhman Prasad and Madan Lal held a promissory note for Rs. 16,500 executed by two persons Mohammad Ihtisham Ali and Mohammad Azhar Ali on January 4, 1934. One of the debtors Azhar Ali made an application under the Encumbered Estates Act. Subsequently the creditors instituted a suit in the Court of the Civil Judge, Mohanlalganj Lucknow to recover Rs. 21,697-8 on foot of the pro-note. In their plaint the plaintiffs mentioned that Azhar Ali had already made an application under the Encumbered Estates Act. They sought relief in the first instance only against Ihtisham Ali, but they made a second prayer that in case the defendant No. 2 Azhar Ali should get his application under the Encumbered Estates Act dismissed, a decree should be given by the Court against both defendants. Subsequently the plaintiffs on May 4, 1937, discharged Azhar Ali from the suit entirely. The defendant Ihtisham Ali raised a number of pleas, but particularly he contended that in view of the provisions of Act XXV of 1934 (the Encumbered Estates Act) and s. 10 of the Civil P. C., the trial of the present suit should be stayed pending the decision of the Special Judge under s. 9 of the Encumbered Estates Act on the claim made by the plaintiffs in the Encumbered Estates Act proceedings, that is under s. 10 of the Act.

The learned Civil Judge framed an issue,

"Cannot the trial of the present suit be proceeded with in view of the provisions of the Act XXV. of 1934, and s. 10 of the Civil P. O.?"

He held that

"the matter in issue in the present suit was not also directly and substantially in issue."

In the proceedings before the Special Judge, and he therefore held that there was no bar to proceeding with the case before him. As regards the second question whether in view of the provisions of the Encumbered Estates Act it was competent for him to proceed with the trial of the suit, he held that a person who has not made an application under the Encumbered Estates Act cannot urge that because another person who was a joint debtor with him has made an application under s. 4 a creditor is barred from maintaining a suit against the person who has made no application under s. 4 of the Encumbered Estates Act and cannot maintain a suit to enforce the debt against him individually in a proper Court.

It is from this order that the present application in revision has been filed. The first question which arises is whether an application in revision lies from such an order. *Prima facie* this would have seemed to be an interlocutory order but in view of the decision of a Full Bench of this Court in *Sahdeo Singh, Sardar v. Chanun Kuer, Sardarni*, (5 O. W. N. 604)(1) that content on cannot be maintained. It was held that an order allowing continuation of the trial of a suit which had been stayed and which ought to have remained stayed under s. 10 of the Civil P. O., is a "decided case" within the meaning of s. 115 of the same Code and is capable of being revised by the High Court. It is true that there are remarks in the judgment of Srivastava, J. in *Paras Nath v. Ran Bahadur* (1935 O. W. N. 1158) (2) which would lead to a contrary conclusion but those remarks would not suffice by themselves to justify us in taking a different view, and we are clear that we must act upon the view that an application in revision is competent. We should, however, note that a different view is taken by the High Courts at Allahabad and Lahore, *vide* the cases of *Madan Mohan v. Kuar Kamla Narain Dube* (A. I. R.

(1) 5 O. W. N. 604; 111 Ind. Cas. 161; A I R 1928 Oudh 355; 3 Luck 650 (F B).

(2) 1935 O. W. N. 1158; 158 Ind. Cas. 949; 1935 O. L. R. 633; 2 R. O. 138; A I R 1936 Oudh 22 (F B).

1935 All. 520) (3) (based on the Full Bench ruling of the same Court in *Buddhu Lal v. Mewa Ram*, I. L. R. 43 All. 564) (4) and *Durga Das v. Gobind Singh* (A. I. R. 1936 Lahore 569) (5).

It is contended on behalf of the applicant that the learned Civil Judge has not given proper consideration to the provisions of s. 9 (5) of the Encumbered Estates Act. Section 9 (5) deals with the determination of the liability of joint debtors who are not members of a joint Hindu family. Sub-s. (5) (b) provides that

"if all the joint debtors have not applied under s. 4 the creditors shall have a right to recover from the debtors who have not applied only such amount on account of the joint debts as may be determined by the Special Judge to be due by them."

By s. 9 (5) (a) it is provided that

"for the purpose of determining the amount of the joint debt which is due by the debtor or debtors who have applied and the amount due by those who have not applied, the Special Judge shall make the joint debtors who have not applied parties to the proceedings and shall hear any objection that they may make before recording his finding."

The section thus contemplates the apportionment of liability for a joint debt between those debtors who have applied under the Encumbered Estates Act and those who have not applied, and it would seem that the intention of the Act is that in all cases of joint debts to which applicants under the Act are parties the jurisdiction to decide the amount recoverable from the applicants and that recoverable from the non-applicants rests with the Special Judge. If this is a correct interpretation of the intention of the legislature and if these provisions of the Act are applicable to the debt in suit, it follows that it was the duty of the Civil Judge to leave to the Special Judge the decision of the amount recoverable from the defendant Mohammad Ihtisham Ali.

On behalf of the opposite party creditors it is pointed out that this pro-note was executed by Mohammad Azhar Ali and Mohammad Ihtisham Ali jointly and severally. When the case came up in Court on March 16, 1937, a statement was made on behalf of Mohammad Ihtisham Ali that as between the plaintiffs and the defendants the position of Mohammad Ihtisham Ali was that of a joint debtor, but as between the defendants *inter se* the posi-

(3) A I R 1934 All. 520; 149 Ind. Cas. 176; 6 R. A. 661 (1934) A. L. J. 702.

(4) 43 A. 564; 63 Ind. Cas. 15; 19 A. L. J. 558 (F B).

(5) A I R 1936 Lah. 569; 165 Ind. Cas. 131; 9 R. L. 215.

tion of Ihtisham Ali was that of a surety for Azhar Ali. It was upon this statement that the plaintiff stated on behalf of the plaintiffs that they discharged Azhar Ali from the suit and gave an undertaking that they were not going to prove this debt in the Court of the Special Judge that is against Azhar Ali. This undertaking was evidently conditional on their being able to obtain a decree for the amount of the debt against Ihtisham Ali, leaving Ihtisham Ali to recover from his co-debtor Azhar Ali. The main argument for the opposite party is that s. 9 (5) applies only to joint debts and not to debts for which the debtors are liable jointly and severally, and it follows that there is nothing in that section to preclude the Civil Judge from trying out the case against Ihtisham Ali and granting a decree to the plaintiffs for the full amount claimed, leaving Ihtisham Ali to seek his own remedy against Azhar Ali. In this connection reliance is placed on *Swadeshi Bima Co. Ltd., Agra v. Shiv Narain Katiyar*, (A. I R. 1939 All. 75) (6) in which it was held that

"where the liability of two debtors is not merely joint, but also joint and several, and one of them happens to be a landlord who makes an application under s. 4 of the Encumbered Estates Act, it is not open to the other in a suit brought by the creditor against both of them to raise the objection that the suit so far as it relates to him cannot be instituted."

In this decision the learned Judge remarked that there could not be the slightest doubt that the plaintiff could have recovered the debt either from Shiv Narain Katiyar or from Kanhi Singh (Shiv Narain was the applicant under the Encumbered Estates Act). He went on to say at a later stage.

"There is nothing, however, in any provision contained in the Encumbered Estates Act even to suggest that the plaintiff's right to bring a suit against Kanhi Singh is barred or limited in any way."

He noted that Encumbered Estates Act provided only for a decree being passed in favour of a claimant against the landlord who makes an application under the Act, and he further remarked that

"If the plaintiff was not allowed to institute the suit (that is against the joint debtor Kanhi Singh) the necessary result would be that his claim against Kanhi Singh would be barred by time."

On this view he held that the institution of the suit by the plaintiff against the joint debtor who was not an applicant under the Act was fully competent and (6) A. I R. 1939 All. 75; 120 Ind. Cas. 114; 1938 R. D. 876; (1938) A. L. J. 1153; 11 R. A. 430; 1 L. R. 1939 All. 115.

the suit should not have been dismissed. In the event, however, he remarked that it would be open to the learned Small Cause Court Judge to wait for the decision of the Special Judge regarding the liability of Kanhi Singh.

With the greatest respect it appears to us that logically on the view taken by the learned Judge that it was competent for the plaintiff to institute the suit against the joint debtor, it was equally competent for him to obtain a decree against the joint debtor for the whole amount unless further proceedings in the suit were to be stayed either under s. 10 of the Civil P. C., or in view of the provisions of s. 9 (5) (b) conferring exclusive jurisdiction on the Special Judge. Either he must wait for the decision of the Special Judge or he need not do so. The learned Judge has left it open as to which view he takes on that point, and that is the point which is the critical point in the present case.

The second point urged on this application on behalf of the creditors is that in virtue of his own statement that he is really a surety the defendant Ihtisham Ali is barred from asking for a stay of the proceedings before the Civil Judge in view of the proceeding in the Court of the Special Judge. Section 9 (5) has been amended by Act XI of 1939 and two sub-s. 9 (5) (c) and 9 (5) (d) have been added. Sub-section 9 (5) (c) relates to cases where no suit had been instituted in respect of a joint debt and we need not consider it. Sub-section 9 (5) (d) relates to cases where a suit in respect of the joint debt had been instituted and proceedings therein were stayed under sub-s. (1) of s. 7. It provides that the Court in which such suit has been instituted shall on the application of the creditor proceed with such suit in accordance with sub-s. (c) as against those joint debtors who had not applied under s. 4 in respect of the amount of the joint debt determined by the Special Judge to be due from such joint debtors provided that for the purposes of this Act a person who is liable for a debt as a surety shall not be deemed to be a joint debtor. By this provision a surety is evidently excluded from the whole scheme of apportionment which finds a place in sub-s. (5) of s. 9 of the Act. The argument might have had some force if this sub-section had formed a part of the Act at the time when the matter was before the lower Court, but in any case it is not part of the

case that so far as relates to the creditors the defendant claims any consideration on the ground that in reality he was a surety. On the contrary he admits that as regards the creditors he is a joint debtor, and it is on that footing that the question at issue must be decided.

The most important point which is really being urged against this application is that s. 9 (5) has no application to joint and several debts but applies only in the case of debts which are strictly joint debts. We note that just as in the present case the learned Judge who decided the case of *Swadeshi Bima Co., Ltd., Agra v. Shiv Narain Katiyar*, (A. I. R. 1939 All. 75) (6) was dealing with a debt for which the defendants were liable jointly and severally. We ourselves are clearly of opinion that the words used in this section, where mention is made of joint debtors and joint debts or joint decrees, are not used in the very strict sense of debts and decrees for which the debtors cannot be made liable or proceeded against individually. There is nothing in the wording of these sections which requires that they be interpreted in that very strict sense. We are therefore of opinion that the more general sense should be given to them, and we understand, as evidently did the learned Judge of the Allahabad High Court, that whatever injury may thereby be done to the rights of creditors under the general law the intention of this Act is to limit the rights of creditors even in the case of debtors who are not entitled to the protection of the Act by giving to the Special Judge deciding claims under that Act an exclusive jurisdiction to apportion the liability under joint debts as between those debtors who have applied under the Act and those who have not. On this view it is clear that whatever may be the position in regard to the "institution" of suits against non-applicant joint debtors in the ordinary Civil Courts those suits cannot go forward unless and until the Special Judge has exercised his special jurisdiction to distribute the amount of the debts. Sub-section (5) (b) of s. 9 has been a part of the Act from the very beginning and the wording of that sub-section makes it clear that in the ordinary Civil Courts a creditor can only recover from a non-applicant joint debtor such amount as may be determined by the Special Judge to be due by him.

Only one other point has been put forward on behalf of the opposite party.

Learned Counsel argues that the Full Bench ruling of this Court on which reliance has been placed for the competency of the present revision has no application because the application itself is really founded not on s. 10 of the Civil P. O., but on s. 9 (5) (a) and (b) of the Encumbered Estates Act. We do not think that that really affects the issue. Section 115 of the Civil P. O., gives this Court a discretion to make such order in the case as it thinks fit where it is of opinion that the subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. We are of opinion, that where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the Encumbered Estates Act, and it elects none the less to proceed with the hearing of the suit, it acts with material irregularity, and it cannot be said that when the Court passes such an order, as has been passed in the present case, it is any less a case decided because the decision is not with reference to s. 10 but with reference to the provisions of the Encumbered Estates Act.

In our opinion, therefore, the learned Civil Judge was not justified in holding that the trial of the present suit could be proceeded with in spite of the provisions of the Encumbered Estates Act. We accordingly set aside his order and direct that pending the decision of the Special Judge under s. 9 (5) (b) of the Encumbered Estates Act the plaintiffs suit to recover the amount of his debt from Mohammad Ihtisham Ali shall remain stayed. The applicant will get his costs of this application.

Order set aside.

PATNA HIGH COURT.

Civil Revision Application No. 439 of 1939

March 8, 1940

FAZL ALI AND MURDITH, J.

HRIDAYNATH SINGH—PETITIONER

versus

LOHAR SINGH AND OTHERS—OPPOSITE PARTY

Practice—Revision—Matter under investigation—Remedy available by way of appeal—Interference by High Court held undesirable.

It is the practice of the Patna Court to refrain from dealing with a matter in revision where a definite remedy is provided to the parties in the form of an appeal. Where the matter is still under investigation and the Subordinate Judge has not finally decided any question and the objections, which the petitioner is trying to urge can still be

urged before the Subordinate Judge, in such circumstances, even if the High Court has the power to interfere with the order of the Subordinate Judge, it would be undesirable to do so. *Braja Kumar Neogy v. Babu Harihar Prasad Narayan Deo*, Civil Rev. No. 327 of 1933, relied on.

O. R. App. against an order of the Special Subordinate Judge, Ranchi, dated June 5, 1939.

Messrs. S. M. Mullick and L. K. Chowdhury, for the Petitioner,

Messrs. B. C. De and K. K. Banerji, for the Opposite Party.

Fazl Ali, J.—This application is directed against an order passed by the Subordinate Judge at Ranchi on June 5, 1939, in suit No. 36 of 1936.

It appears that a preliminary decree has already been passed in the suit and a Commissioner has been appointed to take accounts. The defendants produced some account books before the Commissioner, which were rejected by him. When the matter came up before the Subordinate Judge, he referred to the objections raised by the plaintiff in regard to the account books and held that they could not be rejected on those grounds alone. He directed the Commissioner to investigate the points of dispute between the parties by taking evidence about the actual facts and to state his opinion in the matter. The Commissioner is still proceeding with the inquiry and no final decree has been passed yet. The petitioner, however, objects to the observations made by the learned Subordinate Judge with regard to the account books and contends that the Subordinate Judge has not dealt with all the objections raised by him in regard to the account-books. These objections have been enumerated in para. 12 of the petition.

It has been urged on behalf of the opposite party that this is not a fit case for revision because the petitioner has raised grounds in this petition, which he can very well raise in an appeal from the final decree after such a decree is passed. In my opinion, the argument put forward on behalf of the opposite party is a correct one. It was pointed out by me in *Braja Kumar Neogy v. Babu Harihar Prasad Narayan Deo* (Civil Revision No. 327 of 1933, disposed of on April 19, 1934) that it is the practice of this Court to refrain from dealing with a matter in revision where a definite remedy is provided to the parties in the form of an appeal. I do not see any reason for departing from this practice in this case. The matter is still under investi-

gation and the Subordinate Judge has not finally decided any question. The objections, which the petitioner is trying to urge in this Court can still be urged before the Subordinate Judge. In such circumstances, even if we had the power to interfere with the order of the Subordinate Judge, which is before us, it would be undesirable to do so.

I would, therefore, dismiss this application with costs, hearing fee two gold mohurs.

Meredith, J.—I am emphatically of the same opinion as my learned brother.

D.

Application dismissed.

LAHORE HIGH COURT

Second Appeals Nos. 23 and 40 of 1938

April 3, 1939

BRIDE, J.

RAM RATTAN AND OTHERS—APPELLANTS
versus

FAZAL HAQ AND OTHERS—RESPONDENTS

Provincial Insolvency Act (V of 1920), ss. 60 (2), 28—S. 60 (2), scope of and applicability—Insolvent, member of agricultural tribe at time of sale by Receiver—S. 16, Punjab Alienation of Land Act, if applies—Temporary alienation of insolvent's property, whether can be made—Property vested in Receiver under s. 28—If legal owner—Civil Procedure Code (Act V of 1908), O. XLI, r. 20—Proper party—Party interested in result of appeal, if can be added after limitation—Insolvency—Second Appeal—Competency of, when no question under s. 4, Provincial Insolvency Act is decided.

Sub-s. (2) of s. 60, Prov. Insol. Act is intended to supplement s. 23, and to save the operation of enactments prohibiting execution of decrees or orders against the immovable property of the insolvent even after the property has vested in the Receiver and must be held to apply to a sale by the Receiver. Section 16, Punjab Alienation of Land Act applies to a sale by the Receiver of the land belonging to an insolvent who is a member of a notified agricultural tribe as the sale is held in enforcement of an order of adjudication. While applying s. 16, Punjab Alienation of Land Act, the status of the insolvent at the time of the sale of the property must be taken into consideration, in the same way as it is in execution of decrees. The insolvent's acquiring the status of a member of an agricultural tribe after the adjudication, does not prevent the operation of sub-s. (2) of s. 60 at the time of sale of the property. Section 16, Punjab Alienation Act, does not prohibit the temporary alienation of such land, and it is therefore open to the Receiver to arrange for the temporary alienation of the land of the insolvents according to law.

[Case-law discussed.]

Where the real contesting respondent is duly impleaded, another person who is supporting the case of the appellant and is interested in the result of the appeal, can be impleaded as a proper party under O. XLI, r. 20, Civil P. O., even after the period of limitation has expired. 172 Ind. Cas. 776 (12), relied on.

Legally the Receiver and not the insolvent is the

owner of the property, which vests in the Receiver under s. 28, Prov. Insol. Act on the order of adjudication being passed.

Quære:—It is doubtful whether second appeals are competent in cases where no question falling under s. 4, Prov. Insol. Act, has been decided.

S. A. from the order of the District Judge, Gurdaspur, dated May 7, 1938.

Mr. S. L. Puri, for the Appellants.

Mr. Dwarka Nath Aggarwal, for the Respondent (Fazal Haq).

Judgment.—S. A. O. Nos. 23 and 40 of 1938, are two appeals which arise out of different insolvency proceedings, but the main point for decision in both being the same question of law, these can be disposed of together. I doubt if second appeals are really competent in these cases as no question falling under s. 4, Prov. Insol. Act, seems to have been decided; but the point has not been raised and in any case petitions for revision would be competent in view of the question of law involved. The material facts bearing on the question of law in the two cases may be briefly stated as follows: (i) In S. A. O. No. 23 of 1938 one Sheikh Fazal Haq, a Kakkezai Sheikh, was adjudicated an insolvent on March 19, 1931 and his property vested in the Receiver. Before the sale of his property however the Kakkezai tribe was declared an agricultural tribe under the Punjab Alienation of Land Act by a notification of the Punjab Govt., dated August 30, 1935. An objection was then raised that his land could not be sold in view of the provisions of s. 16, Punjab Alienation of Land Act, and this objection has been upheld by the Courts below. From this decision the creditors have preferred an appeal. (ii) In S. A. O. No. 40 of 1938, on a petition filed by a creditor on April 27, 1935, Lal Chand, respondent, a Pleader of Lyallpur, was adjudicated insolvent on October 17, 1936. Lal Chand claimed to have become a Christian on October 12, 1936, i.e., five days before the adjudication and contended that as Christians were notified as an agricultural tribe under the Punjab Alienation of Land Act in the Lyallpur District, his land could not be sold in the insolvency proceedings. The allegation that Lal Chand had become a Christian was disputed and this question of fact should have been decided first. But the Courts below have proceeded to decide the question of law first, assuming that Lal Chand had become a Christian on October 12, 1936 as alleged by him. The contention of Lal Chand that

his land could not be sold has been upheld by the Courts below and from this decision one of the creditors has preferred this appeal.

The facts in this second case are practically on a par with those in S. A. O. No. 23 of 1938, so far as the point of law is concerned, except this that the insolvent in the second case became a member of an agricultural tribe after the presentation of the petition for insolvency, but before the date of adjudication. In the second case, the insolvent became a member of an agricultural tribe by a voluntary conversion to Christianity and not by any notification as in the first case; but this will not make any difference, if it is found that as a matter of fact he did become a Christian on October 12, 1936 as alleged. Shortly stated the point of law, arising in the two cases thus is whether the land belonging to an insolvent, which has vested in a Receiver after his adjudication can be sold by the Receiver if the insolvent acquires the status of a member of an agricultural tribe notified under the Punjab Alienation of Land Act, at any time before the date of the sale; or is s. 16 of that Act a bar to such a sale? The learned Counsel for the appellants relied mainly on two points. It was urged firstly that: (a) when a person is adjudged insolvent, his property vests in the Receiver under s. 28, Prov. Insol. Act, and the Receiver becomes legally the owner of the property as a result. The fact that the insolvent has become a member of an agricultural tribe thereafter is immaterial as the property in question belongs to the Receiver and not the insolvent at the date of the sale; and secondly that (b) the sale of property in the insolvency proceedings is effected by the Receiver and is therefore not a sale in execution of a decree or order of the Court within the meaning of s. 16, Punjab Alienation of Land Act.

As regards the first point, reliance was placed on *Official Assignee of Bombay v. Registrar, S. C. C., Amritsar* (1), and the commentary in Mulla's Law of Insolvency at pp. 167-169. There can be, I think, no doubt that the property of an insolvent vests completely in the Receiver after the adjudication order is passed; for otherwise the Receiver could not dispose of the property and convey valid title to the alienees. It is true that the insolvent gets any surplus

(1) 37 O 418; 6 Ind. Cas. 273; 37 I A 86; 14 O W N 569; 11 O L J 443; 17 A L J 357; (1910) M W N 177; 12 Bom. L R 395; 68 P W R 1910; 7 M L T 417; 45 F R 1910; 20 M L J 432; 119 P L R 1910 (P O).

after the distribution of the sale proceeds of the assets amongst the creditors but that appears to be due to the statutory provision contained in s. 67, Prov. Insol. Act. After considering the relevant provisions of the Act, as regards the vesting of the property in the Receiver, it seems to me that the contention of the learned Counsel for the appellants that legally the Receiver and not the insolvent is the owner of the property, which vests in the Receiver on the order of adjudication being passed is correct. But the property of the insolvent is vested in the Receiver for the purposes of the Prov. Insol. Act and its administration by the Receiver is subject to the provisions of that Act. Part III of the Act deals with the administration of the insolvents' property after adjudication and sub-s. (2) of s. 60, which is strongly relied upon by the respondents, runs as follows:

"Nothing in this Act shall be deemed to affect any provisions of any enactment for the time being in force prohibiting or restricting the execution of decrees or orders against immovable property; and any such provisions shall be deemed to apply to the enforcement of an order of adjudication made under this Act as if it were such a decree or order."

This sub-section is evidently intended to protect the interests of the insolvent by saving the application of enactments prohibiting or restricting the execution of decrees or orders against the immovable property of the insolvent in the hands of the Receiver. If it were held that enactments prohibiting or restricting the execution of decrees or orders against the immovable property of the insolvent will not apply to sale of property which has vested in the Receiver because the insolvent is no longer the owner of the property, s. 60 (2) will be practically rendered nugatory. In view of the scheme of the Act and its place in Part III of the Act which deals with the administration of property, there seems little room for doubt that s. 60 must be held to apply to sale of the insolvent's property which has vested in the Receiver. It is noteworthy in this connexion that sub-s. (5) of s. 28 lays down that the property of an insolvent which is exempted from attachment and sale in execution of a decree by the Civil P. Ct., or any other enactment will not vest in the Receiver at all. Sub-s. (2) of s. 60 seems to be intended to supplement s. 28 and to achieve the same object by saving the operation of similar enactments even after the property has vested in the Receiver. Section 60 lays down that an enforcement of an order of adjudication is

to be deemed to be tantamount to an enforcement of a decree or order of a Court. Now a sale by a Receiver is certainly made in enforcement of an order of adjudication. Consequently, the provisions of s. 16, Punjab Alienation Act, which apply to execution of decrees and orders of Courts against land belonging to members of a notified agricultural tribe must, I think, be held to apply to a sale by the Receiver of land belonging to an insolvent who is a member of such a tribe. The above view receives support from *Mirza v. Jhanda Ram* (2) in which it was held that although the land belonging to an insolvent who is member of an agricultural tribe vests in the Receiver it could not be sold in view of the provisions of sub-s. (2) of s. 60, Prov. Insol. Act.

In the present instance, one of the insolvents (Sh. Fazal Haq) became a member of an agricultural tribe after adjudication. The other (Lal Chand) became so a few days before adjudication; but that would not make any difference as the order of adjudication relates back to the date of the petition by virtue of the provisions of sub-s. (7) of s. 28 of the Act. It must therefore be held that both the insolvents acquired the status of a member of an agricultural tribe after the adjudication, i. e., after their property had vested in the Receiver. But this fact would not, I think, prevent the operation of sub-s. (2) of s. 60 at the time of sale of the property. Section 60 appears to be intended (as stated above) to save the application of enactments like the Punjab Alienation Act in the course of the enforcement of the order of adjudication as if it were tantamount to execution of a decree or order of a Court and will therefore apply to sales by the Receiver. The status of the insolvent at the time of the sale of the property must therefore I think be taken into consideration, in the same way as it is in execution of decrees. There is ample authority for the proposition that the status of the judgment-debtor at the time of the sale of his property in execution of decrees has to be taken into consideration in considering the application of s. 16, Punjab Alienation Act, or similar enactments to the sale and the same principle will, I think, apply to a sale in enforcement of adjudication order, (cf. *Mahabir Prasad v. Mahesh Prasad* (3),

(2) 12 L 367; 130 Ind. Cas. 419; A I R 1930 Lah. 1034; 31 P L R 842; Ind. Rul. (1931) Lah. 291.

(3) A I R 1930 All. 858; 128 Ind. Cas. 825; (1931) A L J 45; 14 R P D 586; L R 11 A 256 Rev.; Ind. Rul. (1931) All. 121.

Ram Prasad v. Gorelal (4) and *Ghulam Qadir Khan v. Gurbakhsh Singh* (5). The facts in *Mahabir Prasad v. Mahesh Prasad* (3) were practically on all fours with those in the present case except that the sale in that case was to be made in execution of a decree. The judgment-debtors in that case were notified as members of an agricultural tribe after the passing of the preliminary decree in a mortgage suit. It was held that land could not be sold in execution of the final decree in view of the provisions of the Bundelkhand Land Alienation Act, which correspond to those of the Punjab Alienation of Land Act. In *Ram Prasad v. Gorelal* (4) it was held that so long as the land is not sold, the judgment-debtors are entitled to claim the privilege to which they are entitled under the same Bundelkhand Act. To the same effect is the view taken in *Thakur Das v. Roshan Bibi* (6) and *Chhajju Ram v. Muzaffar Ahmad* (7). In *Ghulam Qadir Khan v. Gurbakhsh Singh* (5) land belonging to a person who was notified as a member of an agricultural tribe was sold in execution of a decree. The Punjab Alienation of Land Act however came into force before its confirmation and it was held that the sale could not be confirmed. If a sale made in enforcement of an order of adjudication stands on the same footing as a sale in execution of a decree, I do not see why the principle followed in the above rulings should not apply to the sales in the present case. In insolvency proceedings, the creditors get the benefit of any property acquired by or devolving upon the insolvent after adjudication. In the same way there seems to be no reason why the insolvent should not get the benefit of any exemption to which he becomes entitled after adjudication.

The answer to the second argument of the learned Counsel for the appellants, viz., that s. 16, Punjab Alienation of Land Act, does not apply because the sale by the Receiver is not a sale in execution of a decree or order of a Court has also no force in view of s. 60 (2) referred to above, which places a sale in enforcement of an order of adjudication on the same footing as a sale in execution of a decree or order of a Court. *Gur-*

bakhsh Singh v. Sardar Singh (8) was a case under the Pre-emption Act and the question of the effect of s. 60 (2), Prov. Insol. Act, did not arise and was not considered in that case. The learned Counsel for the appellants has further relied upon *Jnanendra Kumar Roy v. Akash Chandra* (9) and *Mahomed Sharif v. Mrs. Boughton* (10) and urged that once a property has vested in the Receiver he cannot be divested of it by any status acquired by the insolvent subsequently. But in these rulings also, the effect of s. 60 (2) does not appear to have been taken into consideration. In the present instance, moreover there is really no question of divesting the Receiver of any property. Section 16, Punjab Alienation Act, only prohibits the sale of the land belonging to a member of an agricultural tribe. It has been however held in *Datar Kaur v. Ram Rattan* (11) that the section does not prohibit the temporary alienation of such land, and this view has been consistently followed in this Court. It will be therefore open to the Receiver to arrange for the temporary alienation of the land of the insolvents according to law.

In view of the above findings, it is unnecessary to discuss a preliminary objection which was raised in S. A. O. No. 40 of 1938, viz., that the appeal was incompetent as the Receiver was not impleaded as a party within the period of limitation. But I may mention that the Receiver in this case was throughout supporting the case of the appellant in the Courts below and being interested in the result of the appeal, he could be impleaded as a proper party under O. XLI, r. 20, Civil P. C., even after the period of limitation had expired; cf. *Swaminatha O'ayyar v. Gopalaswami Odayar* (12). The real contesting respondent in this case was the insolvent himself and he had been duly impleaded. In view of all the circumstances, I have allowed the Receiver to be impleaded under O. XLI, r. 20, Civil P. C. I dismiss both these appeals, but in view

(8) 16 L 173; 155 Ind. Cas. 693; A I R 1935 Lah. 268; 37 P L R 402; 7 R L 766 (F B).

(9) A I R 1938 Cal. 325; 177 Ind. Cas. 352; 11 R O 233.

(10) A I R 1938 Lah. 458; 177 Ind. Cas. 410; 40 P L R 303; 11 R L 311.

(11) 1 L 192; 58 Ind. Cas. 603; A I R 1920 Lah. 456.

(12) (1937) 2 M L J 100; 172 Ind. Cas. 776; A I R 1937 Mad. 741; (1937) M W N 506; 46 L W 916; 10 R M 491; 11 R (1938) Mad. 52.

(4) A I R 1927 All 486; 101 Ind. Cas. 844; 49 A 887; 25 A L J 678.

(5) 45 P R 1902; 42 P L R 1902.

(6) A I R 1933 Lah. 397; 141 Ind. Cas. 634; 34 P L R 523; Ind. Rul. (1933) Lah. 161.

(7) A I R 1936 Lah. 845; 165 Ind. Cas. 243; 38 P L R 1065; 9 R L 231 (2); 1 L R (1937) Lah. 48.

of all the circumstances I leave the parties to bear their costs in this Court.

B.

Appeal dismissed.

ODUH CHIEF COURT

Appeal No. 22 of 1937

April 1, 1940

HAMILTON AND RADHA KRISHNA, JJ.

KAZIM HUSAIN AND ANOTHER—

DEFENDANTS—APPELLANTS

versus

Saiyid MAHFUZ ALI—PLAINTIFF

AND ANOTHER—DEFENDANT—RESPONDENTS

Pre-emption—Oudh—Superior proprietor creating under-proprietary right and selling it to person who is already proprietor and under-proprietor—Co-sharer in the mahal, if can pre-empt.

A superior proprietor created an under-proprietary right which he sold to a person who was already a proprietor and also an under-proprietor. A pre-emption suit was brought by the plaintiff on the ground that he was a co-sharer in the mahal concerned and the defence of the vendees was that under the Oudh Laws Act being under-proprietors they came before a superior-proprietor and he could not, therefore, pre-empt a sale of under-proprietary rights made in their favour:

Held, that the transaction could not be called a sale of a superior proprietary right. The vendor's share in the proprietary *khewat* would in no way be modified by the fact that he had created an under-proprietary right. The only change in the *khewat* would be in the under-proprietary *khewat*. Cases like this could not be distinguished from sales of a prior existing under-proprietary right and consequently the vendees had a preferential right to the would-be pre-emptor and his suit must fail.

A. against the order of Mr. Justice Smith, dated August 24, 1937.

Mr. Naimullah, for the Appellants.

Mr. H. H. Zaidi for Mr. H. Husain, for Respondent No. 1

Judgment.—This is an appeal against a decision of a Single Judge of this Court under s. 12 (2), of the Oudh Courts Act.

The admitted facts are that a superior proprietor created an under-proprietary right which he sold to a person who was already a proprietor and also an under-proprietor.

A pre-emption suit was brought by Syed Mahfuz Ali on the ground that he was a co-sharer in the mahal concerned and the defence of the vendees was that under the Oudh Laws Act being under-proprietors they came before a superior-proprietor and he could not therefore pre-empt a sale of under-proprietary rights made in their favour. All the Courts decreed the suit

including the learned Single Judge of this Court. He held that this was not a sale of an already existing under proprietary right but a transaction by which an under proprietary right was created and since the property in suit was held before the transaction in proprietary tenure, the transaction must be held to have involved also a sale of a share of a proprietary tenure, although the effect of the transaction was to create an under-proprietary tenure. We are unable to agree with the learned Judge that the transaction could be called a sale of a superior proprietary right. The vendor's share in the proprietary *khewat* would in no way be modified by the fact that he had created an under-proprietary right. The only change in the *khewat* would be in the under-proprietary *khewat*. It seems to us then that there can be only two possible views: the first that there was no sale of an under proprietary right because it was not already in existence in which case no one could pre-empt or else that a transaction involving the creation and also the sale of an under-proprietary right would be the sale of an under proprietary right and if so a proprietor cannot pre-empt against a vendee who being already an under-proprietor has a prior right to pre-empt an under proprietary right. Speaking generally, we might say that the object of pre-emption is to prevent the introduction of a stranger in a particular community, be it an under-proprietary or a proprietary community. If this transaction could not be pre-empted, then a new under-proprietor who was formerly a stranger would be introduced and he could pre-empt subsequent sales of under-proprietary rights as much as any other pre-existing under-proprietor and the object of keeping strangers out of the under-proprietary body would not be achieved. We think that cases like the present one cannot be distinguished from sales of a prior existing under-proprietary right and consequently the vendees had a preferential right to the would-be pre-emptor and his suit must fail.

We, therefore, allow the appeal and dismiss the suit with costs in all Courts.

D.

Appeal allowed.

RANGOON HIGH COURT

Second Appeal No. 243 of 1938

July 4, 1939

MYA BU, J.

J. C. CHATTERJI AND OTHERS—

APPELLANTS

versus

MAUNG MYE AND ANOTHER

—RESPONDENTS

Partition Act (IV of 1893), s. 4—“Undivided family,” meaning—S. 4 read with s. 44, Transfer of Property Act (IV of 1882), meaning explained—“Dwelling house belonging to an undivided family,” meaning of.

The expression “undivided family” in s. 4 (1), Partition Act means an undivided family whether Hindu, Muhammadan, Christian or Buddhist, etc. *Sultan Begam v. Debi Prasad* (1), relied on.

The transferee of a share in undivided property is entitled under s. 44, T. P. Act, to his transferor's right to joint possession or other common or part enjoyment of the property in all cases except where the subject-matter of the transfer is a share of a dwelling-house belonging to an undivided family of which he (the transferor) is not a member in which case he is not entitled to joint possession or other common or part enjoyment of the property but is entitled to a partition of the property which however must be denied to him under s. 4, Partition Act in the event of a member of the family being a share-holder, undertakes to buy the share of the transferee.

The expression “dwelling-house belonging to an undivided family” in s. 4, Partition Act, has been borrowed from s. 44, T. P. Act, and bears the same meaning. *Sultan Begam v. Debi Prasad* (1), relied on.

The expression “dwelling-house belonging to an undivided family” refers to the family dwelling-house. It does not mean any house or building for human dwelling belonging to an undivided family. Where the house is for most of the time in the occupation of tenants it is not a dwelling-house belonging to an undivided family within the meaning of s. 4, Partition Act.

S. A. against an order of the District Court, Mandalay, dated April 8, 1938.

Mr. K. C. Sanyal, for the Appellant.

Mr. J. V. Kale, for the Respondents.

Judgment.—This is an appeal arising out of a suit for partition and possession of a seven-sixteenth share of certain immovable property and for mesne profits in respect of that share. The property in question is known as holding Nos. 8 and 14, Block No. 164, in Pyigyikyethbaya Quarter, Mandalay. It belonged to U Ba, a Zerbadi Muhammadan who died at Mandalay about eight years before the suit, leaving him surviving as heirs his widow Ma Pwa (defendant No. 2), three sons, Maung That Maung Nyein and Maung Mye (defendant No. 1) and two daughters, Ma Bi and Ma Ngwe Bwin.

The plaintiff having obtained a decree against Maung Thet and Ma Nyein had their shares in the property—calculated to be seven-sixteenth—attached and sold in execution and purchased the same at a Court sale in April 1934. They however, have not obtained possession of the share which they bought and consequently filed this suit against Maung Mye and Ma Pwa who are the only two of the heirs of U Ba having present interest in the property in suit. By their written statements the defendants *inter alia* averred that the property in question being ancestral property was impartible and incapable of partition. This became the subject-matter of a preliminary issue which the trial Court decided in favour of the plaintiffs. Thereafter the trial Court heard the evidence adduced by the parties on other issues including that relating to the quantum of mesne profits. While such evidence was being taken, the defendants raised a plea under s. 4, Partition Act of 1893, thereby assailing the right of the plaintiffs to have the property partitioned. Without the framing of any issue upon this plea the learned trial Judge decided the question thus raised and gave his findings upon the other issues on which evidence was taken. The learned trial Judge upheld the plea under s. 4, Partition Act, and came to certain findings as to the value of the property and the quantum of mesne profits and gave a decree in favour of the plaintiffs in accordance with those findings.

Being dissatisfied with the refusal of the trial Court to grant a decree for partition and with the findings regarding the value of the property and the quantum of mesne profits the plaintiffs appealed to the District Court. The learned District Judge considered that there should have been a full inquiry into the value of the property and the quantum of mesne profits and consequently remanded the case for a full inquiry by a Commissioner on these points. The Commissioner came to practically the same findings as the learned trial Judge who accepted the Commissioner's findings and re-submitted the case to the District Court. The learned District Judge held that s. 4, Partition Act, was applicable and confirmed the findings of the trial Court on the question of the value of the property but slightly modified the finding as to the quantum of mesne profits. The main question for decision in this case is whether the plea raised by the defendants

under s. 4, Partition Act, can be maintained. The relevant portion of that section is in sub s. (1) which reads as follows :

"Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf."

The expression "undivided family" means an undivided family whether Hindu Muhammadan, Christian or Buddhist, etc. see *Sultan Begam v. Debi Prasad* (1). The present case will fall within the purview of the section if the property in suit is a dwelling house belonging to an undivided family. A comparison of s. 4 (1), Partition Act with s. 44, T. P. Act helps to make the meaning of the former section much clearer. The latter section provides:

"Where one of two or more co-owners of immovable property, legally competent in that behalf, transfers his share of such property or any interest therein, the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred."

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house."

The rule that can be deduced from these two sections read side by side is, in my opinion, that the transferee of a share in an undivided immovable property is entitled to his transferor's right, the joint possession or other common or part enjoyment of the property and enforce a partition of the same (para. 1 of s. 44, T. P. Act), but if the subject-matter of the transfer be a share of a dwelling-house belonging to an undivided family and the transferee be not a member of the family, (1) he is not entitled to joint possession or other common or part enjoyment of the property (para. 2 of s. 44, T. P. Act), and (2) he cannot be granted a decree for partition in a suit filed by him for that purpose if any member of the family being a share-holder undertakes to buy the share of the transferee (first part of s. 4, Partition Act) in which event, (3) all that is open to the Court to do is to make

(1) 30 A 324; A W N 1908, 126; 5 A L J 352.

a valuation of such share and direct the sale of it to such share-holder and give necessary and proper directions in that behalf (second part of s. 4, Partition Act). Thus, the transferee of a share in undivided property is entitled under s. 44, T. P. Act, to his transferor's right to joint possession or other common or part enjoyment of the property in all cases except where the subject-matter of the transfer is a share of a dwelling-house belonging to an undivided family of which he (the transferor) is not a member in which case he is not entitled to joint possession or other common or part enjoyment of the property but is entitled to a partition of the property which however must be denied to him under s. 4, Partition Act in the event of a member of the family being a share-holder undertakes to buy the share of the transferee.

Provisions of s. 4, Partition Act, can be applied to the present case only if the share which the plaintiffs purchased is a share in a "dwelling-house belonging to an undivided family." This expression appearing in s. 4, Partition Act, has been borrowed from s. 44, T. P. Act, see *Sultan Begam v. Debi Prasad* (1) and bears the same meaning. S. 44, T. P. Act, has been designed to prevent the transferee, who is an outsider, from enforcing his way into a dwelling-house in which other members of the transferor's family have a right to live. In *Girija Kanta v. Mohim Chandra* (2) a Bench of the Calcutta High Court refused to grant the transferee of a two-thirds share in huts used as residence by a joint Hindu family a decree for joint possession with other members of the family. In the course of the judgment the learned Judges observe :

"A stranger to the family should not be placed in actual joint possession of the huts, in which the defendants reside, whatever the strict rights of the plaintiff may be, as purchaser of a two-thirds share of the disputed property."

As Mukerji J., in whose conclusions I respectfully agree, has reviewed almost all available case law on the subject in *Nil Kamal v. Kamakshya Charan* 109 Ind. Cas. 67 (3) I need not perform the same task again but desire to adopt the following observations of the learned Judge as my own :

"These decisions lay down that the word 'family' as used in the section ought to be given a liberal and comprehensive meaning and it includes a group

(2) 20 O W N 675; 35 Ind. Cas. 294; A I R 1916 Cal. 170; 23 O L J 587.

(3) 109 Ind. Cas. 67; A I R 1928 Cal. 539.

of persons related in blood, who live in one house under one head or management; that it is not restricted to a body of persons who can trace their descent from a common ancestor; that it is not necessary for the members to constitute an undivided family that they should constantly reside in the dwelling-house, nor is it necessary that they should be joint in mess; that it is sufficient if the members of the family are undivided *qua* the dwelling-house which they own; that it is the ownership of the dwelling-house and not its actual occupation which brings the operation of the section into play; and that the object of the section is to prevent a transferee of a member of a family who is an outsider from forcing his way into a dwelling-house in which other members of his transferor's family have a right to live."

Bearing in mind these pronouncements and the object of the enactment of s. 4, Partition Act, I have come to the conclusion that the expression "dwelling-house belonging to an undivided family" refers to the family dwelling-house. It does not mean any house or building for human dwelling belonging to an undivided family. In the present case, there has not only been no evidence to the effect that it was a family dwelling-house but it has transpired in the course of the evidence that the buildings are houses which were for most of the time in the occupation of tenants. The property in question is therefore not a dwelling-house belonging to an undivided family within the meaning of s. 4, Partition Act. As regards the findings of the learned District Judge on the question as to the value of the property and as to the quantum of mesne profits I see no reason whatever to interfere with them. Since I have held that s. 4, Partition Act, does not apply there is nothing to show why the appellants should not be granted their rights under para. 1 of s. 44, T. P. Act. They are entitled to a decree for partition of the property in suit. If they obtain the decree for partition of the property in suit the findings of the Courts below regarding the value of the property become unnecessary. For these reasons, I allow this appeal and direct that there shall be a preliminary decree for partition of the seven-sixteenths share in the property in suit and delivery thereof and also for a decree for the mesne profits, as found by the lower Appellate Court in favour of the appellants. The appellants are entitled to their costs in all the Courts.

Appeal allowed.

PATNA HIGH COURT

Criminal Appeal No. 19 of 1940

March 15, 1940

HARRIS, O. J. AND VARMA, J.

MOHAMED HABIB—APPELLANT

versus

EMPEROR—OPPOSITE PARTY

Criminal trial—Private defence, right of—Accused held had right of private defence and did not exceed that right.

Held, that under the circumstance if the accused hit back and caused injuries to his assailant which ultimately resulted in death, it could not be said that he exceeded the right of private defence, if at the time he inflicted the injuries he did not realise that they were of a very serious nature. The accused, therefore, had in the circumstances a right of private defence which he did not exceed in protecting himself against his assailant.

Or. A. from a decision of the Sessions Judge, Darbhanga, dated January 13 1940.

Messrs. K. K. Banerji and K. P. Varma, for the Appellant.

The Govt. Pleader, for the Crown.

Varma, J.—This is an appeal on behalf of one Mohamed Habib who has been convicted by the Sessions Judge of Darbhanga, under s. 304 of the I. P. C., and sentenced to two years' rigorous imprisonment. Two other persons, Abdul Sattar and Sheikh Salim, stood their trial before the same Court but they have been acquitted by the learned Sessions Judge.

The occurrence is said to have taken place on July 19, 1937, at village Andhri which is at a distance of 12 miles from Police Station Darbhanga. On that date the Sub-Assistant Surgeon from village Sakri which is at a distance of 5 miles from Andhri, was summoned to attend to the injuries on Wahab at 8 p. m. He came and gave first-aid and advised them to take the injured person to the hospital. Wahab was taken to the hospital but he died without recovering consciousness. Habib the present appellant happens to be the youngest of four brothers. The eldest was Wahab, the deceased; the next was Razaque; and the third was Sattar. It is said that these brothers have got a cousin Saleem. The prosecution case is that Sattar and Habib were sitting at about 4 p. m. at the door of Saleem. Wahab went there and asked his brothers to take back the registered deed from the Registration Office and then divide the *belagan* lands, adding that delay would entail fine. The receipt happened to be in the name of Habib. Sattar and Habib refused. Then

Wahab asked for the receipt, so that he might take back the document. This led to an altercation and abuses, and on the orders of Ziarul Haque, who is said to be a father-in-law of Habib, to assault, Habib struck Wahab on the head with a *lathi*, and Saleem struck him on the right wrist. It is said that Sattar and Hafiz, son of Ziarul Haque, also struck Wahab with *lathis*. Wahab in self defence hit Habib and Sattar. Wahab fell down senseless into a tank close by, and then the others turned on the complainant Razaque and chased him, but he ran away. Majeed is said to have taken out Wahab from the tank, and Wahab was taken to his own house.

The case of the accused is to be gathered from the written statement. The accused did not make any definite statement before the Committing Magistrate and in the Sessions Court, although Habib admitted that there was a fight between the four brothers on account of a share of their aunt's property, he did not know who hit whom, nor did he admit having hit anybody in the fracas.

It may be noted that Abdul Razaque was found to have an abrasion with a swelling on the left forearm about two days old. Sattar succeeded in proving that he had an abrasion with a swelling on the left leg, a bruise with swelling on the back of the left knee, a swelling on the left forearm, and also a bruise on the left arm. Habib had a swelling on the left index finger and the thumb, and a swelling on the left forearm. The injuries on Wahab were these; (1) fracture of the right ulna, (2) a lacerated longitudinal wound 2" x $\frac{1}{4}$ " scalp deep on the vault of the skull about 1" to the right of middle line. On dissection there was found *ante mortem* clot around the wound. The doctor noticed an injury also on the chest but that injury does not seem to have been the result of an assault on Wahab, might have been due to a fall after having received the injuries on the head and the arm. Death, according to the doctor, was due to the injury on the head and the pressure caused on the brain on account of that injury. In the *post mortem* report the doctor says "the death in my opinion was due to shock and compression due to the head injury."

The trial was with the aid of three assessors. The first assessor was of opinion that Habib was not proved to have hit Wahab on the head, nor that Sattar or

Saleem caused grievous hurt to Wahab; the second assessor was of opinion that the charge was not proved and the third assessor was also of the same opinion as the second one.

The First Information Report in this case was lodged not earlier than July 21 1939, at 8 A. M. although the occurrence is said to have taken place on July 19, 1939 at 4 P. M. The learned Sessions Judge has not accepted the defence version of the occurrence inasmuch as he says that it was not proved that the occurrence took place at the field which was the subject matter in dispute. So far as the prosecution version is concerned he considers that the delay in lodging the First Information Report should lessen our confidence in the exactness of the report. Of the eye-witnesses examined in support of the prosecution story, he relies to a certain extent upon the evidence of Zainul (P. W. No. 3) and Sadaruddin (P. W. No. 4); but he does not rely upon the evidence of Sundar Sao (P. W. No. 5). Without going into the details of the evidence, this case can be disposed of on the findings of the learned Judge himself. After having discarded the evidence of one of the eye-witnesses, and that for very good reasons, he was of opinion that it was Wahab, the deceased, who was the aggressor. He says that according to the evidence it was Wahab who first came to the spot carrying a stick, and that Habib and Sattar at the time had no weapons. It was however, not clear from the prosecution evidence when and how they got the weapons. Now, on these findings the question that arises is whether it could be said that the appellant had a right of private defence. Wahab came to the place with a stick in hand. There is no doubt that some injuries were caused to Habib by means of a stick. Under those circumstances, if he hit back and caused injuries to his assailant which ultimately resulted in death, it cannot be said that he exceeded the right of private defence, if at the time he inflicted the injuries he did not realise that they were of a very serious nature. Looking at the nature of the injury caused on the head of Wahab, which ultimately caused the death of Wahab, it appears that the skull was not fractured; and it was due chiefly to the pressure on the brain that death ultimately resulted. It cannot, therefore, be said that the injury inflicted by the appellant on Wahab's head was of an unusually severe nature or

that it was intended to be so. It appears, therefore, that the appellant had in the circumstances a right of private defence which he did not exceed in protecting himself against his assailant.

I would, therefore, allow the appeal, set aside the conviction and sentence passed upon the appellant and direct that he be acquitted and set at liberty forthwith. His bail bond, if any, will be cancelled.

Harries, C. J.—I agree.

D. *Appeal allowed.*

LAHORE HIGH COURT.

Second Appeal No. 1159 of 1938

March 9, 1939

BHIDE, J.

JIWAN—PLAINTIFF—APPELLANT

versus

KESHO DAS AND OTHERS—DEFENDANTS—

RESPONDENTS

Transfer of Property Act (IV of 1882), s. 55 (4) —Purchaser from mortgagor failing to pay mortgagee as stipulated—Property pre-empted by F and transferred to R—None paying mortgagee—R not aware of non-payment—Mortgagor paying amount and bringing suit to recover it—S. 55 (4) held did not apply to R—Decree held could not be passed against R—Evidence Act (I of 1872), s. 90—Production of certified copies—Presumption.

A mortgagor sold a portion of the mortgaged land to M for certain amount a portion of which was to be paid by M to the mortgagee. One F pre-empted the sale and got a decree on payment of the full purchase money. He then transferred the land to R. Neither M nor F nor R paid the mortgage money due to the mortgagee. The mortgagor was obliged to pay the sum and therefore sued for recovery of the sum. He claimed a decree against R as well as a charge on the property on the basis of the payment made to the mortgagees and also as an 'unpaid vendor. R had notice of the previous mortgage but he was not aware that the mortgage charge remained unpaid till the property was purchased by him.

Held, that the principle of s. 55 (4), T. P. Act, did not apply to R. The mortgagor was therefore entitled to a decree against R and a charge against property in his hands.

No presumption under s. 90, Evi. Act can be raised on the basis of the certified copies. The mere production of the certified copies did not relieve the person producing them from the necessity of producing evidence as regards the execution of the originals. 156 Ind. Cas. 864 (1), and 71 Ind. Cas. 568 (2), relied on.

S. A. from the decree of the Senior Sub-Judge, Gurdaspur, dated June 24, 1938.

Mr. C. L. Aggarwal, for the Appellant.

Mr. Shamair Chand, for Respondent No. 1.

Judgment.—The material facts of the

case giving rise to this second appeal may be briefly stated as follows:—An ancestor of the plaintiff mortgaged the land in dispute along with some other land in favour of Kunj Lal, predecessor-in-interest of defendants Nos. 2 and 3, for Rs. 192 by a registered deed dated August 11, 1899. A further charge of Rs. 400 was created on the same land by another registered deed dated August 4, 1914. On May 29, 1929, the plaintiff sold 2/3rds of the land along with some other land to one Mulk Shah for Rs. 4,000 out of which Rs. 500 were to be paid to the previous mortgagees, namely defendants Nos. 2 and 3. (In the plaint it is stated that the sale was for Rs. 4,500 but it is admitted that the sale was in fact for Rs. 4,000 only). Fatta, defendant No. 4, pre-empted the sale in favour of Mulk Shah and got a decree from the Appellate Court on payment of the full purchase money with costs. A few months later, he transferred the land pre-empted by him to Ram Singh, defendant No. 1. The plaintiff alleged that neither Mulk Shah nor Fatta nor defendant No. 1 paid the mortgage money due to defendants Nos. 2 and 3 and that he himself was obliged to pay the sum and therefore sued for recovery of the sum of Rs. 500. He claimed this amount both on the basis of the payment made to the mortgagees and also as an 'unpaid vendor.' The trial Court dismissed the suit but on appeal the learned Senior Subordinate Judge has granted a decree for Rs. 500 against Fatta, defendant No. 4, only. From this decision the plaintiff has preferred the present appeal and his contention is that he was entitled to a decree for the aforesaid sum against Ram Singh, defendant No. 1, and that the same should also have been made a charge on the property sold to Ram Singh.

Before proceeding to the merits of the case, it is necessary to deal with the contention of the learned Counsel for the appellant that certain documents, namely copies of the mortgage deeds of 1899 and 1914, were wrongly rejected by the Courts below. It appears that these certified copies were produced in the trial Court but no evidence was led with respect to them. The appellant apparently relied on s. 90, Evi. Act, for a presumption being raised as regards the due execution of the original mortgage-deeds; but as the originals were not forthcoming, it seems clear from the decision of their Lordships of the Privy Council reported in *Bajan*

Singh v. Brij Raj Saran Singh (1) that no presumption under s. 90 could be raised on the basis of the certified copies. It is not disputed that no evidence was led as regards the certified copies of the mortgage deeds. The mere production of the certified copies did not relieve the plaintiff from the necessity of producing evidence as regards the execution of the originals: *vide Chuhamal v. Rahim Baksh*, 71 Ind. Cas. 568 (2). In these circumstances, it seems to me that the Courts below were right in holding that these copies were not duly proved and they were rightly returned. The learned Senior Subordinate Judge was also right in holding that there were no reasons for admitting additional evidence with respect to these certified copies under O. XXI, r. 27, Civil P. O., as the plaintiff had ample opportunity of producing the necessary evidence in the trial Court.

Coming to the merits of the case, the main contention of the learned Counsel for the appellant is that Ram Singh, defendant, had notice of the previous mortgage as well as the non-payment of the mortgage money and therefore the appellant was entitled to claim the sum of Rs. 500 from Ram Singh as a charge on the property sold. He relied in this respect on the principle laid down in s. 55 (4), T. P. Act. There seems to be sufficient evidence on the record to show that Ram Singh had knowledge of the previous mortgage. The plaint in the pre-emption suit instituted by Fatta was actually written by Ram Singh, who is a peon writer. Ram Singh has also admitted that the sale-deed in favour of Muik Shah was seen by him. This sale-deed also mentions the mortgages in favour of defendants Nos. 2 and 3. The real point for consideration, therefore, is whether Ram Singh was aware that the mortgage charge remained unpaid till the property was purchased by him. The pre-emption decree was on payment of the full purchased money, namely Rs. 4,000 with costs, as stated above. This amount had been deposited by Fatta in Court and as a result Fatta acquired title as full owner (see O. XX, r. 14, Civil P. O.). It is alleged that Fatta subsequently withdrew a sum of Rs. 500 out of the sum deposited by him. It is not clear why Fatta was allowed to withdraw this sum

but in any case the fact remains that Fatta had obtained a valid title by depositing the full purchase money in Court in accordance with the decree passed in his favour. It was this title which he conveyed to Ram Singh subsequently, and it has been found that Ram Singh also paid the full purchase money, namely Rs. 4,000 to Fatta. There is nothing on the record to show that Ram Singh was aware at the time of the sale in his favour that the sum of Rs. 500 which was due to the mortgagees had been withdrawn and not been paid to them by Fatta. In view of the fact that Fatta had deposited the full purchase money, Ram Singh would have been justified in inferring that the mortgage money had been paid to the mortgagees. In the absence of any clear evidence as to his knowledge of the withdrawal of the sum of Rs. 500 by Fatta and the non-payment of that sum to the mortgagees, the principle of s. 55 (4), T. P. Act, will not, I think, apply to Ram Singh. I therefore hold that the learned Senior Subordinate Judge was right in not granting a decree for Rs. 500 against Ram Singh. As regards the payment of the mortgage charge by plaintiff to defendants Nos. 2 and 3 I do not think any separate cause of action accrued to plaintiff. The payment of the mortgage charge simply wiped out the mortgage. All that the plaintiff could claim in the circumstances was damages for breach of contract from the original vendee or at the most against Fatta, who took the property by pre-emption. He has already been granted a decree for Rs. 500 against Fatta. In view of the facts described above, I do not think he is entitled to claim any relief against Ram Singh. I accordingly dismiss the appeal with costs.

s. Appeal dismissed.

ODH CHIEF COURT

First Civil Appeal No. 24 of 1937

March 28, 1940

ZIA-UL-HASAN AND HAMILTON, J.J.

MADAN THEATRES, LTD.—DEFENDANT—

APPELLANT

versus

NARAYAN DAS—PLAINTIFF—

RESPONDENT.

Contract—Penalty—Money payable by instalments—Failure of instalment rendering money paid liable to forfeiture—Provision held penalty—Interest—Interest not provided in contract—Whether can be allowed.

Where in an agreement to pay money by instalments it is provided that in case of default the money already paid would be forfeited, the provi-

(1) 57 A 494; 156 Ind. Cas. 864; A I R 1935 P O 132; 62 I A 180; 8 R P O 4; 1935 O W N 752; (1935) M. v. N 108; (1935) A L J 817; 39 O. W N 1037; 69 M L J 225; 42 L W 231; 37 Bom L R 805; 37 P L R 614 (P O).

(2) 71 Ind. Cas. 568; A I R 1924 Lah 303; 18 P W R 1923.

sion is a penalty. In such a case, if there is a default a reasonable sum by way of damages only can be claimed. 33 Ind. Cas. 323 (1), referred to.

No interest would be allowed where the claim for interest is not within the contract nor is such interest by way of damages nor is it specifically provided for by statute. 173 Ind. Cas. 15 (2), relied on.

F. O. A. against the decree of the Civil Judge of Mohanlalganj, Lucknow, dated September 30, 1936.

Messrs. *H. D. Srivastava* and *S. R. Srivastava*, for the Appellants.

Messrs. *H. Husain* and *Makund Behari Lal*, for the Respondents.

Judgment.—This is an appeal by defendant No. 1 Madan Theatres Ltd., against a decision of the Civil Judge of Mohanlalganj against them decreeing a suit of the plaintiff Narayan Das.

There was originally a second defendant but he is not a party to the appeal and we are not concerned with him.

The plaintiff took the rights of the distribution of a film "Sukhi Lutera" for the U. P. and Delhi Provinces. The defendant-appellant owned the film and was to hand over two copies of it to the plaintiff, who was to make arrangements with various cinemas that the film might be shown there. An agreement, which is Ex. A-1 was entered into on March 5, 1934, and gave the plaintiff the right for two years to lease the film to cinemas in the area already stated. The plaintiff was a distributor under the name of the Surree Visnuu Talkies and he had to pay Rs. 15,000 to the appellant; Rs. 3,000 were to be paid on March 3, 1934, Rs. 3,000 were to be paid on receipt of the railway receipt of the film and the balance of Rs. 9,000 was to be paid by five equal monthly instalments of Rs. 1,800, the first instalment becoming payable in the first week of May, 1934, and the last, therefore, being payable in the first week of September, 1934. Admittedly this last instalment was not paid then and has in fact never been paid. The reason given for not paying it is that the plaintiff thought that the takings had been so bad that he would never get Rs. 15,000 before the end of the year. Under para. 8 of the agreement the plaintiff as distributor was to lease the film to cinemas for 60 per cent. of the takings for the first run, 50 per cent. for the second run and 40 per cent. for the third and subsequent runs. From these takings he was entitled to 10 per cent. for himself, the balance going to the appellant. Under para. 18 of the agreement if the

takings did not amount to Rs. 15,000 within one year from the date of the agreement, the plaintiff had the right to recover the debt from the appellant. The case of the plaintiff, therefore, is that by September, 1934, he guessed that Rs. 15,000 would not be recovered from cinemas as takings and, therefore, the difference between Rs. 15,000 and the actual takings would have to be returned to him by the appellant so that it was unnecessary for him to make this last payment. The Court below has found that this was no justification for not paying the last instalment, and the learned Counsel for the plaintiff-respondent has not really disputed the correctness of the decision of the lower Court. We have it, therefore, that the plaintiff did not fully comply with the terms of the contract. On failure to comply with any of the terms of the contract on the part of the plaintiff, the appellant was, according to this agreement, entitled under para. 4 to stop the screening of the film, to take possession of all copies of the film in possession of the plaintiff, to forfeit all the money paid by the plaintiff without affecting the right to sue for the money and under para. 17 to cancel the above agreement after giving a fortnight's notice. In fact none of these things was done.

It has been argued by the learned Counsel for the appellant that his client did forfeit the money, but he has not been able to point to any document or oral evidence showing that there was such forfeiture. It is clear from Ex. B-1, D. W. No. 1, a letter from the appellant, dated December 4, 1934, that he had not forfeited anything for he then merely asked for that last instalment which in reality should have been paid in the month of September. The learned Civil Judge came to the conclusion that there was waiver by the appellant of the rights which we have enumerated above and, he, therefore, went into the evidence of accounts and came to the conclusion that the plaintiff was entitled to the amount claimed which consisted of the balance between Rs. 13,200 actually paid by the plaintiff towards the sum of Rs. 15,000 and Rs. 7,971-14-0 consideration of takings, thus arriving at the principal sum Rs. 5,222-2-0 plus Rs. 77-14-0 as interest by way of damages.

The learned Counsel for the appellant has urged before us that the suit was premature or without cause of action as the film did not run for a full year. He urges that it was the duty of the plaintiff under para. 3 of the agreement to continue screen-

ing the said film in the territory and stations allotted during the period stipulated above (i. e., one year) and as he did not do so he is not entitled to maintain the suit.

This point is first raised in this Court for we find no mention of it anywhere before. Apart from that, the appellant relies merely on the statement of P. W. No. 1 that the film was kept in use till January or February 1935, as meaning that after that period and up to March 5, 1935, the film was not shown anywhere. The exact date when the film was no longer shown is not given, and if we are to take it as being the end of February there were only some five days left. The plaintiff had no cinema of his own in which to show the film but he had to find cinema manager willing to take it and if he tried his best and they would not take it, it could not possibly be said that he had broken his contract. It was only if he was negligent that it could be said that he had not carried out the terms contained in para. 3 of the agreement, and there is no evidence that he was negligent for, as we have said, the point was never raised before. We are unable, therefore, to find that because the film did not appear in any cinema between the end of February and March 5, this was a breach of the contract by plaintiff.

The next point urged by the learned Counsel for the appellant is that the film has never been returned and the claim of the plaintiff should not have been allowed without an order for the return of the film. This appears in para. 8 of the memorandum of appeal in this Court and the learned Counsel for the plaintiff-respondent says that he has no objection to the decree in favour of his client being made conditional on the return of such copies of the films as his client has.

The next point urged by the learned Counsel for the appellant is the most important one. He urges that the failure of the plaintiff to pay the last instalment prevents him from maintaining this suit at all. There is no doubt that under the contract the appellant was given the right to do various things, which we have already stated, among others that of forfeiting the money already paid, but we are unable to find that he did in fact exercise any of his rights and we agree, therefore, with the decision of the lower Court that he waived those rights and if there was any breach of the contract on the part of the plaintiff, the appellant would only be entitled to

damages and he has distinctly stated that he would sue for those separately. We are satisfied that the provision that the money already paid could be forfeited is a penalty, for a right to forfeit as in the present case, sum of Rs. 13,000 because of the non-payment of the last instalment of Rs. 1,800, is obviously a penalty and cannot be compared with the forfeiture of a small sum paid in advance. In cases of penalty, *Steedman v. Drinkle* (A I R 1915 P O 94) (1), shows that only a reasonable sum can be claimed, but in this case not even a reasonable sum can be claimed because that reasonable sum will be the damages for which the appellant says he will sue separately, and presumably for this reason he gave no indication as to what this reasonable sum would be. The position, therefore, is reduced to this: what did the plaintiff actually realise and then what is the difference between the sum realised and the Rs. 15,000 minus the last instalment, for, he was entitled to recover this difference under the terms of the agreement. The plaintiff has stated on oath that as shown by the accounts which he has put in and by certain vouchers given him by cinema managers the amount is that which he has claimed in the plaint. We have, therefore, his statement on oath as to the amount which is supported by a book of accounts, Ex. 108, which contains items of takings as well as other items, and he has also filed vouchers on papers belonging to various cinemas which purport to be the actual takings. By filing these accounts and the vouchers of these cinemas he has given an opportunity to the defendant-appellant to prove that he has not admitted receipt of monies which are not contained either in this account book or in these vouchers, but the defendant has produced no evidence to show that any other amount was realised. It was also the duty of the plaintiff under para. 11 of the agreement to submit regularly the booking of the film and accounts of the takings with statements of ticket sales signed by the managers of the cinemas and countersigned by the distributor. The plaintiff has sworn that he did submit these accounts which, it is clear from this statement, would be statements similar to those vouchers which he has submitted in this case, for he says that one set of vouchers he kept and the other set of vouchers he sent to the appellant. Against this evidence on oath by the plaintiff supported, at any rate, to some

(1) A I R 1915 P O 94; 33 Ind. Cas. 323; 85 L J P O 79 (P O).

extent by his accounts and these vouchers, the defendant has not given any evidence by coming into the witness-box and saying that he received no such accounts. The nearest he has got to giving evidence was that defendant No. 2 stated that defendant No. 1 did not send these vouchers to him and, therefore, he came to the conclusion that none were submitted by the plaintiff to defendant No. 1. This evidence obviously is entirely useless. The learned Counsel for the appellant also asks us to hold that Ex. B-7, a letter by the plaintiff to the appellant, which states that the "cheque of instalment together with upto date account of statements shall be sent to you by tomorrow as soon as completed" means that no such accounts had been submitted by that time. In the first place we are not prepared to hold that this amounts to anything more than what it says, namely, that full accounts up to the date of that letter had not yet been submitted, and we cannot presume that no accounts at all had been submitted up to that date much less that the promise to submit whatever accounts had not yet been submitted, on the following day was not carried out. We consider that the plaintiff had discharged the burden which lay on him to submit *prima facie* proof of the amount which he had actually received, and in the absence of anything to make us doubt his statement on oath reinforced by the documents he has produced, we are entitled to accept it.

The last point raised by the learned Counsel for the appellant is that in view of the decision of their Lordships of the Privy Council in *Bengal Nagpur Railway Company Ltd. v. Ruttanji Ramji* (65 I A 66) (2), no sum should have been decreed as interest as it was not within the contract nor was such interest by way of damages and nor was it specifically provided for by statute. We accept this contention with the result that the decree of the Court below is modified only in that the plaintiff is only entitled to execute his decree after the return of such copies of the film as he has and he is only entitled to Rs. 5,222-2-0 and not also to Rs. 77-14 interest. As the appellant was disputing the decree of the Court which decreed Rs. 5,300 against him and has only succeeded as regards Rs. 77-14

(2) 65 I A 66; 173 Ind. Cas. 15; 1938 O L R 119; 19 P L T 125; (1938) A L J 169; A I R 1938 P O 67; 10 R P O 216; 47 L W 281; 1938 O W N 261; 1938 A L R 167; 4 B R 374; (1938) 1 M L J 640; 32 S L R 374; 67 O L J 153; 42 O W N 985; (1938) M W N 646; 1 L R (1938) 2 Cal. 72; 40 Bom. L R 746 (P O).

and an order for the return of the two films which are probably of little use as he has never asked for them back, we think this is a fit case in which the respondent should be allowed his costs.

We, therefore, allow only to the extent stated above, this appeal but allow the respondent his costs

D.

Appeal allowed.

MADRAS HIGH COURT

Appeals Nos. 121 and 122 of 1937

July 27, 1939

WADSWORTH, J.

KARANKATTIL HAJI THAMBILAVA
ISMAL ROWTHEN'S SON OHINNAP-
PAYAN AND OTHERS—APPELLANTS

versus

KARUMANASSERI GRAMOM
PARASURAMA PATTAR'S SON
NARAYANA PATTAR—RESPONDENT

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14, s. 11—Lease by mortgagee back to mortgagor, part of mortgage transaction and merely machinery for realizing interest—Suit for rent under lease—Under decree in such suit equity of redemption, when can be sold—Decision of issue between parties in prior execution proceedings under different and anterior decree—Similar matter at similar stage in subsequent suit, if can be raised.

When a lease back is part of a transaction of mortgage and is merely a piece of machinery for realizing the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realize the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage. The fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and the mortgage form part of the same transaction. Nor the fact that an advance by way of security for rent was paid necessarily makes the lease something separable from the mortgage. Similarly the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is a clear indication that both the deeds form part of one and the same transaction.

The decision of an issue between the same parties in a prior execution petition under a different and anterior decree, is the decision of a question arising in part of the proceedings in one suit and an attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit will be barred by *res judicata*.

A. against the appellate orders of the Sub-Judge, South Malabar at Palghat, in A. S. Nos. 32 and 31 of 1937, respectively.

Messrs. K. Kuttikrishna Menon and K. V. Gopalakrishna Nair, for the Appellants.
Messrs. P. S. Narayanaswami Iyer and P. R. Narayana Iyer, for the Respondent.

Judgment.— These appeals arise out of an order allowing the execution of a decree for arrears of rent obtained by a usufructuary mortgagee against his mortgagor who is the lessee of the hypotheca. In the execution petition the mortgagee sought to bring to sale the equity of redemption in the mortgaged property in order to realize the decree for arrears of rent. An objection which was disallowed in the lower Appellate Court, was based on O. XXXIV, r. 14, Civil P. C., to the effect that the decree was in fact a decree for payment of money in satisfaction of a claim arising under the mortgage and that therefore the decree-holder was not entitled to bring the mortgaged property to sale otherwise than by a suit for sale in enforcement of the mortgage.

The appellant (mortgagor lessee) mortgaged his property usufructuarly to the respondent by a deed dated November 30, 1930 and by another deed dated December 1, 1930 the mortgagee leased the property back to the mortgagor. The mortgage itself provides for redemption on 1st Kumbham 1107 or any date up to the 30th of that month or during the same period in successive years. The lease is for a period of one year ending on 1st Kumbham 1107 on which date the lessee undertakes to surrender the property. The liabilities undertaken by the mortgagee in respect of Govt. revenue, *michavaram* etc., under the mortgage deed are the subject of special covenants in the lease deed. The question of the relation between the lease and this mortgage has come up for consideration in a previous litigation arising out of the lease. The rent due under the lease deed was not paid and the lessor-mortgagee filed a small cause suit for the arrears and got a decree which was executed on the original side of the Sub-Court. In execution the decree-holder sought to bring to sale the equity of redemption in the mortgaged property. An objection was preferred on the strength of O. XXXIV, r. 14, Civil P. C. On this petition the Subordinate Judge passed orders holding that the application for sale was barred under O. XXXIV, r. 14, and allowed the objection petition. The judgment in this matter is Ex. A. The execution with which we are now concerned was under the decree in a later suit, O. S. No. 215 of 1934, the appears in question being arrears of rent for years subsequent to the year actually covered by the lease. The execution petition was filed in the Court of the

District Munsif and the same objection under O. XXXIV, r. 14 was taken to the application to bring to sale the equity of redemption. It was also objected that the application was barred by *res judicata* by reason of the former order Ex. A. The trial Court upheld the objection but the learned Subordinate Judge has allowed the execution to proceed.

It is, I think, well established that when a lease back is part of a transaction of mortgage and is merely a piece of machinery for realizing the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realize the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage. It is however contended that this lease must not be regarded as part of the mortgage transaction and that it is an entirely separate transaction on a different date with features which indicate an intention that it should not be merely a portion of the mortgage transaction. The differences upon which the learned Subordinate Judge relies are as follows: Firstly there is an interval of one day between the two deeds. Secondly, there is the difference in the period of the lease which is for one year only, whereas the mortgage is redeemable at the end of the same period or at subsequent dates. Thirdly there is the fact that the lease provides for the payment of what is called *kattakanam* which, I am informed, means an advance paid as security for future rents. It seems to me that the fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and the mortgage form part of the same transaction, more especially in the circumstances of the present case wherein the standing crops on the land were to be reaped by the mortgagor, so that both the full possession of the property and the actual effect of the lease were to begin at a subsequent date when the standing crops were harvested. Nor do I think the fact that an advance by way of security for rent was paid necessarily makes the lease something separable from the mortgage. And as to the difference in the term the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is to my mind a clear indication that both the deeds form part of one and the same transaction. Reading these two documents

together I have no doubt in fact that they are both part of the same bargain and that the lease was intended to implement the undertakings of the mortgage. Instead of providing for a simple mortgage with payment of interest in cash, the common device was employed of drafting the mortgage as a usufructuary mortgage and making the mortgagor a tenant paying rent. The transaction was in its essence a mortgage in which the interest was collected in the shape of rent.

Moreover, it seems to me that it is not open to the respondent to contest the identity of the transaction of lease with the transaction of mortgage. The matter was thrashed out at length between the same parties in connexion with the same transaction in the execution petition in a former suit for rent. It is contended that though the principle of *res judicata* applies to successive execution petitions in the same suit under the same decree, there is not *res judicata* in respect of a decision in an execution petition under a former decree when the same matter arises for decision in an execution petition under a subsequent decree. This contention seems to me to overlook the essential basis of the rulings with reference to the applicability of the principle of *res judicata* to proceedings in execution. The difficulty which arose in applying the principle of *res judicata* to execution proceedings arose from the fact that successive execution petitions in the same suit could not be regarded strictly speaking as decisions in successive suits between the same parties. Therefore, in terms, s. 11, Civil P. C., had no application. But it was held that though the precise rule embodied in s. 11 did not apply, the parties were governed by the principle that when in one stage of a suit a matter had been finally decided, the same matter could not be agitated again in a subsequent stage of the same suit. But when we are concerned with the decision of an issue between the same parties in a prior execution petition under a different and anterior decree, this difficulty does not arise. What we have is the decision of a question arising in part of the proceedings in one suit and an attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit. The principle of s. 11 applies directly and it is unnecessary to call in aid the reasoning of the Privy Council in *Ram Kirpal v. Rup Kuari* (1) and subsequent cases as to

(1) 6 A 269; 11 I A 37; 4 F. 489 (P O).

the application of the same rule by analogy to successive stages of the same suit.

The most that can be said for the decree-holder is that the order Ex. A, in the former proceedings only decided that the lease in this case was part of the transaction of mortgage and that in execution of the decree for arrears under that lease the hypotheca could not be brought to sale; whereas now we are concerned with the execution of the decree for arrears due from the tenant holding over after the expiry of the lease. So that the question is not precisely the same. But in so far as it involves a decision as to the oneness of the transaction of lease with the transaction of mortgage, the matter cannot in my opinion be re-opened between the parties. I do not think that it makes any difference to the applicability of O. XXXIV, r. 14 that we are now concerned with arrears of rent due from a tenant holding over after the expiry of the term of the lease. The relation between the parties is still governed by the terms of this lease even though the original period fixed has expired. The rent claimed is still in its essence a sum of money due under the mortgage. Therefore, O. XXXIV, r. 44, still applies.

It is however argued that in so far as the decree is a decree for costs this Rule will have no application and the respondent quotes the case in *Haribans Rai v. Srinivasa* (2). That case is not quite an authority for the position which the respondent takes up. It was a case of a usufructuary mortgagee who was not given possession of the hypotheca and sued for possession and incidentally got a decree both for possession and for costs. It was held that the decree so far as it related to costs was not a decree for money due under the mortgage and that therefore O. XXXIV, r. 14 did not bar its execution by the sale of the hypotheca. The position however is somewhat different here. It is true that the mortgagee is suing for possession but his substantial claim is for arrears of rent and those arrears are, in the view I have taken, an essential part of the mortgage amount. By the analogy of O. XXXIV, r. 10 the decree in so far as it is a decree for costs must be deemed to be added to the claim under the mortgage even though the suit is not in terms a suit based on the mortgage. I do not think that there are any grounds for separating the costs on the relief for possession from the costs in the rest of the suit. The

(2) 35 A 518; 20 Ind. Cas. 896; 11 A L J 841.

essential thing which the mortgagee wishes to recover is the money due from his tenant which is in effect the interest due on his mortgage. This he cannot recover by sale of the equity of redemption otherwise than under a mortgage decree. In this view I allow the appeal, set aside the order of the lower Appellate Court and restore the order of the District Munsif dismissing the execution petition and allowing the objection with costs throughout (in A. A. A. O. No. 121 of 1937 only). Leave granted.

N. D.

Appeal allowed.

ALLAHABAD HIGH COURT
Criminal Reference No. 137 of 1939

November 17, 1939

BENNET AND VERMA JJ.

OHHANGA MAL—APPLICANT

versus

EMPEROR THROUGH HEALTH
OFFICER, MUNICIPAL BOARD,
ALIGARH—OPPOSITE PARTY.

U. P. Prevention of Adulteration Act (VI of 1912),
s. 18—Prosecution under—Previous conviction, if
can be shown—Point that ghee is not manufactured
at shop cannot be taken for first time in revision
—Expression "in which ghee is manufactured"
applies to manufactory, shop or place.

In the case of a prosecution under s. 18, U. P.
Prev. of Adulteration Act previous conviction for
selling adulterated ghee would be relevant to show
intention. *Rex v. Armstrong* (1), relied on.

In the case of a prosecution under s. 18, it is
for the accused to take the plea that his shop
is not such a manufactory, shop, or place in which
ghee is manufactured, under s. 242, Criminal P. O.,
in the trial Court. If he fails to do this, he can-
not raise it for the first time in revision.

The words "in which ghee is manufactured" in
s. 18 apply to the three previous things mentioned
that is "manufactory, shop or place." If this were
not so, then it would be an offence to keep any
substance to be used for the adulteration of such
ghee in any kind of a factory or any kind of a
shop. That cannot be what was intended by the
Legislature, but the Legislature did intend that the
manufactory or the shop were those in which ghee
was manufactured.

Mr. M. A. Aziz, for the Applicant.

Mr. A. M. Khwaja, for the Opposite Party.

The Deputy Govt. Advocate, for the Crown.

Bennet, J.—This is a criminal reference
by the learned Sessions Judge of Aligarh
in regard to a conviction of Ohhanga Mal
under s. 18, U. P. Prev. of Adulteration
Act (Act VI of 1912) and a fine of Rs. 150
and Rs. 48-12-0 as expenses or in default of
payment one month's rigorous imprison-

ment. The case was tried summarily and
was a summons case. The Criminal P. O.,
s. 242 provides as follows:

"When the accused appears or is brought before
the Magistrate the particulars of the offence of which
he is accused shall be stated to him, and he shall be
asked if he has any cause to show why he should not
be convicted; but it shall not be necessary to frame a
formal charge."

In accordance with this Section the
Magistrate apparently explained the report
of the Sanitary Inspector to the accused.
This report set out that accused had in his
shop certain canisters containing *moong phali*
or groundnut oil and certain canisters
containing ghee and the keeping of these
two sets of canisters was contrary to s. 18
of the Act. The accused filed a written
statement in which ground 2 sets out that
groundnut oil cannot be mixed in ghee and
the Court might examine this itself. Enmity
was also alleged with the Sanitary Inspec-
tor. No other defence was taken. The
accused orally admitted in the statement to
the Court that some canisters contained
ghee and other canisters contained *moong*
phali oil. The first report also set out that
one month before the date now charged the
accused had been fined Rs. 71-15-6 on
September 19, 1938, for selling adulterated
ghee. This previous conviction would be
relevant to show intention following the
well-known ruling in *Rex v. Armstrong* (1).
The accused was convicted and afterwards
he made an application in revision to the
Sessions Judge. That revision proceeds on
the same grounds as his written statement.
The learned Sessions Judge however took
an entirely new ground that the Section
requires that the shop should be one in
which ghee is manufactured and the Ses-
sions Judge states:

"Clearly the shop of the applicant was not such
a manufactory, shop or place in which ghee is
manufactured and therefore s. 18 does not apply
and therefore the applicant has been wrongly con-
victed."

Learned Counsel for the applicant is
quite unable to show any thing on the re-
cord in support of this finding of the Ses-
sions Judge that the shop of the applicant
is not a place in which ghee is manufactur-
ed. We adjourned this case for an interval
to allow learned Counsel to produce the
licence and conditions under which the
accused has his shop for sale of ghee, but
learned Counsel merely produced licence
receipts of payments. On the back of those
receipts it is stated that there are condi-

(1) (1922) 2 K B 555; 91 L J K B 904; 16 Cr. App.
R 149; 127 L T 221; 86 J P 209; 66 S J 540; 38 T L
R 681.

tions of which a copy is given to the applicant, but such conditions are not produced before us. It is therefore not possible to see whether or not there is in the conditions permission to manufacture ghee in the shop. In any case, it was for the accused to raise this point under s. 242, Criminal P. C., in the trial Court. As accused did not raise the point in the trial Court he cannot raise it now in revision.

The learned Single Judge who referred this matter to this Bench desired a pronouncement on the point as to be interpretation of s. 18, U. P. Prev. of Adulteration Act. We are of opinion that the words "in which ghee is manufactured" do apply to the three previous things mentioned, that is, "manufactory, shop or place." If this were not so, then it would be an offence to keep any substance to be used for the adulteration of such ghee in any kind of a factory or any kind of a shop. We do not think that that is what was intended by the Legislature, but the Legislature did intend that the manufactory or the shop were those in which ghee was manufactured.

In the U. P. Prev. of Adulteration (Amendment) Act, 1930, this s. 18 is introduced and the marginal note is "prohibiting of adulterants in places where ghee is manufactured or sold." It is clear from this marginal note that the Legislature intended to prevent the adulterant being kept either in the place where ghee was manufactured or in the place where ghee was sold. But in the text after the words "in which ghee is manufactured" in sub-s. (1) the words "or sold" are omitted. It appears that the omission of these words "or sold" is a mere verbal error in the Amending Act, otherwise the words would not appear in the margin. This Court cannot take the words in the margin as amounting to law and the Court must follow the text. It is clear that the Act requires further amendment if the intention in the margin is to be carried out. But the marginal note also shows that it was not the intention to interpret sub-s. (1) by omitting to apply the qualifying words to the first two places mentioned, namely manufactory and shop. As the text stands the qualifying words do apply to the shop. Under the circumstances of this case we consider that the conviction by the Magistrate is correct and we refuse this reference and return the record to the Court below.

D.

Reference refused.

OUDH CHIEF COURT Full Bench

Application No. 29 of 1937

April 4, 1940

HAMILTON, YORKER AND

RADHA KRISHNA, JJ.

N. Saiyed KAZIM HUSAIN—

JUDGMENT-DEBTOR—APPLICANT

versus

Mst. MANGALA DEVI—DECREE-HOLDER—
OPPOSITE PARTY

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 30 (2)—Expression "if decree has already been passed" refers only to decrees passed before Act.

The words "if a decree has already been passed" in cl. (2) of s. 30 of the U. P. Agri. Relief Act refer only to decrees passed before that Act came into force. 167 Ind. Cas. 168 (1), 172 Ind. Cas. 324 (2) and 174 Ind. Cas. 659 (3), not followed.

App. for revision of the order of the Munsif of Kheri dated December 14, 1936.

Order of Reference to a Full Bench

Radha Krishna, J.—(December 13, 1939).—The facts which gave rise to this application are that on May 28, 1935, Seth Pearey Lal, the predecessor-in-interest of the opposite party, obtained a decree from the Court of the Munsif of Kheri against the applicant for a sum of Rs. 600 with costs and future interest on the basis of a promissory note dated July 30, 1929. The applicant had set forth in para. 9 of his written statement that he was an agriculturist and claimed reduction in interest on that ground. His claim to be an agriculturist was disputed by the plaintiff opposite party. Subsequently the applicant's Counsel admitted the claim and a decree as stated above was passed.

On April 25, 1936, the applicant made an application under s. 30 of the U. P. Agri. Relief Act for the amendment of the said decree by reduction of interest in accordance with the provisions of sub-s. (1) of s. 30. This application was opposed by the decree-holder on the ground that the prayer in the application was barred by the principle of *res judicata* and that sub-s. (2) of s. 30 applied to the decree passed between January 1, 1930, and the date on which the Agri. Relief Act came into force. It may be mentioned here that the said Act came into force on April 30, 1935. Certain other objections were also raised by the opposite party.

The Court below framed the following issues with regard to the question of law

raised by the opposite party—

1. Is the application not maintainable as alleged in para. 2 of the written statement?
2. Is the application barred by *res judicata* as alleged in para. 1 of the written statement?

It decided them against the applicant and dismissed the application. Against the said order the applicant has come up to this Court in revision.

The contention on behalf of the applicant is that the words "If a decree has already been passed" in cl. (2) of s. 30 refer to any decree passed before the date of the application for amendment and are not confined to decrees before the enactment of the Act. His further contention is that no question of *res judicata* arises on this view.

I have heard the learned Counsel for the parties at length. The decision of the case turns upon whether the words "If a decree has already been passed" used in cl. (2) of s. 30 refer to decrees passed before the Act came into force or include even those decrees which were passed on dates prior to the application for amendment even though subsequent to the passing of the Act.

I am inclined to think that on the clear language of the section the words referred to above apply only to decrees passed before the Act. Clause (1) of s. 30 lays down a rule of substantive law enacted by the U. P. Agri. Relief Act regulating the rate of interest on a loan taken before, the Act came into force for the period from January 1, 1930. The Act, as stated before, came into force from April 30, 1935, so cl. (2) was enacted for the purpose of enabling those debtors against whom decrees had been passed before that date to obtain the benefit of cl. (1). In respect of suits to be filed after April 30, 1935, the Legislature must naturally have assumed that debtors would be in a position to claim the reduction in interest as allowed by the Act. It has been contended that the Legislature by cl. (1) laid down that no loan shall carry interest at a higher rate than specified therein and the absolute privilege granted by this sub-section would be defeated if the debtor was debarred from making an application for reduction as provided in cl. (2) in cases where the decree was passed after the Act came into force. It is true that there is nothing in the Act which prohibits the judgment-

debtor in express terms from making an application for reduction of interest in case where a decree has been passed after the Act at any time till it remains unsatisfied in whole or in part, but the Legislature must have been fully aware of the general principles of *res judicata* applicable to all suits and proceedings, and I am not prepared to accept in the absence of such an express provision that the Legislature intended to abrogate the principle of *res judicata* so far as applications for reduction of interest were concerned. It is further true that the Act was specifically enacted to give relief to agriculturist debtors but I find it difficult to agree with the contention that that intention would be frustrated if the interpretation urged by the opposite party is accepted. The Act made an adequate provision for reduction of interest in cases in which decrees had already been passed before the Act came into force by means of cl. (2); and in cases of suits filed after the Act came into force it would be most reasonable to suppose that the debtors would take advantage of the provisions contained in cl. (1). We cannot impute an intention to the Legislature to force the advantages of the Act upon a sleeping or negligent debtor. In the absence of any express provision to the contrary the principle of *res judicata* would in my opinion be applicable to the proceedings of an application for reduction of interest under cl. (2).

It has been further argued that the words "If a decree has already been passed" necessarily refer to a point of time and that it would be most logical and reasonable to discover that point of time in cl. (2) itself. The only point of time contemplated in cl. (2) is the date of the application for amendment and, therefore, the words "If a decree has already been passed" refer to the date of the application and not to the date when the Act came into force. In my opinion, in interpreting the said words, cls. (1) and (2) should be read together. Clause (2) is really a part of cl. (1) and was enacted to give effect to the rule of law laid down in cl. (1) in cases where decrees had already been passed, and the opportunity for claiming reduction of interest was not otherwise available.

The anomaly created by accepting the interpretation put forward by the learned Counsel for the appellant is most clearly brought out in the present case. In con-

testing the suit the applicant judgment-debtor claimed in his written statement to be an agriculturist and entitled to reduction of interest as provided by cl. (1). He could not substantiate his claim to be an agriculturist and admitted the claim of the plaintiff opposite party with the result that a decree for the full amount was passed. In the present application for reduction of interest can the judgment-debtor be allowed to raise the same question which must be taken to have been impliedly decided against him in the suit? If the contention of the learned Counsel for the appellant is accepted, it would be open to the judgment-debtor to re-agitate the question of his being an agriculturist although that question may have been decided on merits in the suit, which would in my opinion be a wholly untenable position.

The contention of the learned Counsel for the applicant is amply supported by the following decisions of the Allahabad High Court:

1. *Baryar Singh v. Ram Dularey*, (1936 Allahabad Law Journal, 1309, (1), 2. *Narain Singh v. Banke Behari Lal*, (I. L. R. 1937 Allahabad 943-A, I. R. 1937 All. 753) (2), 3. *Hafiz Abdul Noor v. Sahu Brij Mohan Saran*, (A. I. R. 1938 Allahabad 153, I. L. R. 1938 All., 305) (3).

With great respect to the learned Judges who decided the above cases, I find great difficulty in accepting their view. The question involved for decision is of considerable importance. There is no decision of this Court on the point that I know of. I, therefore, refer the following question for decision of a Full Bench of this Court under s. 14 (1) of the Oudh Courts Act:—

"Do the words 'If a decree has already been passed' in cl. (2) of s. 30 of the U. P. Agri. Relief Act (XXVII of 1934) refer only to decrees passed before that Act came into force or even to decrees passed before the date on which an application for reduction of interest is made under cl. (2) of s. 30 by the judgment-debtor?"

Messrs. G. Hasan and I. Husain, for the Applicant.

Messrs. R. B. Lal and M. M. Lal, for the Opposite Party.

(1) (1936) A L J 1309; 167 Ind. Cas. 168; A I R 1937 All. 96; 1936 R D 560; 1937 A L R 144; 9 R A 511; I L R (1937) All. 403.

(2) I L R (1937) All. 913; 172 Ind. Cas. 224; (1937) A L J 842; 1937 R D 489; A I R 1937 All. 753; 10 R. A 386; 1937 A L R 974.

(3) A I R 1938 All. 153; 174 Ind. Cas. 659; (1938) A L J 107; 1938 R D 223; (1938) A L R 305; 10 R A 603; I L R (1938) All. 305.

Opinion of the Full Bench

Yorke, J.—(April 2, 1940.)—The question which has been referred to this Full Bench is as follows:

"Do the words 'if a decree has already been passed' in cl. (2) of s. 30 of the U. P. Agri. Relief Act (XXVII of 1934) refer only to decrees passed before that Act came into force or even to decrees passed before the date on which an application for reduction of interest is made under cl. (2) of s. 30 by the judgment-debtor?"

The matter has arisen in this way. The late plaintiff Seth Pearey Lal now represented by *Mst. Mangala Devi* instituted in 1935 a suit to recover the balance due on a pro-note for Rs. 4,000 dated July 30, 1929. After the institution of the suit on April 30, 1935, the Agri. Relief Act came into force. On May 14, 1935, the present judgment-debtor applicant *Nawab Syed Kazim Husain* filed a written statement, in para. 9 of which he claimed a reduction of interest under what he called the new Act, evidently referring to s. 30 (1) of the Agri. Relief Act. On May 28, 1935, certain statements were made by Counsel. The defendant's Counsel admitted that the amount of Rs. 600 was due and also agreed to future interest at 6 per cent. per annum, and the suit was decreed for Rs. 600 with costs and future interest. In effect the defendant consented to a decree, and thereby gave up his claim to be an agriculturist and entitled to reduced interest.

On April 25, 1936, the defendant made an application, to the same Court which had passed the decree, under s. 30 (2) of the Agri. Relief Act asking for amendment of the decree and reduction of interest. Two defences were taken, namely that in view of the consent decree of May 28, 1935, the application was barred by the rule of *res judicata*, and secondly that s. 30 (2) had no application to cases in which the decree was passed after the Act came into force. The learned Munsif upheld both the contentions of the decree-holder and rejected the application as not maintainable at all.

On the matter coming up before one of the members of this Bench, the question of the proper interpretation of s. 30 (2) of the Act was strenuously argued before him, and he accordingly made a reference in the term stated above.

Learned Counsel for the judgment-debtor applicant has rested his case in the main on three decisions of the High Court at Allahabad, two of them Single Judge cases, and the third a decision of

a Bench. In *Baryar Singh v. Ram Dularey*, (1936 A. L. J. R. 1309) (1) it was held by Bennett, J., that a judgment-debtor can in the case of a decree passed after the coming into force of the U. P. Agri. Relief Act apply for relief under s. 30 (?) of the Act. His view was based on two considerations, first, that if the intention of the legislature had been to limit the application of the section to cases in which a decree had been passed before the Act came into force, s. 30 (2) would not have been worded in the form in which we find it, namely "if a decree has already been passed" but the wording should have been "if a decree has already been passed before this Act comes into force." Secondly, he thought that a defendant should not be deprived of relief under this Act merely because his legal advisers were not aware of the law on the point during the pendency of the suit. He considered that it was more natural in dealing with agriculturists to give them relief both during the suit and also after the decree, and legislation of this nature should be construed liberally to give the intention of the Act as much force as possible. It would thus appear that he interpreted cls. 30 (1) and 30 (2) as giving an agriculturist debtor liable under loans taken before this Act came into force two opportunities to claim the relief set forth in s. 30 (1) of the Act, one opportunity at the time of suit and one opportunity by application for amendment of the decree after a decree had been passed, and evidently he would not, on his construction of the section, have held that a debtor who had pleaded s. 30 (1) unsuccessfully in a suit to be thereby debarred from getting amendment under s. 30 (2).

In *Narain Singh v. Banke Behari Lal* (I. L. R. 1937 All. 943) (2) it was held that the words "already been passed" had reference to the date upon which the application under s. 30 was made. It was conceded that s. 30 (2) was rather ambiguously drafted; but it was said that

"having regard to the policy of the legislature in the matter of giving relief to all debtors against whom decrees on loans were passed whether before or after the passing of the Act, the sub-section cannot be interpreted to mean that in suits decided after the Act came into force the defendant is bound to apply for relief under s. 30 before the decree is passed and that if he fails to do so any future application after the decree has been passed would be barred by s. 11 of the Civil P. O."

The learned Judge remarked that until decree has been passed there is no necessity to apply for relief, and that even

after the passing of the decree the defendant may not desire to apply immediately for relief, and that in his view there was no reason for holding that in these circumstances the defendant was barred for all time from claiming such relief.

The matter was considered again by a Bench of two Judges in *Abdul Noor v. Brijmohan Saran*, (I. L. R. 1938 All. 305) (3) where the view taken in these two previous cases was upheld. The learned Judges who decided this case examined the provisions of the four sections making up this Chapter, and they apparently based their view in regard to the provisions of s. 30 on the view taken by them in regard to the provisions of s. 28. In this connection they remarked:

"It is important to bear in mind that in the Act itself there are no provisions as to when a debtor has to make an application asking for a reduction of interest. In respect of loans contracted after the Act came into force it is open to the debtor to make his application for reducing interest either when a decree is going to be passed or any time after the decree whenever it is sought to be enforced against him. There is nothing in the Act which prohibits a debtor from making such an application after the decree has been passed and this applies to both kinds of cases, that is to cases in which the loan was taken after the Act came into force and also to the loan taken before."

Sections 28, 29 and 31 of this Act all deal with interest on loans taken after the passing of the Act. Section 28 provides for the rate of interest on loans taken after the passing of this Act above which the debtor is not liable to pay. Section 29 provides for benefit for prompt payment of loans taken after the passing of this Act, and s. 31 provides for the rate of interest on loans taken after the Act comes into force after the aggregate of interest has reached 100 per cent. of the sum borrowed. In none of these three sections is there any provision corresponding to s. 30 (2), and the reason of this obviously is that there is no necessity for any such provision inasmuch as a plea based on these three sections of the Act can be taken in the written statement when a suit is filed.

With great respect I am unable to agree with the view that in respect of loans contracted after the Act comes into force it is open to the debtor to make his application for reducing interest either when a decree is going to be passed or at any time after the decree whenever it is sought to be enforced against him. That question did not really arise for decision, but I should myself be much

inclined to doubt whether a defendant who has not taken a plea under ss. 28, 29 and 31 of the Act could be allowed at the time of execution of the decree to apply for amendment of the decree, there being no provision for any such application in the Agri. Relief Act while neither s. 152 nor s. 47 of the Civil P. C., would cover such an application.

Section 30 was evidently framed to meet the case of loans taken before the passing of the Act and such loans would necessarily be of two kinds, that is loans as yet undecreed and loans decreed already. For the case of loans as yet undecreed at that date s. 30 (1) was, I think, inserted to enable the defendant to get the benefit of the reduced rates of interest prescribed in Sch. III for the period from January 1, 1930. Similarly s. 30 (2) appears to me to have been framed to meet the case of loans in respect of which a decree had already been passed at, that is before, the same date.

As learned Counsel for the decree-holder opposite party has contended, the word "already" must be treated as having some real significance, and I am unable to take the view that there is anything contrary to the spirit of this Act in accepting the view that the point of time referred to by the use of the word "already" is the date at which the Act came into force. This interpretation appears to me to be consistent with the view I take that cls. (1) and (2) of s. 30 are intended to cover the whole field of loans taken before the Act came into force, that is those in which a decree has already been passed and those in which a decree has not already been passed. I am further impressed with the view that it could not have been the intention of the legislature by enacting s. 30 (2) to override the ordinary provisions of the law of *res judicata*. The proper time for a debtor to plead that he is entitled to the advantage of the Agri. Relief Act and specifically to a reduction of interest is when a suit is instituted against him and when the question whether he was or was not an agriculturist at the date of the loan can be properly gone into, and I do not in any case think that he should be allowed a second opportunity of litigating a matter which should have been litigated by him at the first opportunity.

In my opinion, while I am reluctant to put a different interpretation on any clauses of the Agri. Relief Act from that which has found favour with the High

Court at Allahabad, the answer to the question referred to us for decision is that the words "if a decree has already been passed" in cl. (2) of s. 30 of the U. P. Agri. Relief Act refer only to decrees passed before that Act came into force.

Radha Krishna, J.—(April, 3, 1940).—I had already expressed my own view on the question in the order of reference. After hearing the arguments before the Full Bench I still adhere to that view. I agree with the answer proposed to be given by my learned brother Mr. Justice Yorke.

Hamilton, J.—I agree.

By the Court.—The answer to the reference is that the words "if a decree has already been passed" in cl. (2) of s. 30 of the U. P. Agri. Relief Act refer only to decrees passed before that Act came into force.

D.

PESHAWAR JUDICIAL COMMISSIONER'S COURT.

Civil Revision No. 156 of 1939

February 3, 1940

MIR AHMAD, J.

UMAR GUL ALLAH DIN AND OTHERS—
DEFENDANTS—PETITIONERS

versus

ABDUL MANAN AND ANOTHER—PLAINTIFFS
—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XXXII, r. 7—Agreement to refer case of minor to arbitration—Leave of Court, if necessary.

Every agreement by the guardian or next friend of a minor relating to a suit is subject to the leave of the Court. Agreement to refer to arbitration is an agreement within the meaning of r. 7 of O. XXXII, Civil P. C., and the leave of the Court should be taken when the case of a minor is being referred to arbitration.

C. R. from an order of the Sub-Judge, Second Class, Nowshera, dated March 20, 1939.

Mr. Sher Khan, for the Petitioners.
Lala Deviditta Mal Kakar, for the Respondents.

Order.—The respondents were plaintiffs in the trial Court. They had sued the petitioners (who were defendants) for possession of 8 mls, 3 gs. of land. The

parties referred the dispute to the arbitration of one Mira Khan. Mira Khan said that the plaintiffs should get a decree for 8 mls. of land against the defendants. The trial Judge accepted the award and passed a decree accordingly. The defendants have come up on revision to this Court. The first objection taken by the learned Counsel for the petitioners is that Said Rahman, petitioner, was a minor and that the reference to arbitration was made by his guardian without getting the leave of the Court as is required by O. XXXIII, r. 7, Civil P. C. The learned Counsel for the respondents meets this objection by saying that the permission was not necessary. The rule runs thus:

(1) No next friend or guardian for the suit shall without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. (2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

It is quite clear that every agreement by the guardian or next friend of a minor relating to a suit is subject to the leave of the Court. Agreement to refer to arbitration is an agreement within the meaning of this Rule and there is no reason why the leave of the Court should not be taken when the case of a minor is being referred to arbitration. All the High Courts except those of Allahabad and Calcutta are unanimous that leave is necessary for referring the case of a minor to arbitration. I agree with the majority of the Courts and hold accordingly. The Rule lays down that the permission should be expressly recorded. There is no question therefore of presuming that the Court impliedly granted the leave when accepting the reference to arbitration. It is a very material defect which goes to the root of the case and makes the reference invalid. I therefore accept the petition, set aside the order of the Court below and supersede the reference to arbitration. I direct that the case shall go back to the original Court for trial on merits. Costs to follow the event.

s.

Petition accepted.

MADRAS HIGH COURT Appeals Nos. 416 of 1937 and 24

of 1938

April 19, 1939

BURN AND STODART, J.J.

VEDULA LAKSHMINARASIMHAMURTI

STYLED AS NITTALA LAKSHMINARA-

SIMHAMURTI AND OTHERS—

APPELLANTS

versus

MEDURI VENKATA JOGISOMAY-

YAJULU AND OTHERS—RESPONDENTS

Hindu Law — Debts — Son's liability — Father defending suit on behalf of minor daughter and setting up false will — Father ordered to pay costs personally on that account — Liability of sons for such debt.

Where the Court orders the father to pay personally the plaintiff's costs in a suit in which the father defends his minor daughter, for setting up a false will, although the father is not party to the suit, such a debt must be said to be a debt tainted with illegality or immorality for which his sons cannot be held liable. The costs of the appeal must be dealt with in the same way as the costs of the suit, if in prosecuting the appeal the father is acting in the same illegal and immoral way.

As, against the orders of the Sub-Judge, Rajahmundry, dated February 10, 1937.

Mr. P. Somasundaram, for the Appellants.

Mr. V. Suryanarayana, for the Respondents.

Burn, J.—These are cross-appeals from the order of the learned Subordinate Judge of Rajahmundry passed on E. A. No. 626 of 1935 in O. S. No. 68 of 1919. The decree-holders in this execution petition sought to recover from the judgment-debtors four sums of money: costs in O. S. No. 68 of 1919 ordered by the decree of the Court to be paid by the guardian of defendant No. 1 to plaintiffs Nos. 2 to 4 amounting to Rs. 606-8-0, interest on the same sum from October 16, 1923 to September 15, 1935 at 6 per cent, per annum amounting to Rs. 476-8-9, the costs decreed in A. S. No. 134 of 1924 on the file of this High Court amounting to Rs. 465-1-6 and costs in C. M. P. No. 2774 of 1927 on the file of this High Court amounting to Rs. 402-13-0. The learned Subordinate Judge held that the legal representatives of judgment-debtor No. 1 Vedula Ramakrishnamma should be added in the execution petition and that execution should proceed against

any self-acquired properties of judgment-debtor No. 1 in their hands for the recovery of the first two items namely, Rs. 666-8-0, and interest Rs. 476-2-9. He directed that with regard to the remaining two sums all the joint family property of the respondents should be held liable. The judgment-debtors have appealed with regard to the last two items. Their contention is that the costs of the appeal (A. S. No. 134 of 1924) should have been dealt with in the same way as the cost of the suit and interest upon it and that in so far as the costs in the O. M. P. are concerned, only the estate of appellant No. 1 should be made liable. In O. M. A. No. 24 of 1938 the transferee decree-holders have appealed contending that the legal representatives of the judgment-debtor No. 1 should also be held liable for the costs of the suit and the interest Items Nos. 1 and 2 referred to above.

Dealing with appeal No. 24 of 1938 first, we think the contention raised on behalf of these appellants is quite untenable. It was shown that Vedula Ramakrishnamma in defending O. S. No. 68 of 1919 on behalf of his minor daughter Nittala Yellamma set up a false will. It was for that reason that the Court ordered him personally to pay the costs of the plaintiff's although he himself was not a party to the suit. We think that it is quite clear that this debt is properly described as *avyavaharika*. As the learned Subordinate Judge has said, although he might have felt responsible for defending the suit on behalf of his minor daughter, he was certainly under no obligation to fabricate a will in order to do so and all the costs that he incurred in prosecuting a defence of this kind must be said to be a debt tainted with illegality or immorality for which his sons cannot be held liable.

With regard to the costs of the appeal we agree with the learned Counsel for the appellants in O. M. A. No. 416 of 1937 that they must be dealt with in the same way as the costs of the suit. It was urged on behalf of the respondents (decree-holders) that whatever might be said about the costs of the suit, the costs incurred by Vedula Ramakrishnamma in prosecuting the appeal could not be said to be a debt tainted with illegality or immorality. We find however on referring to the grounds of appeal (the appeal was preferred jointly by Vedula Ramakrishnamma as defendant No. 2 and his daughter as defendant No. 1) that the allegations made

are that the lower Court was wrong in its decision that the will was a fabrication. It is quite clear therefore in prosecuting the appeal Vedula Ramakrishnamma was acting in the same illegal and immoral way as he had done in conducting the defence on behalf of his minor daughter. There was no separate ground taken in A. S. No. 134 of 1924 that the order of the trial Court directing the guardian to pay the costs was in itself illegal.

With regard to Item No. 4 appellant No. 1 in O. M. A. No. 416 of 1937 was the only person interested in O. M. P. No. 2774 of 1927. That petition was filed on his behalf by his father to bring him on record as the legal representative of his sister, appellant No. 1, in A. S. No. 134 of 1924. The order of the Court was that the petition be dismissed with costs of respondents Nos. 1 and 3. The liability for this falls, as the learned Subordinate Judge has said, upon the estate of the minor Nittala Lakshminarasimhamurti but his brothers are in no way concerned in that and the joint family property in their hands cannot be made liable for this item. The learned Subordinate Judge appears to have overlooked this point when he made all the joint family property liable for the costs decreed in O. M. P. No. 2774 of 1927. The result therefore is that O. M. A. No. 416 of 1937 is allowed with costs throughout and that O. M. A. No. 24 of 1928 is dismissed with costs.

[Note:—It should be made clear in the decree that the item of Rs. 465-1-6 (costs in the appeal) will be recoverable from any self-acquired properties of Vedula Ramakrishnamma in the hands of any of the judgment-debtors.]

N-D.

Order accordingly.

PATNA HIGH COURT

Criminal Revision No. 72 of 1940

March 11, 1940

HARRIES, O. J. AND VARMA, J.

Chaudhury CHANDRA NARAIN JHA

—PETITIONER

versus

THE KING-EMPEROR—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), ss. 233, 225, 537—Charge under s. 420, Penal Code (Act XLV of 1860), covering many cases of cheating—Defect, if curable, when no prejudice is caused—Prosecution under s. 420, Penal Code (Act XLV of 1860)—Misrepresentation, proof of—Exact words used by accused should be given.

Lumping of various cases of cheating in a charge

under s. 420, I. P. O., should be avoided. But where by such a defect no prejudice is caused to the accused, and there is no miscarriage of justice, the defect is curable under ss. 225 and 537, Criminal P. O. 174 Ind. Cas. 1 (1), relied on.

In a prosecution under s. 420 if misrepresentation has to be proved, it would be better to get the exact words used by the accused.

Or. R. against an order of the Sessions Judge, Darbhanga, dated January 16, 1940.

Messrs. M. Yunis and M. Azizullah, for the Petitioner.

Varma, J.—The petitioner *Chaudhuri Chandra Narain Jha* was convicted on three counts by a Magistrate of Darbhanga and sentenced under each of those counts as follows: In Case No. 397 of 1939 for having attempted to cheat Sonelal Gupta he has been awarded a sentence of one year's rigorous imprisonment with a fine of Rs. 150 in default three months' rigorous imprisonment; in Case No. 428 of 1939, which is in connection with the cheating of Ramdhani Mahto Pasi, he has been sentenced to six months' rigorous imprisonment with a fine of Rs. 150 in default three months' rigorous imprisonment; and in Case No. 429 of 1939, which is connected with Misri Sahni, he has been given the same sentence as in Case No. 428 of 1939. The sentences of imprisonment are to run concurrently, with the result that he has got a sentence of one year's rigorous imprisonment with a fine of Rs. 450 in all. The original sentences of fine were more, but it is the modified sentences on appeal, that I have mentioned just now.

The case for the prosecution is that on May 25, 1939, Inspector Rajbali Thakur on receipt of some information from a spy that gold *mohurs* were being faked with the object of creating public arranged to have a test purchase. He gave the spy Rs. 20 and received a faked gold *mohur*, which is an exhibit in this case. On receiving some further information on June 5, 1939, he deputed the senior Town Sub-Inspector to search the house of one Kambilas Mahto who is an electroplater. Sonelal Gupta, who was the victim in Case No. 397 of 1939, was deputed to act as a decoy. Sonelal Gupta went with the spy with a marked ten-rupee note. He came and gave certain information to the Police Office. The Police went to a sweetmeat shop known as the Prabhas Cabin and surrounded the shop. The petitioner who was there was searched and the marked note, four faked gold *mohurs* and one silver coin

which, if electroplated with gold, would have looked like a gold *mohur* were recovered from him. On his own statement the Inspector drew up a First Information Report. The house of Ramdas was then searched and certain articles connected with electroplating were recovered. Now, these searches had the effect of rousing the curiosity of at least two other persons who had dealt with the petitioner. One was Ramdhani Pasi who had purchased a gold *mohur* from the petitioner, and the other was Misri Sahni. Ramdhani Pasi on hearing of these searches got the gold *mohur*, which he had purchased from the petitioner, tested by one goldsmith, Sitarama Sonar, and found that the gold *mohur* was faked. He went and lodged an information before the Police, and in his own information he mentioned the name of Misri Sahni, and the latter also made a statement and produced the gold *mohur* which was found to be faked. Later on in the course of the investigation a test identification was held, and on June 21, 1939, in that test identification Ramdhani and Misri both picked out the present petitioner. After conviction the petitioner went in appeal. The lower Appellate Court modified the conviction connected with the case of Sonelal Gupta from under s. 420 to one under ss. 420/511, I. P. O., and as I have just now said, he reduced the sentence of fine. The petitioner has now come in revision before us.

Mr. Yunus appearing on behalf of the petitioner, has urged that the charge framed in this case is improper and it offends against the provisions of s. 233, Criminal P. O. This point was urged before the lower Appellate Court. In order to appreciate this point I would quote the charge which runs as follows.

"I, Muhammad Usman, Magistrate, First Class hereby charge you *Chowdhury Chandra Narain Jha alias Kandhaiyaji* as follows:—

"That you on or about May 9, and June 5, 1939, at Mahalla Mullaganj and Laheria Sarai cheated Ramdhani Manton Pasi, Misri Sahni and Sonelal Gupta (p. ws.) by dishonestly inducing them to deliver cash Rs. 50 to you on account of the price of two faked gold *mohurs* passed as genuine and also on account of advance for 4 similar gold *mohurs*. The said Rs. 50 was the property of the said three witnesses, and thereby committed an offence punishable under s. 420 of the I. P. O., and within my cognizance."

Looking at this charge, it is clear that the three cases of cheating have been lumped together in one charge. Even the sum of money advanced by the victims of the offences of cheating have been lumped

together, although it was Rs. 20 in the case of Ramdhani, Rs. 20 in the case of Misri and Rs. 10 in the case of Sonelal. The question is whether the irregularity in the charge has prejudiced the petitioner before us. The law on this point has been clearly laid down by their Lordships of the Judicial Committee in the case of *Babulal Choukhani v. King-Emperor* (1). There were two appellants in that case and they were charged with offences under the Electricity Act. The first appellant, Babulal Choukhani, was convicted of theft of electricity. His conviction by the Magistrate for conspiracy was quashed on appeal by the High Court. The second appellant was convicted of aiding and abetting the first appellant, the conviction given against him for conspiracy being likewise quashed. The charges framed against both the appellants, jointly with the other accused were as follows :

"That you between January 1934, and January 20, 1935, at 2 and 2-1 Chittaranjan Avenue (Bharat Lakshmi Picture House), Jupiter Cinema, 66-2 Beadon Street, Sealdah Hotel, 225 Harrison Road and other places in Calcutta, Howrah and 24 Parganas, along with Krishna Chandra Shome, Bhola Nath Chatterji, Hardwar Singh, Aswini Kumar Panja, Nanilal Ghose alias Noni Mistri, Putu, Mohammad Abdul Azim and Bhudeb Chandra Seth, and others were parties to a criminal conspiracy to commit theft (dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited by tampering with meters at the premises of the consumers and that in pursuance of the said conspiracy, theft of electric energy was in fact committed at Bharat Lakshmi Picture House, Jupiter Cinema and other places and thereby committed an offence punishable under s. 120-B of the I. P. O., read with s. 39 of the Indian Electricity Act and s. 379 of the I. P. O., and within the cognizance of this Court."

The first appellant Babulal Choukhani alone was further charged as follows :

"That you between April 1934, and January 16, 1935, at Bharat Lakshmi Picture House, situate at 2 and 2-1 Chittaranjan Avenue, Police Station Jorasanko, Calcutta, committed theft (by dishonest consumption or user) of electric energy belonging to the Calcutta Electric Supply Corporation Limited and thereby committed an offence punishable under s. 39 of the Indian Electricity Act (IX of 1910) read with s. 379 of the I. P. O., and within the cognizance of this Court."

The second appellant alone was further charged as follows :

"That you between April 1934 and January 16, 1935, at Bharat Lakshmi Picture House, abetted Babulal Choukhani in the commission of the offence of theft (by dishonest consumption or user)

of electric energy belonging to the Calcutta Electric Supply Corporation Ltd., which offence was committed in consequence of your abetment and you have thereby committed an offence punishable under s. 109 of the I. P. O., read with s. 39 of the Indian Electricity Act (IX of 1910) and s. 379 of the I. P. O., and within the cognizance of this Court."

The first point raised before their Lordships was in connection with s. 239 (d) of the Criminal P. O., but we are not concerned in this case with that provision of law. It was contended in that case that the charge of theft was not properly framed, because the charge as framed alleged a multiplicity of offence between April 1934 and January 1935 whereas the offence did not constitute a single continuing offence; they were separate offences committed on particular dates and should have been separately charged. The Judicial Committee observed as follows :

"Their Lordships feel that the form of the charge was most irregular and regrettable and one which should be avoided. But they cannot regard this objection as one which in the circumstances of this case should receive effect, especially because they agree with the High Court that no injustice was inflicted on the appellants. The specific offences of which they were accused were satisfactorily proved by competent evidence, corroborated in all necessary respects. There was no miscarriage of justice. In addition the irregularity was such as could be, and was cured under ss. 225 and 537 by the finding that the accused had not been prejudiced."

In the case before us the lower Appellate Court has come to the conclusion that the case continued for a length of time and the witnesses were cross examined elaborately on behalf of the accused, and, although the form of the charge was such as should be avoided, no prejudice was caused to the petitioner. I agree with the finding of the learned Judge that the petitioner has not been prejudiced by the defect in the charge.

The second point urged by Mr. Yunus is that attempting to cheat Sonelal has not been made out, because there was no case of representation on the part of the petitioner which would bring the offence under s. 420. The learned Judge in the Court below has himself noticed that the first information in respect of that occurrence does not specify that the petitioner made any false representation to Sonelal to induce him to believe that the gold mohurs were genuine. No doubt towards the end of his examination-in-chief Sonelal said that the accused made him believe that the gold mohurs (Exs. III to VI) were genuine and nothing was wrong with them ;

(1) 19 P L T 343; 174 Ind. Cas. 1; A I R 1938 P C 130; 1938 A L R 309; (1938) A L J 382; 10 R P O 250; (1938) 1 M L J 647; 33 Cr. L J 452; 42 O W N 621; 1938 O W N 416; 1938 O L R 189; 1938 M W N 505; 4 B R 490; 67 O L J 161; 40 Bom. L R 781; 65 I A 158; 32 S L R 476; 1 L R (1938) 2 Cal. 295 (P.C.).

but his evidence on this point falls short of the mark. If misrepresentation had to be proved, it would have been better to get the exact words used by the petitioner, and it must also be remembered that Sonelal himself was being used as a decoy by the Police. The benefit of the discrepancies in the evidence of Sonelal must be given to the accused. I would, therefore, give the petitioner benefit of the doubt with regard to this charge and set aside his conviction and the sentence passed on him under s. 420/511 I. P. O.

So far as the conviction under s. 420, I. P. O., connected with the other two prosecution witnesses, Ramdhani Pasi and Misri Sahni, is concerned, they are poor people and they came to inform the Police on hearing of the searches carried on in the shop and of the person of the present petitioner. Their evidence has been accepted by both the Courts below. There is no reason to discard their evidence now. I would, therefore, uphold the conviction of the petitioner for cheating these two witnesses as well as his sentences passed in Case Nos. 428 and 429 of 1939.

There is one other point which was raised by Mr. Yunus and that was that evidence, which was clearly inadmissible, has been brought upon the record. *Firstly*, that the statements made by the spy, who was not examined, have been brought on the record through the Inspector; and *secondly*, certain statements by P. W. No. 16 were made in his cross-examination with regard to the statements made by him before the Sub-Inspector. The learned Judge has held that these statements were inadmissible, and he has based his conclusions on evidence other than these statements.

A special plea was raised on the question of sentence by Mr. Yunus on the ground that the petitioner comes of a respectable family and he is a young man of 18 years. Looking at the nature of the offence, it is only a person of some substance who can pass a fake *mohur* for a genuine one. No one would easily purchase even a genuine *mohur* from a poor man. The offence is a serious one and I see no reason to interfere with the sentences connected with the cheating of Ramdhani Pasi and Misri Sahni.

In the result the sentence of one year's rigorous imprisonment with a fine of Rs. 150 for having attempted to cheat Sonelal Gupta will be set aside; but the

sentence of six months' rigorous imprisonment with a fine of Rs. 150 in default three months' rigorous imprisonment in each of the two Cases Nos. 428 and 429 of 1939, relating to the offences of cheating Ramdhani Pasi and Misri Sahni will stand, the sentences to run concurrently.

Harries, C. J.—I agree.

D.

Order accordingly.

LAHORE HIGH COURT

Second Appeal No. 1690 of 1938

March 20, 1939

BHIDE, J.

NAND LAL—PLAINTIFF—APPELLANT

versus

Mst. LAKHMI AND OTHERS—DEPENDANTS—

RESPONDENTS

Res judicata—Plaintiff abandoning claim — There is no decision operating as res judicata — Evidence Act (I of 1872), ss. 68, 49 — Deed of adoption or gift requires no attestation in Punjab — Operation of s. 68 is precluded—Certified copy of registered deed produced—Person challenging deed not denying that it is copy of deed—Attesting witnesses, if must be produced—Document making gift of piece of land and relinquishment of reversionary rights, not registered —Whether admissible for collateral purpose of proving relinquishment—Registration Act (XVI of 1908), s. 17—Document giving up reversionary rights, if must be registered.

When the plaintiffs abandon their claim, there is no trial of the issues arising between the parties and consequently there is no decision which could operate as *res judicata*. To prevent the defendants being harassed unnecessarily a second time on the same cause of action, the law however prescribes that the plaintiffs shall not sue again on the same cause of action, unless the suit is withdrawn under O. XXIII, r. 1, Civil P. O., owing to some technical defect, etc., and the permission of the Court is obtained. 110 Ind. Cas. 818 (2), relied on. *Watson v. Collector of Lilla Rajshahye* (1), distinguished.

There is no law in force in the Punjab requiring a deed of adoption or gift to be attested by witnesses and this by itself would preclude the operation of s. 68, Evi. Act.

Where, when a certified copy of a registered deed of gift is produced, a party challenging the deed does not specifically deny that it is the copy of the deed, in such a case under Proviso to s. 68, Evi. Act, the production of an attesting witness is not essential.

Where an unregistered document executed by a reversioner contains relinquishment of reversionary right and also an agreement to make a gift of a piece of land to the donee even if the document requires registration so far as the gift is concerned it can be admitted in evidence for the collateral purpose of proving the relinquishment of reversionary rights under s. 49, Evi. Act.

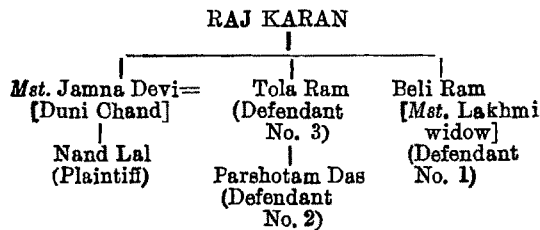
The transfer of reversionary rights is not itself tantamount to transfer of property and hence registration of a document giving up reversionary rights is not necessary. 88 Ind. Cas. 550 (3), relied on.

S. A. from the decree of the District Judge, Rawalpindi, dated August 15, 1938.

Messrs. Harnam Singh and B. H. Ali, for the Appellant.

Dr. Nand Lal, for the Respondents.

Judgment.—The following pedigree table will show the relationship of the parties concerned in this case:



The suit out of which this appeal arises was instituted by Nand Lal for a declaration that a gift of property made by Mst. Lakhmi, defendant No. 1, in favour of Parshotam Das, defendant No. 2, shall not affect his reversionary right. The suit was resisted by the defendants mainly on the ground that Nand Lal had been adopted by one Hira Singh and had, therefore, lost his right to inherit the property in dispute. It appears that in the year 1924 on the death of Duni Chand, father of the plaintiff, when his property was mutated in favour of Nand Lal, Tola Ram and Mst. Lakhmi instituted a suit to contest the succession on the ground that Nand Lal had been adopted by Hira Singh and could not therefore inherit the property of his father. Eventually, however, they abandoned the suit and it was dismissed. The defendants' allegation was that the withdrawal of the suit was due to a compromise effected between the parties by virtue of which one *ghumaon* of land was given by the plaintiff Nand Lal to Tola Ram and Tola Ram and Mst. Lakhmi abandoned their claim. The trial Court dismissed the suit and the decision has been upheld by the learned District Judge on appeal. On behalf of the plaintiff who has come in second appeal the following points have been argued: (1) The withdrawal of the suit by Mst. Lakhmi and Tola Ram in the year 1931 was tantamount to a dismissal of their claim and consequently the issue as to adoption which arose in that case must be held to have been decided against them and to operate as *res judicata*. (2) The execution of the deed of adoption on which the defendants relied and of which a certified copy was produced by them has

not been duly proved. (3) That the agreement on which the defendants relied required registration and was inadmissible in evidence.

As regards the first point, it appears from the record of the previous case that issues were framed including one on the question of adoption, but thereafter both the plaintiffs abandoned their claim, stating that they had been persuaded to do so by respectable members of their brotherhood. As a result the suit was dismissed but the parties were left to bear their costs as desired by the plaintiffs. The learned Counsel for the appellant contended that as the plaintiffs led no evidence and the suit was dismissed the issue as to adoption must be deemed to have been decided against them and must operate as *res judicata*. In support of this contention, the learned Counsel has relied on *Watson v. Collector of Lilla Rajshahye* (1). But that case is distinguishable as the plaintiffs in that case do not appear to have abandoned the claim as in the present suit. When the plaintiffs abandon their claim, there is no trial of the issues arising between the parties and consequently there is no decision which could operate as *res judicata*: cf. *Rama Mal v. Upendra Dutt* (2). To prevent the defendants being harassed unnecessarily a second time on the same cause of action, the law however prescribes that the plaintiffs shall not sue again on the same cause of action, unless the suit is withdrawn owing to some technical defect, etc., and the permission of the Court is obtained (O. XXIII, r. 1, Civil P. C.). The learned Counsel for the appellant next argued that the case did not fall within the purview of O. XXIII, r. 1, Civil P. C., as the defendants were not awarded costs. But the wording of that Rule shows that costs are in the discretion of the Court and when the plaintiffs had not gone to trial on the issues and the defendant raised no objection, the Court may have thought it proper to leave the parties to bear their costs. I accordingly hold that there was no decision in the previous suit on the question of adoption, whether express or implied, which could operate as *res judicata* against the defendants in this case.

As regards the second point, the plaintiff admitted that there was a gift by Hira Singh in his favour, but denied that there was any adoption. He did not produce the

(1) 13 M I A 160; 3 Beng. L R 48; 12 W R 43 (P O).

(2) A I R 1928 Lah. 710; 110 Ind. Cas. 818.

original deed alleging that it had been lost and the defendants had therefore to produce a certified copy of the deed as secondary evidence. The learned Counsel for the appellant urged that the production of the secondary evidence did not absolve the defendants from producing evidence as regards the execution of the deed as required by s. 68, Evi. Act, and as no attesting witness was produced the execution of the deed must be held to have been not proved. This contention also does not appear to me to have any force. In the first place there appears to be no law in force in this province requiring a deed of adoption (or gift?) to be attested by witnesses and this by itself would preclude the operation of s. 68. Moreover, the deed was registered and when a certified copy was produced, the plaintiff did not specifically deny that it was the copy of the deed of gift which according to him was executed by Hira Singh in his favour. It would appear from the proviso to s. 68 that in the circumstances the production of an attesting witness was not essential. The plaintiff had described himself as an adopted son of Hira Singh at the time when the land of Hira Singh was mutated in his favour on the alleged deed of gift. If that deed was different, the plaintiff might have been expected to produce at any rate a copy thereof to support his case; but he has not done so. In view of all these circumstances I agree with the learned District Judge that the execution of this document was sufficiently proved.

The third point raised by the learned Counsel for the appellant was that the agreement dated March 10, 1931, which was relied on by the defendants and by which the plaintiff is said to have given up his reversionary rights in the property left by the husband of *Mst. Lakhmi*, required registration. It was urged that the transfer of reversionary rights was itself tantamount to transfer of property and hence registration was necessary. But this contention seems to be clearly untenable in view of the Division Bench ruling of this Court reported in *Gurbhaji v. Lachhman* (3). The learned Counsel next urged that the agreement included a gift of one *ghumaon* to Tola Ram and hence it required registration as a deed of gift at any rate. But there is no dispute in the present case as regards the gift of one *ghumaon*

(3) 6 L 87; 88 Ind. Cas. 550; A I R 1925 Lah. 341; 26 P L R 217.

to Tola Ram. The agreement is relied on only to prove the relinquishment of the reversionary rights. Consequently even if the document required registration so far as the gift was concerned, the document can be admitted in evidence for the collateral purpose of proving the relinquishment of reversionary rights: *cf.* s. 49, Evi. Act. In my opinion the appeal fails and must be dismissed with costs.

s.

Appeal dismissed.

BOMBAY HIGH COURT.

Application in Testamentary and Intestate Jurisdiction Suit No. 12 of 1934

March 8, 1939

BLACKWELL, J.

BHAGWANDAS NARANDAS—

APPLICANT

versus

D. D. PATEL & Co.—OPPOSITE PARTY

Criminal Procedure Code (Act V of 1898), s. 476 (as amended in 1923)—Stranger to proceedings in which offence is committed can apply under s. 476—Application under, when should be made—Applicant, if entitled to adduce evidence outside record of proceedings out of which application arises, to show that evidence, in those proceedings was false—Proceedings under—Costs, if can be awarded—Evidence Act (I of 1872), ss. 44, 41—Whether applies to civil and criminal proceedings—Judgment in probable suit is judgment in rem—Stranger's right to impeach decree in rem—Party against whom judgment is set up, if should bring separate suit—Probate decree—Application under s. 476, Criminal Procedure Code—Criminal Court's jurisdiction to decide that probate decree was forgery—Applicability of s. 44 to application under s. 476, Criminal Procedure Code.

Section 476, Criminal P. C., as amended, contains words which were not present in the former section, namely "whether on application made to it in this behalf or otherwise." Therefore it is open to the Court to entertain an application under s. 476 at the instance of a stranger to the proceedings out of which the application arises and in the course of which the offence is alleged to have been committed. 120 Ind. Cas. 629 (2), relied on.

Under s. 476 as it now stands the application need not be made in the course of the proceedings out of which it arises, or immediately thereafter. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the merits and would no doubt depend upon all the circumstances. *Begu Singh v. Emperor* (3) held overruled by 88 Ind. Cas. 709 (1) and 6 Ind. Cas. 801 (6), relied on. *Aujakannu Pillai v. Emperor* (4) and *In re Lakshmidas Lalji* (5), dissented from. [p. 870, col. 1.]

In deciding whether it is in the interests of justice that an inquiry should be made the Court is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. The applicant is entitled to adduce evidence outside the record of the proceedings out of which the application arises to show that evidence given in those proceedings was false.

In re Lakshmidas Lalji (5), relied on. 140 Ind. Cas. 619 (7), explained.

Proceedings under s. 476 being of civil nature Court would have jurisdiction to award costs. 114 Ind. Cas. 741 (24), followed.

Section 44, Evi. Act enables any party to a suit or other proceeding to show that a decree proved by the adverse party against him was obtained by fraud. The section would, apply in any proceedings, civil or criminal, if the decree sought to be challenged is proved by the adverse party. It cannot be said that it applies only in a suit for revocation of a probate.

A judgment in a probate suit is a judgment *in rem*.

[Case-law relied on.]

By reason of s. 44, Evi. Act, the law in India is different from that in England, and in India the argument that a decree *in rem* even of a foreign Court cannot be contested at all, or can be contested only by the parties to the suit in which it was pronounced, cannot be accepted, and further in India a decree *in rem* which is relevant under s. 41, can be contested on the ground of fraud or collusion which does not go to the jurisdiction of the Court. Apart from s. 44, a stranger to a suit in which a decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. It is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside, but he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud. *Bater v. Bater* (12), not approved.

Where in the testamentary suit in which probate decree was passed, a stranger makes an application under s. 476, Criminal P. O., the proceedings under s. 476 must be regarded as independent, and when the applicant in the affidavit upon which the application is based admits the decree and there is no question of the decree being proved against him by the adverse party, s. 44, Evi. Act does not apply to this application. Although the Criminal Courts have no jurisdiction to revoke the probate it has full jurisdiction to decide that it was a forgery in a criminal case in which the party offering the evidence of forgery admits the probate to be valid and admits the title of the executor, but seeks to show what means he used in order to become so. Having regard to s. 44, Evi. Act, it would be equally open to the party offering the evidence of forgery to prove that the probate decree was obtained by fraud, if it were set up against him by the accused, instead of admitting the probate and the title of the executor. In the case of an application under s. 476, although s. 44, Evi. Act, does not apply, evidence of forgery is admissible in the same manner as it would be admissible in a criminal case, the applicant admitting the validity of the probate decree and the title of the executors. *Buttery's Case* (20) and *Priestman v. Thomas* (22), relied on. *Rez v. Vincent* (21), held no longer good law. *Manjanali Debi v. Empress* (18), dissented from.

Facts.—In or about the year 1923 Rasiklal Chandulal, the son of Chandulal Narandas, inherited a large estate from his mother. Rasiklal Chandulal died at Patan on April 17, 1934, being still a minor. On his death, his father Chandulal Narandas became entitled to inherit his estate. On August 25, 1925, E. D. Sassoon, United Mills Ltd., and D. D. Patel & Co., obtained

a decree against the firm of Rasiklal Chandulal, of which Chandulal Narandas was the sole proprietor, for Rs. 2,10,916-11-0 and Rs. 200 for costs. On the death of Rasiklal Chandulal, the decree-holders D. D. Patel & Co., attached the securities and shares belonging to the deceased. Chandulal Narandas then alleged that there had been a settlement in respect of the decree. Realizing that he was unable to establish a settlement, he set about devising a scheme whereby his judgment-creditors might be prevented from having recourse to the estate which he had inherited from his son. Accordingly in conspiracy with Kalidas Gopaldas, Ratilal Ambalal, Kanubhai Keshavji, Ramanlal Mohanlal, Krishnalal Himatlal, Manilal Hargovandas, Manilal Gopaldas, Laloo Kuber, and in particular with his brother Bhagwandas Narandas, who was appointed one of the executors under the will, he procured the preparation and execution at Patan of a false will of the deceased Rasiklal dated April 11, 1934. A petition for probate of the will having been filed by Bhagwandas Narandas, D. D. Patel & Co., filed a caveat alleging that the will was a forgery. At the instance of Bhagwandas Narandas a commission was issued to Baroda, and from the evidence taken it became evident that the witnesses who were alleged to have executed the will were persons of no substance and were unreliable. Meantime photographs of the alleged signature of the deceased upon the will and of genuine signatures of the deceased were at the instance of the caveators submitted to hand-writing experts, and they expressed the opinion that the signature on the will was a forgery. Knowing that that signature was a forgery, and realizing that he would not be able to prove it to be genuine, Bhagwandas Narandas put pressure upon Chandulal Narandas to have the proceedings compromised in order that the forgery might not be established. Consequently on February 14, 1936 a consent decree was taken whereby probate was to issue to the plaintiff, and half the estate of the deceased was to go to the attaching creditors and the other half to the minor brothers of the deceased and the legatees who agreed to take half the amount mentioned in the will.

The conspiracy and the offences alleged were sought to be established by the evidence recorded on the commission, by other materials in the possession of the Police of Bombay, and by the matters

alleged in a complaint filed by P. D. Patel, partner of D. D. Patel & Co., on August 3, 1934 in the Court of the Chief Presidency Magistrate against Kalidas Gopaldas and others. It was one of the terms of the consent decree that the caveators should withdraw the criminal complaint, and they did so. Thus, Bhagwandas Narandas, Dhandulal Narandas and the other persons who were instrumental in the preparation and execution of the forged will were alleged to have succeeded in stifling the enquiries which had been started by the Police, and procured the admission to probate of a will which they knew to be forged. (An application was made under s. 476, Criminal P. O., for filing a complaint against Bhagwandas Narandas under ss. 191, 196, 467, 108 and 120-B, I. P. O.)

Mr. N. H. Bhagwati, for the Applicant.

Messrs. K. A. Somjee, Sir Jamshedji Kanga and M. M. Desai, to show cause.

Blackwell, J.—(After setting out facts, the judgment proceeded.) Section 476 (1), Criminal P. O., is as follows:

"When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in s. 195, sub-s. (1), cl. (b) or cl. (c), which appears to have been committed in or in relation to a proceeding in that Court such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the First Class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate."

Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

For the purposes of this sub-section, a Presidency Magistrate shall be deemed to be a Magistrate of the First Class."

The former s. 476 was amended by s. 128, Criminal P. O., (Amendment) Act, 1923. Several decisions based upon the former section have been cited to me, but, as was pointed out by Crump, J., in *Bai Kasturbai v. Vanmalidas* (1) the effect of them is very materially affected by the amendment. Mr. Somjee, for the respondent, took a preliminary objection to my entertaining the application based upon a

number of grounds. First he submitted that a stranger to the testamentary proceedings out of which the application arises could not make the application. Section 476, as amended, contains words which were not present in the former section, namely "whether on application made to it in this behalf or otherwise." I think therefore that it is open to the Court to entertain an application under s. 476 at the instance of a stranger to the proceedings out of which the application arises. It was held in *Harekrishna Parida v. Emperor* (2) that the Court may be moved by a person who was not a party to the proceedings out of which the application arises. I respectfully agree with that decision. This point fails.

Next it was contended that the application can be made only in the course of the proceedings out of which the application arises, or immediately after the conclusion of those proceedings. Mr. Somjee relied upon decisions to this effect in *Begu Singh v. Emperor* (3) and *Aiyakannu Pillai v. Emperor* (4). A different opinion was expressed in *In re Lakshmidas Lalji* (5) and by Miller, J., in his dissenting judgment in *Aiyakannu Pillai v. Emperor* (4) and *Begu Singh v. Emperor* (3) must be taken to have been overruled by *Bahadur v. Eradatullah Mallick* (6). In *Bai Kasturbai v. Vanmalidas* (1) Crump, J. considered *Begu Singh v. Emperor* (3) and after pointing out that it was overruled by *Bahadur v. Eradatullah Mallick* (6) he said (p. 714*):

"It is also obvious from a reference to the section itself as it stood, and as it now stands, that the main grounds on which the decision rests are no longer in force. The learned Judges relied on the words "committed before it or brought under its notice in the course of a judicial proceeding" which are no longer to be found in the section;"

and he pointed to other amendments in the section which affected the grounds of the decision. As regards the former section I prefer the opinion expressed by the Judges in *In re Lakshmidas Lalji* (5) and by Miller, J., in his dissenting judgment in

(2) 8 Pat. 736; 120 Ind. Cas. 629; A I R 1929 Pat. 242; 11 P L T 75; 31 Cr. L J 143; Ind. Rul. (1930) Pat. 53.

(3) 34 O 551; 5 Cr. L J 398; 5 O L J 508; 11 O W N 568 (F B).

(4) 32 M 49; 9 Cr. L J 41; 19 M L J 42; 4 M L T 404 (F B).

(5) 32 B 184; 7 Cr. L J 33; 10 Bom. L R 28.

(6) 37 O 642; 6 Ind. Cas. 801; 12 O L J 45; 14 O W N 799.

(1) 49 B 710; 88 Ind. Cas. 709; A I R 1925 Bom. 436; 26 Cr. L J 1189; 27 Bom. L R 616.

Aiyakannu Pillai v. Emperor (4). On the section as it now stands it is, I think, clear that the application need not be made in the course of the proceedings out of which it arises, or immediately thereafter, and the difference of opinion upon the former section is now immaterial. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the merits and would no doubt depend upon all the circumstances.

Then it was contended that the applicant is not entitled to adduce evidence outside the record of the proceedings out of which the application arises to show that evidence given in those proceedings was false. In support of this contention certain observations of the Judges in: *In re Chatur Jethaji* (7) were relied upon. They did not however say that the Court could look only to the record of the proceedings for the purpose of ascertaining whether the evidence was false. This was certainly not the opinion of the Judges in reference to the former section in: *In re Lakshmidas Lalji* (5). In that case Chandavarkar, J. said (p. 191*):

"An offence may be committed in the course of a trial before a Judge, and no one may know anything about it. It may be discovered long after the trial has ended; the Judge or his successor may come to know of it in the course of some other trial or in some other way. No private party may think it worth his while then to apply for a sanction to prosecute; and yet in the interests of public justice it may become necessary that there should be a prosecution."

These observations, in my opinion, apply with even greater force to the present section, which contains the words which were not present in the former section "whether on application made to it in this behalf or otherwise." In my view in deciding whether it is in the interests of justice that an inquiry should be made the Court is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. Next it was contended that the judgment in the testamentary proceedings was a judgment *in rem*, which conclusively established the validity of the will and the title of the executors, and that no evidence could be adduced to show that the will was a forgery, except in a suit for revocation of the probate, and ss. 4 and 41, Evi. Act,

(7) 34 Bom. L R 1247; 140 Ind. Cas. 619; A I R 1932 Bom. 551; (1932) Cr. Cas. 783; 34 Cr. L J 33; Ind. Rul. (1933) Bom. 1.

and s. 273, Succession Act, were relied upon. As regards s. 44, Evi. Act, which provides that any party to a suit or other proceeding may show that any judgment, order, or decree, which is relevant under ss. 40, 41 or 42, and which has been proved by the adverse party, was obtained by fraud, it was contended that s. 44 would apply only in a suit for revocation, and in the alternative that it does not apply to this application in which the judgment is admitted by the applicant in para. 19 of his affidavit, s. 44 being applicable only when the judgment has been proved by the adverse party. The contention that s. 44 would apply only in a suit for revocation is in my opinion ill founded. The section contains no limitation of the character suggested; it enables any party to a suit or other proceeding to show that a decree proved by the adverse party against him was obtained by fraud. The section would, in my opinion, apply in any proceeding, civil or criminal, if the decree sought to be challenged is proved by the adverse party.

No authority is needed for the proposition that judgment in a probate suit is a judgment *in rem*. Of the cases cited upon this point, I may mention *Komollochun Dutt v. Nilrutton Mundle* (8), *Venkatasubamma v. Ramayya* (9), *Harmasji Navroji v. Bal Dhanbaiji Jamsetji Dosabhai* (10) and *Bal Gangadhar Tilak v. Sakwarbai* (11). Mr. Somjee referred to *Bater v. Bater* (12), but it was pointed out by Macpherson, J., in *Sita Devi v. Gopal Saran* (13), that by reason of s. 44, Evi. Act, the law in India is different from that in England, and that in India the argument that a decree *in rem* even of a foreign Court cannot be contested at all, or can be contested only by the parties to the suit in which it was pronounced, cannot be accepted, and further that in India a decree *in rem* which is relevant under s. 41, Evi. Act, can be contested on the ground of fraud or collusion which does not go to the jurisdiction of the Court. Apart from s. 44, Evi. Act, it is well established that a stranger to a suit in which a

(8) 4 O 360; 4 O L R 175.

(9) 62 M L J 365; 133 Ind. Cas. 111; A I R 1932 P O 92; 55 M 443; 59 I A 112; 9 O W N 201; Ind. Rul. (1932) P O 63; 36 O W N 441; (1932) A L J 293; 36 L W 532; (1932) M W N 486; 55 O L J 263; 34 Bom. L R 764 (P O).

(10) 12 B 164.

(11) 26 B 792; 4 Bom. L R 637.

(12) (1906) L R P 209; 75 L J P 60; 94 L T 835; 22 T L R 408.

(13) A I R 1928 Pat. 375; 111 Ind. Cas. 762; 9 P L T 397.

decree *in rem* has been passed may impeach that decree for fraud and have it set aside if the fraud be proved: see the judgment of Latham, J., in *Ahmedbhoy Hubibhoy v. Vullebhoy Cassambhoy* (14), where the question is fully discussed. It is also clear that having regard to s. 44, Evi. Act, it is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside, but that he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud: see *Bansi Lal v. Dhapo* (15) and *Rajib Panda v. Lakhan Sendh Mahapatra* (16), in which the judgment of Banerjee, J., is very instructive. It has been urged that this is an application in the very suit in which the probate decree was obtained, and that s. 44 applies only where the decree is set up in a separate suit or proceeding, and Counsel referred to *Biswa Nath Prosad v. Bhagwandin Pandey* (17), where it was held that an execution proceeding is a continuation of the suit, and s. 44 does not apply. In my opinion, although instituted in the testamentary suit in which the decree was passed, this is an independent proceeding brought by a stranger to the suit, but I think that as the applicant in the affidavit upon which the application is based admits the decree and there is no question of the decree being proved against him by the adverse party, s. 44, does not apply to this application. Mr. Desai however for the applicant said that he did not upon this application seek to challenge the validity of the decree or the title of the executors, but that while admitting both he sought to show that in procuring the decree and his title as executor the respondent had been guilty of the offences set out in the schedule to the rule. He submitted that he was entitled to adduce evidence for this purpose. I will return to this argument later.

Mr. Somjee next submitted that no evidence would be admissible in a Criminal Court to establish the alleged offences so long as the probate of the will was unrevoked, and that if this be so, it would be futile for the Court to admit such evidence on this application even if it is admissible and the Court should decline to do so, and he relied upon *Manjanali Debi v. Empress* (18) and *Kanullah v. Emperor* (19). Section 44

Evi. Act, was not referred to in *Manjanali Debi v. Emperor* (18) and *Buttery's Case* (20), hereafter discussed, was not cited. With respect *Manjanali Debi v. Emperor* (18), was in my opinion wrongly decided. In *Kanullah v. Emperor* (19), the point decided was that the Criminal Court should have stayed its hand when the decree of the Munsif, upon which he had moved under s. 476, was reversed, as that order was no longer justified. Mr. Somjee also referred to the notes on s. 41 of Woodroffe and Ameer Ali's Law of Evidence, Edn. 9, at p. 419, where it is said that while in English Law a judgment *in rem* is strong *prima facie* evidence in a criminal case on behalf of the person in whose favour such judgment was given, yet "under this Act such a judgment will be conclusive in a criminal, equally and to the same extent as in a civil proceeding;" he referred also to Sarkar on Evidence, Edn., 5, p. 384, where it is said that "a judgment *in rem* under this section," (i. e., s. 41) "will be conclusive in a criminal as well as in a civil proceeding." The learned authors of these works do not, however, in these passages refer to s. 44. I see no ground for drawing any distinction between civil or criminal proceedings as to the applicability of s. 44, which permits "any party to a suit or other proceeding" to prove that a judgment proved by the adverse party was obtained by fraud. If therefore a criminal enquiry should be directed and a complaint made, I think that s. 44 would apply if the probate decree were relied upon by the accused.

In *Buttery's Case* (20), above mentioned, nine Judges considered the objection taken for the prisoners that the probate unrevoked was conclusive evidence of the validity of the will, and overruled it and held that the conviction for forging the will was right. The ruling to the contrary by King, C. J., in the earlier case in *Rex v. Vincent* (21), cannot now be treated as good law. Mr. Somjee objected that in the year 1818 when *Buttery's Case* (20), was decided, the probate affected personalty only and not realty, and that no regard should be paid in India to the ruling in that case where no distinction has ever been made as in England between real and personal estate. But in England since the passing of the Land Transfer Act of 1897 probate is conclusive as to both real and personal property, and the principle in *Buttery's Case* (20), is considered as good law in England today;

(14) 6 B 703.

(15) 24 A 242; A W N 1902, 38.

(16) 27 O 11; 3 O W N 660.

(17) 14 O L J 648; 10 Ind. Cas. 536.

(18) 4 O W N 176 N O.

(19) 12 O W N 1; 6 O L J 703; 6 Cr. L J 354.

(20) (1818) R & R Cr. O 342.

(21) (1721) 1 Sk. 481.

see Williams on Executors, Edn. 12, p. 386; Halsbury's Laws of England, Edn. 2, Vol. 9, p. 592, s. 991 *f. n.* (a), Roscoe's Criminal Evidence, 1921, Edn. p. 660, citing *Priestman v. Thomas* (22), where Cotton, L. J., expressed the opinion that although the Chancery Division had no jurisdiction to revoke the probate of a will, it had full jurisdiction to decide that it was a forgery, and Archbold's Criminal Pleading, Evidence and Practice, Edn. 30, p. 818. The question is discussed in Vol. 2 of Smith's Leading Cases, and at p. 693 the learned authors say :

"In *Buttery's Case* (20) a probate was held not to be conclusive evidence that the party obtaining it had not forged the will, which may at first sight seem inconsistent with the doctrine in *Noell v. Wells* (23), at p. 236, *viz.*, that the party in a civil action cannot avoid the probate by showing the will to be forged. But, on consideration, the cases appear to be consistent; for, in the civil suit, the evidence is offered for the purpose of showing that the party who obtained probate did not thereby become executor, which character the special Court has adjudged him to possess: but in the criminal case, the party offering the evidence admits the probate to be valid till repealed, admits the prisoner to have thereby become executor, but merely seeks to show what means he used in order to become so, which is no more than if he sought to prove that in the affidavit in which the prisoner verified the scripts he had committed perjury."

In my opinion, the principle in *Buttery's Case* (20), is applicable in India in a criminal case in which the party offering the evidence of forgery admits the probate to be valid till repealed, and admits the title of the executor, but seeks to show what means he used in order to become so. Having regard to s. 44, Evi. Act, I think that it would be equally open to the party offering the evidence of forgery to prove that the probate decree was obtained by fraud, if it were set up against him by the accused, instead of admitting the probate and the title of the executor. As regards the present application under s. 476, although s. 44, Evi. Act, does not apply, I think that evidence of forgery is admissible in the same manner as it would be admissible in a criminal case, the applicant admitting the validity of the probate decree and the title of the executors.

All the points taken by way of preliminary objection in my opinion fail. I therefore proceed to hear the application upon the merits. [His Lordship then proceeded to hear the application upon the merits, and dismissed it with costs, observing as follows]: Mr. Desai submits that I should

(22) (1884) 9 P D 210; 53 L J P 109; 51 L T 843; 32 W R 842.

(23) (1668) 1 Lev. 235 (236).

make no order as to costs. He argues that s. 476 falls under Chap. XXXV, Criminal P. C., and that there is no provision made in any part of that Chapter for costs. He referred me to *Emperor v. Behari Lal* (24); and though in that case it was held on the particular facts that the Munsif had no jurisdiction to award costs, it was pointed out in the judgment that in proceedings under s. 476 the Court acts as a Civil Court, and that the Civil Court would have jurisdiction to award costs to one or the other party where the parties were the same as those in the civil litigation. I am clearly of opinion that an application under s. 476, being in the nature of a civil application the Court has full jurisdiction to award costs.

D.

Order accordingly.

(24) A I R 1928 All. 588; 114 Ind. Cas. 741; 51 A 338; (1929) A L J 62; Ind. Rul. (1929) All. 277.

CALCUTTA HIGH COURT

Civil Rule No. 591 of 1939

May 24, 1939

B. K. MUKHERJEE AND ROXBURGH, JJ.

MAHESH MISSIR AND OTHERS—

PETITIONERS

versus

PROVINCE OF BENGAL—OPPOSITE PARTY

Calcutta Improvement Act (V of 1911), s. 24—Any portion of land intended to be acquired in pursuance of contract under s. 21, if can be abandoned by Board of Trustees—Land Acquisition Act (I of 1894), s. 49—Order of tribunal rejecting reference under s. 49 (1)—Appealability—Held, application of the tenants to acquire their huts also was not premature.

Even apart from s. 78, Land Acquisition Act, there is nothing in the Land Acquisition Act or the Cal. Improvement Act which prevents the acquiring authority from abandoning a portion of the land in respect of which proceedings under the Act have been taken. Under s. 24, Cal. Improvement Act, very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. There is nothing in law therefore which prevents the Board from abandoning any portion of the land intended to be acquired in pursuance of a contract entered into under the provisions of s. 24, Cal. Improvement Act. *Secretary of State v. Mahip Sha* (3), relied on.

A decision on or a determination by the tribunal of any matter which has no reference to compensation in some form or other does not come under the definition of an 'award,' and no appeal lies in such cases. An order of the tribunal rejecting reference under s. 49; Land Acquisition Act is not therefore appealable. 50 Ind. Cas. 732 (1), relied on. 37 Ind. Ind. Cas. 11 (2), explained.

Held, on facts that the application of the tenants for the acquisition of their huts also was not premature. The action taken by way of agreement under s. 24, Cal. Improvement Trust Act, for

exemption of acquisition of part of the premises following steps taken for acquisition of the whole amounted to this: that the provisions of Land Acquisition Act (as part of the Cal. Improvement Trust Act) were being put into force for the purpose of acquiring a part only of the premises in question..

C. Rule issued from an order of the President, Calcutta Improvement Tribunal, dated April 18, 1939.

Messrs. *Surendra Madhab Mullick, Probodh Chandra Kar and Sukumar Ghose*, for the Petitioners.

Messrs. *Bepin Chandra Mullik and Bireswar Bagchi*, for the Opposite Party.

B. K. Mukherjea, J. — This rule is directed against an order passed by the Calcutta Improvement Tribunal, dated April 18, 1939, rejecting a reference made to it by the First Land Acquisition Collector, Calcutta, under s. 49 (1), Land Acquisition Act. The material facts may be shortly stated as follows: Premises No. 40, Lake Road which comprises an area of 6B-5C-6ch of lands was scheduled for acquisition under the Land Acquisition Act as amended by the Cal. Improvement Act, under declaration No. 12578 L-A, dated June 19, 1937. One Saradindu Mukherji, who is stated to be the owner of the premises, applied to the Board of Trustees for the Improvement of Calcutta for exemption of this property from acquisition under s. 78, Cal. Improvement Act. This application was rejected. Thereupon there was an agreement entered into between the owner and the Board on January 24, 1939 by which a portion of the premises measuring 58ct 12ch only which was coloured blue in the map was to be acquired and the balance measuring 66ct 12ch, which was painted pink was exempted from acquisition. Proceedings were then taken up by the Collector for the acquisition of the blue plot only and the petitioners who are alleged to have huts on the pink portion filed applications before the Collector stating *inter alia* that the land to be acquired contained a part of the access from the lake to their structures and that filtered water connections and drains to their huts also ran through that land. It was further stated that they had a right to use the water of the tank and *jhil* in premises Nos. 40 and 40/1 Lake Road. As the aforesaid access and water connections were said to constitute an integral part of the huts in the excluded portion they prayed for the acquisition of these huts as well. Upon that the Collector made a reference to the

Court under s. 49 (1), Land Acquisition Act, and the question referred for determination was, whether the portion of the land intended to be acquired formed a part of the house of the petitioners within the meaning of s. 49, Land Acquisition Act. The tribunal by its order mentioned aforesaid rejected the reference on the ground that the reference was incompetent. It is against this order that the present rule has been obtained.

Mr. Bepin Chandra Mullik who appears for the opposite party has raised a preliminary point and he has argued that as the order rejecting the reference could have been challenged by way of appeal the petition for revision does not lie. We do not think that this contention is sound. From the decisions of the tribunal only a limited appeal is given by the Act XVIII of 1911 and as the Preamble of that Act says, an appeal lies only from the award of the tribunal constituted under the Cal. Improvement Act of 1911, I am unable to hold that a decision on or a determination by the tribunal of any matter which has no reference to compensation in some form or other comes under the definition of an 'award.' That no appeal lies in such cases has been expressly held by a decision of this Court in *Sarat Chandra Ghose v. Secretary of State* (1). The case in *Dalchand Singhi v. Secretary of State* (2), upon which reliance has been placed by Mr. Bepin Chandra Mullik, cannot, in our opinion, be regarded as an authority in support of a contrary view. In that case it was not disputed that an appeal would lie only against an award but it was observed by the learned Judges that such orders had been dealt with in appeal by the Allahabad and Madras High Courts. The learned Judges however concluded by saying that as there was a petition in revision filed in that case upon which a rule was obtained they had ample authority to deal with the matter under s. 115, Civil P. C. We are unable to hold that the order passed by the tribunal in the present case was an appealable order.

Coming now to the merits of the case it would seem that the tribunal has rejected the reference relying on certain previous decisions of its own where under similar circumstances the reference was held to be incompetent. The reason in substance appears to be this. There was a declaration here made under s. 6, Land Acquisition Act,

(1) 46 O 861; 50 Ind. Cas. 732; A I R 1919 Cal 86; 23 O WN 373.

(2) 43 O 665; 37 Ind. Cas. 11; A I R 1917 Cal 148.

which covers the entire premises including both the pink and the blue plots. The agreement entered into between the trustees on the one hand and Saradindu Mukherji on the other was not in pursuance of cl. (4) of s. 78, Cal. Improvement Act, and consequently there was no abandonment within the meaning of cl. 5 of that section. It is said therefore that as there has not been an abandonment of the land acquisition proceedings with regard to the pink portion s. 49, Land Acquisition Act, is inapplicable, for it cannot be said that the provisions of the Act are being enforced for the acquisition of a part of the house, unless the acquisition of the lands upon which the remaining part of the house stands is abandoned. There can be no doubt, in my opinion, that unless at the present moment there has been an abandonment of the acquisition with regard to the pink portion no question of reference under s. 49, Land Acquisition Act, can possibly arise. But the error lies in assuming that the only way of abandoning acquisition is that provided by s. 78, Cal. Improvement Act. Section 78 lays down one particular method, according to which, if any area, the acquisition of which has been sanctioned by the Local Govt. is not required by the Board for the execution of the scheme the Board may abandon the acquisition proceedings in consideration of certain money payments being made by the owner or an agreement being executed by him in conformity with the provisions of that section. But even apart from s. 78, Land Acquisition Act, there is nothing in the Land Acquisition Act or the Cal. Improvement Act which prevents the acquiring authority from abandoning a portion of the land in respect of which proceedings under the Act have been taken. As was observed by D. N. Mitter, J. in *Secretary of State v. Mahip Sha* (3)

"it was consistent with commonsense that the party which had been given power to acquire lands for certain purposes had also the power to abandon any such land which was intended to be acquired from acquisition unless there was provision in the statute preventing such piecemeal acquisition."

This is also the principle underlying s. 48, Land Acquisition Act. Under s. 24, Cal. Improvement Act, very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. There is nothing in law therefore which prevents the Board from abandoning any portion of the land intended

(3) 41 O W N 437

to be acquired in pursuance of a contract entered into under the provisions of s. 24, Cal. Improvement Act. Whether there has been abandonment or not on any particular case would of course depend upon the circumstances of that case. Mr. Bepin Ohandra Mullik contends before us that the agreement in this particular case cannot amount to an abandonment as there are various other things which are required to be done by the owner and unless these things are done the matter cannot be said to be complete. There is nothing however said on this point by the tribunal and we have no materials before us upon which we can hold that the acquisition of the pink portion has not been definitely abandoned. On the other hand the order of the Collector clearly suggests that the agreement has been acted upon and proceedings have been started to acquire the blue portion only to the exclusion of the pink plot.

In these circumstances it seems to me that if the petitioner's case is true, circumstances are present which would justify the Collector in making a reference under s. 49 (1), Land Acquisition Act, and in our opinion the matter ought to be investigated on its merits by the tribunal. The result is that the rule is made absolute. The order of the tribunal dated April 18, 1939 is set aside and the matter is sent back to him in order that the reference case may be disposed of on its merits and according to law. It is desirable that the reference should be heard in the presence of Mr. Saradindu Mukherji who is stated to be the owner of the plots and it would be open certainly to the opposite party to raise any other contention relating to the maintainability of the reference at the instance of the petitioners who are stated to be the tenants in occupation of certain huts upon the land. There will be no order as to costs in this rule.

Roxburgh, J.—On the merits the simple question is whether the application of the tenants under s. 49, Land Acquisition Act, 1894, was premature or not. The order of the tribunal is rather unfortunate in form, as it suggests that the only basis of decision is the fact that as Govt. might change its mind, and eventually go on with the acquisition, so the application of the tenants cannot be considered. The suit of a plaintiff might equally well be dismissed on the ground that he might subsequently change his mind and not execute his decree

if obtained, and proviso 1 to s. 49 itself makes provision allowing the owner to change his mind at any time before the award is made. The point for decision is whether, under the law, circumstances exist by which the tenants have the right to make the application for a reference; this is to be decided by reference to the terms of s. 49 itself, and to the facts. Under sub-s. 1 of s. 49 the provisions of the Act are not to be put into force for the purpose of acquiring a part of a house, manufactory or building if the owner desire that the whole of such house, manufactory or building shall be acquired, and then under the terms of proviso 2 provision is made that if any question shall arise as to whether any land proposed to be taken under the Act does or does not form part of a house the Collector is to refer the matter to the Court. It will be seen that the precise time at which the reference is to be made is not clearly specified; certainly it must be made if the provisions of the Act have already and clearly been "put in force" but they are not inconsistent with a reference being made at an earlier stage. In the present case the method by which the provisions of the Act are to be put into force for the purpose of acquiring a portion of the premises in question is by way of declaration and notice for acquisition of the whole, followed by an agreement under s. 24, Cal. Improvement Act, made with the landlord for exempting a portion, and hence by eventual abandonment of the acquisition under s. 48. In such case it is even more difficult than in a case where the proposal to acquire a portion is a direct one to determine the precise point of time at which it may be said that the provisions of the Act are being put into force for the purpose of acquiring a portion. In the present case there was originally an application for action under s. 78, Cal. Improvement Act, but this was rejected by the trustees, and the present proposal for action under s. 24 was adopted, and has been carried out to the extent of a formal agreement having been made.

Mr. B. O. Mullik draws attention to the terms of sub-s. (5) of s. 78, to the effect that when an agreement has been executed in pursuance of sub-s. (4) or payment has been made under the proviso the proceedings for the acquisition shall be deemed to have been abandoned and contends that on the analogy of those provisions the stage for the present application in the analogous

procedure by way of s. 24 and of eventual formal abandonment under s. 48, Land Acquisition Act, has not been reached, but consideration of these provisions seems to support rather the contrary view. It emphasizes the fact that in order to find out the whole land acquisition law applicable here we have to read the Cal. Improvement Trust Act and the Land Acquisition Act as one, and as has been pointed out in *Secretary of State v. Hindusthan Co-operative Insurance Society Ltd.* (4) incorporation of the provisions of the Land Acquisition Act into the provisions of the Cal. Improvement Trust Act is a case of legislation by reference, the terms incorporated being those of the Land Acquisition Act as it stood when it was adopted (in the schedule) and incorporated under ss. 69 and 71 (b), Cal. Improvement Act. In short the present action taken by way of agreement under s. 24, Cal. Improvement Trust Act, for exemption of acquisition of part of the premises following steps taken for acquisition of the whole amounts to this: that the provisions of Land Acquisition Act (as part of the Cal. Improvement Trust Act) are being put into force for the purpose of acquiring a part only of the premises in question. The Collector himself appears to have understood the position to be such for in his order of reference, after setting out the contentions of the applicants he concludes:

"I beg therefore to refer for the decision of the Court as to whether the portion of the premises intended to be acquired form part of the home of the petitioners within the meaning of s. 49 (1), Land Acquisition Act."

I think therefore that the application was not premature, and that the tribunal has failed to exercise the jurisdiction vested in it.

s. *Rule made absolute.*

(4) A I R 1931 P O 149; 132 Ind. Cas. 748; 59 Cal 55; 58 I A 259; 35 C W N 794; (1931) A L J 475; 33 Bom. L R 1006; 1931) M W N 692; Ind. Rul. (1931) P O 236; 54 O L J 14; 61 M L J 864 (P O).

RANGOON HIGH COURT

Second Appeal No. 308 of 1937

August 25, 1939

DUNKLEY, J.

DAW PO AND OTHERS—APPELLANTS

versus

U PO HMYIN AND ANOTHER—RESPONDENTS
Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, s. 115—Compromise—Court cannot select some terms and pass decree in accordance with them while neglecting others—Limitation for filing revision in Rangoon High Court—Specific Relief

Act (I of 1877), s. 9—Suit under—Nature and scope—Contract Act (IX of 1872), s. 2 (d)—Consideration may move from third person—Contract—Stranger to, when can sue on it.

Parties to a suit can compromise their differences on any terms they please and they can include in those terms any matters, whether the subject-matter of the suit or not, and, under the provisions of O. XXIII, r. 3, Civil P. C., the Court is compelled to pass a decree in accordance with the terms of the petition. It is not open to the Court to select some terms of the petition and pass a decree in accordance with those terms while neglecting the others. [p. 876, col. 2.]

It is a rule of practice in the Rangoon High Court that revisions may be filed at any time within 90 days of the date of the decree sought to be revised, and the applicant is entitled to utilize that rule of practice to the full. 52 Ind. Cas. 897 (1), referred to [p. 878, col. 1.]

In a suit under s. 9, Specific Relief Act the plaintiff must aver previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit being brought, and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession. The decree must either dismiss the suit or order the plaintiffs to be put into possession by the defendants, such decree being based on previous possession and dispossession merely and not on title. [p. 877, col. 1.]

"Consideration" as defined in s. 2 (d), Contract Act, shows that the consideration may move from a third person and need not necessarily move from the promisee. [p. 878, col. 1.]

A stranger to a contract can sue upon it at any rate in the following circumstances, namely, (a) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally and (b) where the contract creates a trust in favour of the stranger. 20 Ind. Cas. 630 (4), 124 Ind. Cas. 55 (5) and 143 Ind. Cas. 723 (6), relied on. [p. 878, col. 2.]

S. A. against the decree of the District Court, Myaungmya, dated August 5, 1937.

Mr. K. C. Sanyal, for the Appellants.

Mr. R. K. Ray, for the Respondents.

Judgment.—The incompetent way in which this litigation has been conducted has placed me in a position of great difficulty in endeavouring to do justice between the parties. The litigation originally arose out of a dispute regarding the ownership of the holding of agricultural land now in suit between U Baik and his wife Daw Po, on the one side, and U Po Hmyin and his wife Daw Zan Byu, on the other side. In Civil Regular Suit No. 3 of 1935 of the Township Court of Moulmeingyun U Po Hmyin and Daw Zan Byu sued the tenants of this land for recovery of rent for the agricultural year 1933-34. The defence of the tenants was that they were the tenants of U Baik and Daw Po and not of U Po Hmyin and Daw Zan Byu. U Baik was dead at the time that this suit was brought. Ma Hla Khin

is the daughter of U Baik and Daw Po and T. D'Attaiides is her husband. He held a general power-of-attorney from both Daw Po and Ma Hla Khin. The suit in the Township Court never went to trial for the parties filed a joint petition, signed by themselves and their Pleaders, and by T. D'Attaiides and others as witnesses for the compromise of the suit. The terms of the petition were:

"(a) That there be a decree against the defendants.

(b) That after the passing of the decree the plaintiffs U Po Hmyin and Daw Zan Byu shall transfer the land gratis, for natural love and affection, either by sale deed of release to Da Po, Ma Hla Khin and Mr. T. D'Attaiides within 15 days from the passing of the decree.

(c) That the plaintiffs would not claim the said land any longer, for which the present rent suit is filed, and further undertake not to execute the decree until the land is transferred to Daw Po and others."

On the presentation of this petition the learned Township Judge passed the following order:

"Parties and Pleaders present. They file a joint petition for compromise decree on the terms contained in the petition. These terms are noted by the Court but not contained in the body of the decree as some portion of the terms are extraneous to the decree in suit.

ORDER

Let there be a decree for Rs. 240 with costs on the uncontested scale. The decree is not to be executed before the time stipulated in the joint petition."

And upon that there followed a decree for a sum of Rs. 240 with the further declaration that the decree should not be executable until the land had been transferred to Daw Po and her two relatives. Now, in declining to pass a decree in accordance with the terms of the petition the learned Township Judge acted without jurisdiction. Parties to a suit can compromise their differences on any terms they please and they can include in those terms any matters, whether the subject-matter of the suit or not, and, under the provisions of O. XXIII, r. 3, Civil P. C., the Court is compelled to pass a decree in accordance with the terms of the petition. It is not open to the Court to select some terms of the petition and pass a decree in accordance with those terms while neglecting the others. Consequently, all those terms, including the terms regarding the transfer of the land to Daw Po, Ma Hla Khin and T. D'Attaiides, ought to be part of the decree in Civil Regular Suit No. 3 of 1935 of the Township Court of Moulmeingyun. Subsequently, Daw Po, Ma Hla Khin and T. D'Attaiides instituted Suit No. 10 of 1935 of the Sub-Divisional Court of

Wakema against U Po Hmyin and Daw Zan Byu as defendants. This suit was tried by the Additional Sub-Divisional Judge, and the second appeal which is now before me arises out of this suit. Daw Po and Ma Hla Khin have died and T. D'Attalides has been adjudicated insolvent during the pendency of this second appeal. The Official Assignee has therefore been joined as an appellant as representing the estate of T. D'Attalides, and the other appellants are the legal representatives of Daw Po and Ma Hla Khin.

The title of the plaint in Suit No. 10 of 1935 of the Sub-Divisional Court was "suit under s. 9, Specific Relief Act," and in the course of his judgment disposing of this suit the learned Additional Sub-Divisional Judge made reference to s. 9, Specific Relief Act. It is plain that neither the Pleadings who appeared in the suit nor the Additional Sub-Divisional Judge have any conception of the nature and scope of a suit under the provisions of s. 9, Specific Relief Act. The plaint in such a suit must aver previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit being brought, and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession. The decree must either dismiss the suit or order the plaintiffs to be put into possession by the defendants, such decree being based on previous possession and dispossession merely and not on title. I shall, later in this judgment, have to return to the averments of the plaint in this suit, but for the present moment it suffices to say that the suit was fought throughout as a suit based on title for declaration of title and recovery of possession.

The learned Additional Sub-Divisional Judge came to the conclusion that the plaintiffs had not proved their title or their previous possession but gave them a decree declaring that the terms of the agreement of compromise and the decree in Suit No. 3 of 1935 of the Township Court of Moulmeingyun were binding on the defendants. Such a decree was, of course, valueless because it is unexecutable. As I have said, in the course of his judgment the learned Additional Sub-Divisional Judge referred to s. 9, Specific Relief Act, and against a decree in a suit under that section there is no right of appeal. Consequently, under the circumstances the present respondents took the only step that they could take, namely

they made an application in revision to this Court (Civil Revision No. 386 of 1936), and in his judgment in that revision my learned brother Spargo pointed out that a suit did not become a suit under s. 9, Specific Relief Act, merely because that section was mentioned in the plaint and the judgment, that the suit in question was plainly a suit for recovery of possession based on title, and that therefore an appeal lay to the District Court. He therefore dismissed the application in revision. The present respondents then filed a first appeal in the District Court of Myaungmya (Civil Appeal No. 16 of 1937). The appeal was, on the face of it, long time-barred, but the learned District Judge gave the present respondents the benefit of s. 5, Lim. Act, in a summary *ex parte* order without hearing the present appellants. This action of the learned District Judge caused further difficulty. When this second appeal was first heard by my learned brother Mosely the case had to be remanded to the District Court with instructions to the learned District Judge to comply with the law and come to a proper finding on the question of limitation after hearing the present appellant. This he has now done. He has come to the conclusion that the respondents had sufficient cause for not preferring their first appeal within the period of limitation prescribed, and exercised his discretion under s. 5, Lim. Act, in their favour, and on the merits he has allowed the appeal and dismissed the suit of the plaintiffs-appellants. Against these decisions the present appeal has been brought, and it has been canvassed before me both on the question of limitation and also on the merits.

The period prescribed for an appeal to the District Court is 60 days. The respondents did not file their application in revision to this Court until after a period of 82 days had lapsed from the judgment of the Sub-Divisional Court. Subsequently, after the judgment of Spargo, J., had been delivered in the revision case, a first appeal was not filed in the District Court until a period of 30 days had lapsed. It is urged on behalf of the appellants that the filing of the revision in this Court by the respondents was not a sufficient cause for the delay in filing the appeal and that, in any case, no proper explanation of the delay of 82 days in filing the revision, or of 30 days in filing the appeal after the judgment in the revision, has been given. In my opinion, the respondents were justified in filing their application in revision to this Court. In fact, on

the plaintiff of the appellants in the original suit and the judgment of the learned Additional Sub-Divisional Judge, they had no other course open to them, for, if they had filed an appeal direct in the District Court it would undoubtedly have been rejected on the ground that no appeal lay; and therefore, in my opinion, the principle of s. 14 (1), Lim. Act, is applicable, and under s. 5 of that Act it must be held that the respondents had sufficient cause for not preferring their appeal during the time that they were prosecuting the revision before this Court. It is urged that they had no excuse for not filing their revision more promptly, but it is a rule of practice in this Court that revisions may be filed at any time within 90 days of the date of the decree sought to be revised, and the respondents were entitled to utilize that rule of practice to the full: see *Sunierbai v. Collector of Belgaum* (1). After Spargo, J., had delivered his judgment there was not, in my opinion, any undue delay. The respondents had to be informed by their Rangoon Advocate of the result of the revision application and they then had to come to Rangoon and obtain copies of the High Court judgment, before they could get their appeal accepted by the District Court, and for this purpose a delay of 30 days was not excessive. Consequently, in my opinion, the learned District Judge exercised his discretion under s. 5, Lim. Act, rightly in accepting the first appeal of the respondents.

Turning now to the merits of the appellant's case the learned District Judge has held that the appellants were not entitled to the declaration which has been given to them by the learned Additional Sub-Divisional Judge as they were not parties to the compromise agreement filed in the Township Court of Moulmeingyun, and further, so far as the appellants were concerned there was no consideration for the agreement. On the question of consideration the learned District Judge is clearly wrong. The consideration for the agreement was the withdrawal by the tenants of their defence in the rent suit in the Township Court and their consenting to a decree for the rent in favour of the respondents. "Consideration" is defined in s. 2 (d), Contract Act, and the words in that definition "the promisee or any other person" show that the consideration may move from a third person and need not necessarily move from the promisee. In this

respect the law of contract in India and Burma differs from the English law of contract. There was ample consideration for this agreement.

The other ground of the learned District Judge's decision is a strict application of the principle laid down in *Tweddle v. Atkinson* (2), which decided that a person who is not a party to a contract cannot sue on it. But in England the authority of this case, which was decided in 1861, has been greatly weakened since the fusion of law and equity in a line of modern decisions of which I propose to mention only one: *Les Affreteurs Reunis Societe Anonyme v. Leopold Walford (London) Limited* (3). Moreover, *Tweddle v. Atkinson* (2), has never been the law in India. The question as to whether, and if so, to what extent, a third party may sue on a contract to which he is not a party has been considered in numerous cases of which I will cite four of the most important decisions: *Debnarayan Dutt v. Chunilal Ghose* (4), *Subbu Chetti v. Arunachalam Chettiar* (5) and *Jagadamba Debya v. Bidhootibhusan Sarkar* (6). These cases decided that a stranger to a contract can sue upon it at any rate in the following circumstances, namely (a) where a party to the contract agrees with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally and (b) where the contract creates a trust in favour of the stranger. In *Khirodebihari Dutt v. Mangobinda* (7) the Calcutta High Court has now gone even further, and has held that a stranger to a contract can always sue on the contract if it is made for his benefit, and this last decision seems to be in accordance with the modern English cases.

It is now necessary to see what were the facts leading up to the compromise of the rent suit in the Township Court of Moulmeingyun, and on this point the evidence in Suit No. 10 of 1935 of the Sub-Divisional Court of Wakema leaves no room for doubt. T. D'Attalides, acting

(2) (1861) 1 B & S 393; 30 L J Q. B. 265; 8 Jur. (N.S.) 332; 4 L T. (N.S.) 468; 9 W R 781; 124 R R 610.

(3) (1919) A C 801; 88 L J K B 861; 121 L T 393; 24 Com. Cas. 268; 35 T L R 542; 14 Asp. M C 451.

(4) 41 O 137; 20 Ind. Cas. 630; A I R 1914 Cal. 129; 18 O L J 603; 17 O W N 1143.

(5) 53 M 270; 124 Ind. Cas. 55; A I R 1930 Mad. 382; 58 M L J 420; 31 L W 371; Ind. Rul. (1930) Mad. 557 (F B.).

(6) 60 O 767; 143 Ind. Cas. 723; A I R 1933 Cal. 407; 37 O W N 447; Ind. Rul. (1933) Cal. 466.

(7) 61 O 841; 152 Ind. Cas. 351; A I R 1934 Cal. 682; 38 O W N 682; 7 R O 363.

(1) 43 B 376; 52 Ind. Cas. 897; A I R 1918 P O 135; 46 I A 15; (1919) M W N 254; 23 O W N 753; 21 Bom. L R 1148 (P O.).

for himself, his wife and his mother-in-law, defended the suit in the Township Court on behalf of the tenants. He negotiated the compromise agreement with U Po Hmyin and T. D'Attaiides and U Po Hmyin were the real parties to this agreement. This is admitted by U Po Hmyin in his written statement in the present suit and also in his evidence. He set up that the written agreement was mistranslated to him and he was made to understand that he was to get a sum of Rs. 1,000 as well as one year's rent. Both the lower Courts have come to the conclusion that this defence was false, and all the evidence in the suit is to the effect that U Po Hmyin signed this agreement voluntarily with full knowledge of its contents. The real parties to this agreement were the appellants, on the one side, and the respondents, on the other. The two tenants signed it as bare trustees, their beneficiaries being the appellants. It is also urged that the respondents are now estopped from denying their liability to the appellants, and had they been paid the one year's rent which they were to obtain under the written agreement, I should have been inclined to hold that they were so estopped. T. D'Attaiides in his evidence states that he has paid this amount of Rs. 240, but as satisfaction of the Township Court decree has not been recorded I cannot accept this statement. However, it is quite clear that the tenant entered into this compromise agreement as trustees for the present appellants and hence, in accordance with the authorities which I have cited, the appellants are entitled to enforce this agreement against the respondents.

The decree which they have obtained is meaningless and worthless to them, and this is due to the defective nature of their plaint in the suit in the Sub-Divisional Court. Plainly, the suit should have been a suit for specific performance of the agreement, and the question which I have to decide is whether on the pleadings in the suit I can make a decree for specific performance in their favour. Paragraphs 5 and 6 of the plaint read as follows:

"5. That in *U Po Hmyin v. Maung Ye Hmwe*, O. R. Suit No. 3 of 1935 a compromise petition was filed (a certified copy of the same is hereto annexed) in which the defendants had agreed to relinquish their rights, title, and interest over the said paddy land in favour of the plaintiffs Daw Po, Ma Hla Khin and Mr. T. D'Attaiides in consideration of a decree being passed against the defendants in that suit. Accordingly the terms of the compromise were embodied in the compromise decree. A certified copy of the compromise petition and of the decree are herewith attached for ready reference. The plaintiffs thereupon entered upon the land and cultivated paddy for the year

1935-36 after having complied with the terms of the decree of February 5, 1935.

6. That nevertheless defendant No. 1 failed to fulfil his part of the contract embodied in the compromise petition."

And prayer (c) of the prayer of the plaint is as follows: "(C) that the terms of the compromise and the decree may be made binding on the defendants."

Now, had these two paragraphs been the only averments in the plaint and this prayer been the only prayer in the plaint, it would not have been difficult to construe that prayer as being a prayer for specific performance of the agreement of compromise. But, nevertheless, the appellants overloaded their plaint with numerous other averments which were all unnecessary, and a number of other prayers which could not be granted. However, I think that I am bound to construe the plaint as liberally as possible, having regard to the unsatisfactory nature of pleadings presented to Subordinate Courts by Pleaders of the lower grade, so as to do justice between the parties, but bearing in mind that a new case must not be made out which was not made out in the plaint.

The plaint undoubtedly sets up *inter alia* the agreement and a breach of the agreement by the respondents and it asks for a declaration that the agreement was binding on the respondents. Of course, such a declaration is, as I have already said, worthless, and if the prayer had been a prayer for specific performance instead of this bare declaration, that part of the plaint would have been properly a plaint of this nature, and after full consideration I have come to the conclusion that I shall not be going too far in construing the plaint accordingly and granting the appellants the relief which they intended to seek, and to which they are entitled.

The judgment and decree of the District Court on first appeal, dismissing the suit of the plaintiffs-appellants, are therefore set aside, and instead of the judgment and the decree of the Sub-Divisional Court of Wakema, the plaintiffs-appellants will be granted a decree for the specific performance of the compromise agreement filed on January 30, 1935 in Civil Regular Suit No. 3 of 1935 *U Po Hmyin v. Maung Ye Hmwe*, O. R. Suit No. 3 of 1935, of the Township Court of Moulmeingyun, and the respondents are ordered to execute a registered instrument relinquishing, in favour of the appellants all right, title and interest which they may, have in the land in suit, namely holding No. 8 of 1935-36 in Kyonepainggyi kwin.

Mouléingyun township, measuring approximately 32 acres, and it is further ordered that they shall execute this registered instrument within one month of the date of this judgment. The appellants are entitled to their costs as against the respondents in all three Courts, Advocate's fee in this Court eight gold mohurs.

s.

Decree set aside.

CALCUTTA HIGH COURT

Suit No. 1976 of 1938

June 12, 1939

PANCKRIDGE J.

HARNARAIN MISRA—APPLICANT

versus

KANHAIYALAL LOHAWALLA

AND ANOTHER—RESPONDENTS

Companies Act (VII of 1913), s. 171—Winding up order—Subsequent suit without leave—Jurisdiction of Court to grant leave to continue suit, under s. 171—Jurisdiction of Court to dismiss suit on application for leave.

Under s. 171, Companies Act, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been instituted prior to the winding up order. The Court has no jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order. The Court has inherent jurisdiction to dismiss a suit on an interlocutory application for leave to continue the suit.

Mr. S. N. Banerjee (Jr.), for the Applicant.

Mr. R. S. Bachawat, for the Respondents.

Order.—This application raises a question of some importance. In December last year the plaintiff filed a suit against Kanhaiyalal Lohawalla and the Rajputana Films Co., Ltd. It now appears that prior to the institution of the suit, that is to say, on October 6, 1938, an order was made at the instance of a creditor by the District Judge of Ajmere for the compulsory liquidation of the defendant company. The plaintiff states that at the time when the suit was instituted he was unaware of the order for compulsory liquidation, and accordingly he made no application to the Court having jurisdiction in the winding up proceedings for leave under s. 171, Companies Act, to sue the company. The liquidator now applies that the suit should be dismissed against the company as being incompetent on account of the plaintiff's failure to ask for and obtain leave to sue.

The position, when a suit has been instituted against a company after an order for its compulsory liquidation without the leave

of the Court, was considered by me in *In re Steel Construction Co., Ltd.*, (1). In that case the winding up order had been made by this Court, and an application was made by the liquidator to restrain a suit subsequently instituted in the Court of the first Subordinate Judge of Comilla. It appears from the report that the suggestion was made that the application to restrain the proceedings in the Comilla suit should be adjourned in order to give the plaintiff an opportunity of regularizing his position by asking for and obtaining leave under s. 171. As to that I observed:

"In my opinion if such application were made the Court would have no jurisdiction to grant it. As I read s. 171 it means that leave to proceed with a pending legal proceeding can only be granted where that proceeding has been instituted prior to the winding up order. I do not consider that the Court has jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order."

It has been pointed out to me that the opposite view has been taken in the Allahabad High Court and in the Bombay High Court, though, it seems that my view has commended itself to the Lahore High Court. There is clearly no authority binding on me which compels me to modify the opinion I expressed in *In re Steel Construction Co., Ltd.* (1). On the authority of that case I feel constrained to accede to the liquidator's application. On the assumption that the plaintiff had no knowledge of the winding up order, my decision is undoubtedly productive of hardship. I suggested that a solution might be found if the plaintiff were to make an application to withdraw this suit with leave to institute a fresh suit on the same cause of action, and thereafter were to apply to the Court in which the company is being wound up for leave to commence fresh proceedings. That suggestion however did not commend itself to the plaintiff, and there may be very good reasons for this.

It has been urged that there is no rule which specifically empowers the Court to dismiss a suit on an interlocutory application in circumstances such as the present. That indeed must be conceded, but it is by no means uncommon for the Court to make order in interlocutory proceedings dismissing a suit, where it is clear that there is no jurisdiction to entertain it. In my opinion the Court has inherent jurisdiction to take such a course, and if the Court considers that at some stage or other it will be compelled, because of the absence of leave under s. 171, to dismiss

(1) 40 C W N 312.

a suit as against a defendant company, I cannot see that any harm is done by taking this course at the earliest opportunity. I have been referred to cases in England where it has been held that the Court will not stay proceedings where the company is a necessary party to a suit framed against it and other defendants. I will assume, though a perusal of the plaint does not convince me of this, that if the company is dismissed from the suit, the Court cannot grant relief against the other defendant. However, I do not think that this is a consideration which ought to influence me in view of my previous decision. In these circumstances the suit must be dismissed as against the company with costs, including the costs of this application. At the same time if the liquidator is willing to entertain the company's claim, nothing that I have said should affect his decision, whether, if the main claim is maintainable, the plaintiff should be allowed to add to it any of the costs which he has incurred in respect of these proceedings.

s.

Suit dismissed.

CALCUTTA HIGH COURT

Application in Suit No. 38 of 1939

July 13, 1939

AMBER ALI, J.

In re TRUST FOR ZEBUNNESSA
KHATOON

Married Women's Property Act (III of 1874), s. 6 (2)—Irrespective of any Official Trustees Act, existence of Official Trustee capable of receiving money under s. 6 (2), is sufficient—He is payee.

The Official Trustees Act of 1913 has not caused a gap in the evolution of the Official Trustee. The Official Trustee under the old Act is not of a different species of being from the Official Trustee under the later Act of 1913. The Official Trustee of to-day, notwithstanding more elaborate plumage, is but the existing living representative of what is not an extinct race. Even if the Act of 1864 had been wholly repealed saving the existence of the Official Trustee, nevertheless s. 6 (2), Married Women's Property Act, remains. Hence irrespective of any particular Official Trustees Act, if there is now an Official Trustee of Bengal capable of receiving the money under cl. 2 of s. 6 that is sufficient. He is the payee. 170 Ind. Cas. 912 (1), explained.

Sir Asoke Roy (Advocate-General) and Dr. S. K. Gupta, for the Official Trustee.

Mr. Kamala Bose, for the Insurance Company.

Order.—This is an application by the Official Trustee for directions, the practical question asked being, how he should dis-

pose of the sum of Rs. 4,588 in his hands. The short facts are as follows: One Mohamed Ghyasuddin effected a policy of insurance with the Sun Life Insurance Co., of Canada, expressed to be payable to his own wife, Zebunnessa Khatoon. On November 12, 1938, the company paid the amount mentioned to the Official Trustee of Bengal, purporting to do so under s. 6, Married Women's Property Act (Act III of 1874). There was some other claim to this fund by another member of this family but that claim has now been withdrawn and there is no dispute among the members of the family. On December 15, 1938 the solicitors of the Insurance Company demanded from the Official Trustee repayment of the amount by reason of a certain decision of this Court in *Haridassi Dassi v. Manufacturers Life Insurance Co.* (1).

The provision of law with which we are concerned is, as I have said, s. 6, Married Women's Property Act and I shall discuss this section as if the sub-clauses of this section were separately numbered. By virtue of cl. 1 without a doubt the effect of this policy is to create a trust in favour of the widow of the assured; cl. 2 indicates who shall be the trustee of that trust. It provides in other words for the legal ownership of the fund. It reads:

"When the sum secured by a policy becomes payable, it shall, unless special trustees are duly appointed to receive and hold the same, be paid to the Official Trustee of the Presidency in which the office at which the insurance was effected, is situate, and shall be received and held by him upon the trusts expressed in the policy or such of them as are then existing."

Clause 3 declares that in reference to such sum, that is, the sum paid to and received by the Official Trustee, he shall stand in the same position in all respects as if he had been appointed trustee thereof by a High Court under Act XVII of 1864, s. 10. That Act is the Act relating to the Official Trustee in force at the time of the Married Women's Property Act. There had been earlier Acts relating to the Official Trustee as there is now a later Act of 1913.

The decision in *Haridassi Dassi v. Manufacturers Life Insurance Co.*, (1) is one which, like so many others, cannot be appreciated without reference to the peculiar facts. In that case the company's first defence to a suit by a widow, was that as mere beneficiary she could not sue, an objection of non-joinder. Panckridge, J.,

(1) 41 O W N 517; 170 Ind. Cas. 912; A I R 1937 Cal. 39; I L R (1937) 2 Cal. 67; 10 R O 219.

promptly appointed trustees under the first portion of cl. 2 of s. 6. The company then turned round and took a second objection, namely that these trustees were not properly appointed and that under the Act it must be the Official Trustee and no other. On this point being taken, Lord-Williams, J., was met with a further difficulty, namely that the Official Trustee refused to act for want of funds. The learned Judge therefore in order to do justice, was disposing of a technical objection, and with regard to the Official Trustee, seeking to be disembarassed of an unwilling horse. The case before me is perfectly simple. Should difficulties such as were raised before Lord-Williams, J., be presented in any other case before me, I will consider myself free to reconsider my decision.

Before I deal with the only point on which I venture to disagree with the learned Judge's final view, I desire to state the two points, (dealt with at p. 519* of the report), on which, although they do not arise before me, it must not be understood that I disagree, namely the power of this Court to appoint other trustees under the first portion of s. 6, and secondly, the beneficiaries' right to sue. The only point on which I have to express a different view is that discussed in the second column of p. 518* of the report, the question being whether there is in existence an Official Trustee to whom the fund can be paid in pursuance of cl. 2 of s. 6.

The learned Judge finally and contrary to his first impression came to the conclusion that there was no such officer. This view was based on a comparison between the Official Trustees Act of 1864 and the Official Trustees Act of 1913. He was impressed by the fact that there is liberty under s. 7 of the latter Act to the Official Trustee either to accept or refuse a trust. He was further impressed by the fact that under s. 10 of the former Act, the Official Trustee's consent is required. As regards the latter point, the section appears to be the same. In the case before Lord-Williams, J., the question of consent was from a practical point of view most material. The Official Trustee was either refusing or seeking to impose conditions. The learned Judge was obviously impressed with the inconvenience at least of having an officer appointed by law to receive the money, who might refuse to take action on the ground of want of finance, and who might

and apparently did contend that he was not bound to act as trustee until he actually received the money. That question does not arise before me. As I have said, the question whether the Official Trustee, being the person made payee by the Act itself is entitled to refuse to enforce a trust is a question with which I am not called upon to deal. It may be argued that the Act creates him beneficiary of one trust and trustee of another trust in favour of the married woman. As I say, that difficulty does not arise before me, and on a pure question of construction I feel myself at liberty to agree with what the learned Judge has stated to be his first impression. Shortly put my view is as follows: Before the Act of 1913, cl. 2 of s. 6, Married Women's Property Act was quite sufficient. It says that the proceeds of the policy shall be paid and shall be received by the Official Trustee. It is not necessary to proceed to the third clause. In my view, irrespective of any particular Official Trustees Act, if there is now an Official Trustee of Bengal capable of receiving the money under cl. 2 of s. 6 that is sufficient. He is the payee.

But what has the Act of 1913 done? In my view it has not caused a gap in the evolution of the Official Trustee. In my view the Official Trustee under the old Act is not of a different species of being from the Official Trustee under the later Act of 1913. The Official Trustee of to-day, notwithstanding more elaborate plumage, is but the existing living representative of what is not an extinct race. My own view is that even if the Act of 1864 had been wholly repealed, saving the existence of the Official Trustee, nevertheless s. 6 (2), remains. In point of fact, and this point was never argued before the learned Judge, by reason of the General Clauses Act, s. 8, we have to read in the third clause of s. 6, Married Women's Property Act, for the Act of 1864 the Act of 1913. That is one answer to the theory of break in evolution.

Another answer is to be found in another section the effect of which is to provide for the continuity of office, I think s. 15. While therefore I should under ordinary circumstances have had great hesitation in differing from the learned Judge, I feel myself at liberty to agree with his first impression and to hold that s. 6 (2) applies and that the Official Trustee, unless the other trustees are appointed, is the person to receive the

*Pages of 41 O W. N. — [Ed.]

fund and bound to hold it upon the trusts created. The directions I therefore give are that the Official Trustees do not return the fund but hold it upon trusts created by the insurance policy in question and by operation of law, and do dispose of the fund accordingly.

With regard to the costs of this application I have been given able and ample assistance. I understand that the costs of this application are not going to fall on the fund. With regard to the costs of the ultimate beneficiary, I think she also should not pay any costs, and I suggest that the costs of her Counsel appearing may be set off against the commission due to the estate in respect of the fund. Certified for Counsel. The fund may be made over to the nominee under the policy. The Official Trustee will pay the balance of the money after deducting his commission as aforesaid to Zebunnessa Khatoon. Payment already made by the Insurance Company operates to discharge the Insurance Company.

Dr. Gupta has addressed me on the direction to the effect that the costs of Zebunnessa Khatoon may be set off against the commission due. He has pointed out that this is a dispute in which she need not strictly speaking have appeared, and that as it is, the Official Trustee has incurred costs which are not being thrown upon the fund. Nevertheless I think she has incurred some costs for appearance. She is the beneficiary. She is interested as to who is to be her trustee, and in the circumstances of the case I allow my direction to stand. It is not in any way to form a precedent. The costs in question, no affidavits having been filed by her, are only the fee payable to Counsel on a Chamber application.

s.

Order accordingly.

SIND JUDICIAL COMMISSIONER'S COURT

Second Appeal No. 34 of 1937

October 19, 1939

DAVIS J. C. AND LOBO, J.

NARUMAL MULOHAND AND OTHERS

—APPELLANTS

versus

RAIS HASHIM RAIS SAHIBDINO AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. I, r. 8—Applicability—Suit by panchayat—All members not on record—Provisions of O. I, r. 8 not invoked—Suit must fail.

Order I, r. 8, Civil P. C., is often referred to as a rule which applies when the suit is brought by a member of the public on behalf of the public or by a member of a particular community on behalf of the community or by a member of a class on behalf of that class.

Where in a suit brought by a *panchayat* all the members of the *panchayat* are not on record, nor has permission under O. I, r. 8 been obtained by those members who are on record to represent the rest of the members who are interested in the suit, the suit must fail. *Mahomed v. Husen* (2) and 143 Ind. Cas. 665 (3), relied on. 127 Ind. Cas. 542 (1), distinguished.

Mr. Dipchand Chandumal, for the Appellants.

Mr. Hukumatrai M. Eidnani, for Respondents. Nos. 6 and 7.

Davis, J. C.—This is an appeal against the judgment of the First Class Subordinate Judge at Sukkur dismissing an appeal against the judgment of the Subordinate Judge of Rohri, who dismissed the plaintiffs' suit on the ground that the suit was one clearly which fell under O. I, r. 8, Civil P. C., that there were numerous persons interested in the suit, namely, the *panchayat* of the village of Kadirpur and the plaintiffs on the record were not properly authorized to represent them. The case of the appellants as put before us is firstly that the suit was in reality brought by plaintiff No. 1 who is a Modi of the *jagir* of which the first 5 five defendants are *haris*, that he advanced to them seeds and money and that in a document signed by them they acknowledged their indebtedness. Further it is said that even if it was the *panchayat* and not the Modi who advanced money to the *haris* and was entitled to get back its money, nevertheless sufficient members of the *panchayat* have been put on the record as plaintiffs and they adequately represent the *panchayat* for the purpose of this suit, and great reliance is placed upon the judgment of the Privy Council in *Bhagvanpuri v. Secretary of State* (1), p. 1517. The document on the record on which the plaintiffs place great reliance and which indeed shows the relationship between the parties recites that there was a disagreement between the Raj Mahajan and the *panchayat*; formerly there was a Modi named Hakumatmal appointed by the Raj Mahajan but the *panchayat* had appointed another Modi named Narumal Mulomal and in consequence there was a dispute and consequent confusion as to the money and seeds advanced by Naru-

(1) 32 Bom. L R 1516 (1517); 127 Ind. Cas. 542; A I R 1930 P C 232; 34 O W N 849; 59 M L J 134; 52 O L J 54; Ind. Rul. (1930) P C 350; 33 L W 129 (P C).

mal and Hakumatmal. The *am mukhtiar* Imam Bakhsh Khan had introduced further complications and it was finally agreed that the *am mukhtiar* should recover and pay Narumal's advances to Narumal and that both the Modis Hakumatmal and Narumal should make the *batai* of the *jagir*. It was agreed thereafter that Narumal the Modi should have no interest in the *batai* of the *jagir* and in future the *jagirdar* would appoint a Modi of his choice.

This settlement was not signed by the Modi, plaintiff Narumal at all: it was signed by plaintiffs Nos. 2 to 5; but it makes it as clear as can be that the Modi Narumal when he sued in this suit for Rs. 220-5-6 and 39 *kharars* and 3 *tokas* and 7½ *darries* of wheat, was not suing as the learned Advocate for the appellants now says, as the village Modi or the village money-lender asking for the return of loans made by him personally to the *haris* of the *jagir*. This agreement to which plaintiffs Nos. 2 to 5 have put their signatures clearly shows that it was the *panchayat* as such which advanced seeds and *takvai* to the *haris* and it was for this reason that plaintiffs Nos. 2 to 5 joined themselves as plaintiffs in the suit and did not leave the matter to plaintiff No. 1, the Modi alone. The *panchayat* as such was interested in this suit; it was they who claimed the money and it is clear that in order that defendants must be bound, all those persons who constitute the *panchayat* or their representatives duly authorized must be upon the record before the suit is properly framed. But all the members of the *panchayat* are not upon the record, nor has the procedure laid down in O. I, r. 8, been followed and therefore we think it is clear that both the learned trial Judge and the learned appellate Judge were right when they come to the conclusion that this was a suit to which O. I, r. 8 applied. The learned Appellate Judge points out that this is not a suit of the kind to which rulings relating to suits by members of the public apply, for it is a suit akin to that brought by an unregistered society or by a club. Order I, r. 8 is often referred to as a rule which applies when the suit is brought by a member of the public on behalf of the public or by a member of a particular community on behalf of the community or by a member of a class on behalf of that class. The words in O. I, r. 8 are perfectly clear and appropriate; they are

"where there are numerous persons having the same interest in one suit, one or more of such persons

may, with the permission of the Court, sue or be sued or may defend....."

and applying those words to this case it is clear that the *panchayat* consists of numerous persons. It consists really of all the elders of this village of Kadirpur, a fluctuating body, varying from time to time, but certainly all the members of the *panchayat* are not upon the record, nor have those upon the record obtained permission under O. I, r. 8 to represent the other members of the *panchayat*, who undoubtedly exist and who are undoubtedly interested in this suit. But, said the learned Advocate for the appellants this is not necessary because there is now a judgment of the Privy Council in *Bhagvanpuri v. Secretary of State* (1), whereby some persons are now allowed to represent others without the application of O. I r. 8, Civil P. C. But reading through that judgment it would appear that their Lordships were of the opinion upon the facts that all those interested in the suit were upon the record. In that case the defendants were elected *mahants* or managers of an *akhara* (*math*) at the Kumbh at Hardwar. These elected managers gave a power of attorney, which was still in force at the time of the proceedings to one Hardayal Girji who was actually managing the *akhara* properties in virtue of this power of attorney.

Therefore it would appear from the facts of that case that the persons entitled to deal with the property of the *math* were the *mahants* or managers and Hardayal Girji, their duly appointed attorney. The learned Advocate for the appellants says that if we accept the argument of the learned Judges in the case now before us then in the Privy Council case it was not sufficient to bring the Managers of the *akhara* upon the record; it was necessary to bring upon the record all those Nangas or naked persons, who at the Kumbh elected the Managers. But the judgment of their Lordships of the Privy Council proceeded upon the basis that the *mahants* were lawfully entitled to manage the *math* property, so that it could be said that all the persons interested were properly upon the record. It cannot be said that the facts of the case in *Bhagvanpuri v. Secretary of State* (1), are in any way comparable with the facts in this case. The facts in this case are clearly more comparable to a case reported in *Mahomed v. Husen* (2), where the suit was brought on behalf of the *panchayat* and the plaintiffs were told to amend their plaint in accordance with

the provisions of O. I. r. 8. There is a recent judgment of the Privy Council in *Kumaravelu Chettiar v. Ramaswami Ayyar* (3), in which this question of representation under O. I. r. 8 is discussed at length. Order I, r. 8, their Lordships point out, forms an exception to the general principle that all persons interested in a suit shall be parties thereto and being an exception to the general law the provisions laid down by O. I. r. 8 must be strictly followed. They have not been followed in this case. We do not see how it can be said that plaintiffs Nos. 2 to 5 were not necessary parties to the suit and that the suit could have proceeded with Narumal the Modi as plaintiff alone, because it is a case of plaintiffs No. 2 to 5 that it was the *panchayat* which was primarily interested; Narumal was the Modi acting under their orders, but advancing and recovering not his own money but the money of the *panchayat*. We think therefore that the learned Judges of both the Courts below were right in their conclusions that this was a case where numerous persons were interested within the meaning of O. I. r. 8, that these persons were not upon the record and no attempts have been made to invoke the provisions of O. I. r. 8. They therefore rightly dismissed the suit and the appeal must be dismissed with costs. Order accordingly.

s. *Appeal dismissed.*

(3) 143 Ind. Cas. 655; AIR 1933 P C 183; 60 I A 278; 56 M 657; Ind. Rul. (1933) P C 176; 57 O L J 528; 37 O W N 853; (1933) M W N 758; 65 M L J 87; 38 L W 16; (1933) A L J 762; 35 Bom. L R 827 (P C).

ODUH CHIEF COURT

Application No. 138 of 1939 and
Civil Miscellaneous Application No. 699
of 1939

January 9, 1940

THOMAS, C J. AND RADHA KRISHNA, J.

SHANTISAROOP AND OTHERS—

APPLICANTS

versus

Haji Sheikh MOHAMMAD

ABDUL HUQ AND ANOTHER—

OPPOSITE PARTY

U. P. Agriculturists' Relief Act (XXVII of 1931), s. 5 (2)—Scope—Court refusing to grant instalments on finding that applicant is not agriculturist—S. 5 (2) applies to such case—Appeal under s. 5 (2) failing—No revision lies.

The words "refuses to grant instalments" in s. 5, U. P. Agri. Relief Act are unqualified. They cover cases of refusal on the ground that the applicant is not an agriculturist or does not fulfil the requirements laid down by s. 8 of the Act. The issue whether the applicant is an agriculturist is not an in-

cidental issue or an issue the decision of which alone would determine the jurisdiction of the Court to grant instalments. The Court passing the decree alone has jurisdiction to convert it into a decree for instalments and where in the exercise of that jurisdiction it has refused to grant instalments on the finding that the applicants are not agriculturists, s. 5 (2) has application to such a case and when an appeal has been preferred under s. 5 (2) the decision of the Appellate Court confirming that of the trial Court is final and no revision lies. 184 Ind. Cas. 768 (1), followed.

App. and C. Mis. App. for revision of the order of the District Judge of Gonda, dated June 7, 1939.

Messrs. R. B. Lal and M. M. Lal, for the Applicants.

Mr. Mohammad Hafeez, for Opposite Party No. 1.

Judgment.—The facts leading up to this revision are that Haji Sheikh Mohammad Abdul Haq, opposite party No. 1 and one Abdullah obtained a decree for possession and mesne profits against Ram Swarup, opposite party No. 2, and the applicants from the Court of the Civil Judge of Bahraich on September 7, 1935. Abdullah assigned his rights under the decree in favour of Sheikh Mohammad Abdul Haq, opposite party No. 1, and he alone now is entitled to execute the decree. The applicants made an application under ss. 5 and 30 of the U. P. Agri. Relief Act praying for instalments and reduction of interest.

The trial Court held that it was not proved that the applicants were agriculturists at the date of the suit, which was instituted on May 18, 1935, and rejected the application.

The applicants went up in appeal before the District Judge. It may be observed here that so far as the dismissal of the relief for reduction of interest under s. 30 of the U. P. Agri. Relief Act was concerned, no appeal was maintainable against it, and therefore, we are no longer concerned with that relief. So far as the relief for the conversion of the decree for instalments is concerned the appeal was maintainable in the Court of the District Judge under cl. (2) of s. 3. The learned District Judge agreed with the trial Court in holding that the applicants could not claim the benefit of the U. P. Agri. Relief Act inasmuch as they had failed to prove that the income-tax paid by them was not in excess of the local rates payable by them and dismissed the appeal.

This is a revision under s. 115 of the Civil P. C. against the order in appeal passed by the learned District Judge.

By s. 5 of the U. P. Agri. Relief Act the decision of the lower Appellate Court has been made final, and by a recent Full Bench case of this Court in *Mahipal Singh v. Kamta Prasad*, 1939 O. W. N. 970 (1) it has been held that the provision in s. 5 (2) of the U. P. Agri. Relief Act making the decision of the Appellate Court final not only debars a further appeal against it but also prevents interference with it in revision so that no revision lies against the order of the learned District Judge refusing instalments under s. 5 of the Act.

The learned Counsel for the applicants has contended that s. 5 of the Act is applicable when it has been decided that the applicant is an agriculturist and that that section does not arise for application in the present case where the two Courts have held that the applicants have not proved themselves to be agriculturists. It is contended that the order of the learned District Judge does not, therefore, fall under cl. (2) of s. 5 of the Act and the Full Bench case is not applicable to it.

Clause (1) of s. 5 lays down that notwithstanding anything contained in the Civil P. O., V of 1908, the Court shall, on the application of the judgment-debtor, direct that any decree for money or preliminary decree for sale or foreclosure passed by it, against an agriculturist, shall be converted into a decree for payment by instalments. The word "agriculturist" is defined in s. 2 (2) of the Act, and for the purposes of applications under Chap. II of the Act, in which s. 5 falls, certain further requirements are laid down by s. 8 which must be fulfilled before a person can be deemed to be an agriculturist for the purposes of that Chapter. The Court which passed the decree has jurisdiction to convert the decree for payment of money into a decree for payment by instalments provided the applicant is an agriculturist. The Court which has got jurisdiction to fix instalments has also jurisdiction to decide with reference to ss. 2 (2) and 8 of the U. P. Agri. Relief Act whether the applicant is an agriculturist or not. If the Court finds that the judgment-debtor is not an agriculturist, then the Court has to refuse the grant of instalments, and if there is a refusal to grant instalments, the order of the Court is appealable to the Court to which the Court passing the decree is immediately subordinate. The words

(1) 1939 O. W. N. 970; 184 Ind. Cas 768; 1939 O. L. R. 655; 12 R. O. 146.

"refuses to grant instalments" are unqualified. They cover cases of refusal on the ground that the applicant is not an agriculturist or does not fulfil the requirements laid down by s. 8 of the Act. The issue whether the applicant is an agriculturist is not an incidental issue or an issue the decision of which alone would determine the jurisdiction of the Court to grant instalments. The Court passing the decree alone had jurisdiction to convert it into a decree for instalments and it is in the exercise of that jurisdiction that it has refused to grant instalments on the finding that the applicants are not agriculturists. The applicants themselves had a recourse to cl. (2) of s. 5 of the Act when they filed their appeal in the Court of the learned District Judge. The contention of the learned Counsel that s. 5 (2) of the U. P. Agri. Relief Act has no application has no force. In our opinion, the Full Bench case referred to above is fully applicable to the present case and the present revision is not maintainable on the view taken in that case.

The result is that the application fails and is dismissed with costs.

As the revision application has been dismissed, Civil Misc. Application No. 699 of 1939 is also rejected and the order dated September 26, 1939, passed thereon is vacated.

s.

Appeal dismissed.

CALCUTTA HIGH COURT

Testamentary Jurisdiction Application

May 1, 1939

SEN, J.

In the Goods of STANLEY
AUSTIN CARDIGAN MARTIN

Civil Procedure Code (Act V of 1908), O. XXXIX, r. 1—Proceeding for grant of letters of administration—Application for injunction restraining certain persons from paying money belonging to estate lying with them, to certain persons—If falls under O. XXXIX, r. 1—Power of Chartered High Court to grant injunction apart from provision of O. XXXIX, r. 1—Provident Funds Act (XIX of 1925), s. 5 (1)—Deceased nominating certain person to receive amount to his credit in Provident Fund—Such sum, if forms part of estate of deceased.

It is clear from the provisions of O. XXXIX, r. 1, Civil P. O. that before an application for injunction can be granted under that Rule the applicant must show that the property with respect to which an injunction is prayed for, is property in dispute in a suit. In a proceeding for the grant of letters of administration it cannot be said that there is any property in dispute. No question regarding title to property can be decided in an application for probate or letters of administra-

tion. An application made in such proceedings for an injunction restraining certain persons from withdrawing certain sums alleged to appertain to the estate of the deceased and restraining various authorities with whom these sums are lying, from paying them out, until the disposal of the application for letters of administration, cannot be brought within the scope of O. XXXIX, r. 1. 27 Ind. Cas. 617 (1), relied on.

Although the application cannot be brought within the scope of O. XXXIX, r. 1, a Chartered High Court is not powerless to grant an injunction otherwise than in accordance with the provisions of O. XXXIX, r. 1 if a proper case is made out. A Chartered High Court, has an inherent jurisdiction to grant injunctions operating *in personam* under circumstances and conditions other than those set out in the Civil P. O., where the ends of a justice so require. *Mungle Chand v. Gopal Ram* (2), relied on.

Where a deceased has nominated certain person as a person to whom the sum standing to his credit in the Railway Provident Fund should be paid, that sum does not form part of the estate of the deceased and it cannot be disposed of by the deceased in his will.

Mr. Sankar Banerjee, for Miss Lumsden.

Mr. Kamal Sarkar, for Leo Martin.

Order.—This is an application for an order restraining certain authorities of the B. N. Ry. from making payments of money lying with them which are alleged to appertain to the estate of one Stanley Austin Cardigan Martin, deceased, and restraining Miss. E. A. Lumsden from withdrawing or receiving payments of the aforesaid money. The facts leading to this application briefly are as follows. Stanley Austin Cardigan Martin was an employee of the B. N. Ry. He died on December 3, 1938 leaving a minor son. The petitioner is the deceased's brother, Leo Joseph Martin. He alleges that Stanley Martin executed a will before his death disposing of all his property. The property consists of the following items: (1) Money lying with the B. N. Ry. employees Mutual Benefit Fund, Kidderpore, Rs. 1,500. (2) Money lying with the B. N. Ry. Mutual Family Death Benefit Fund Ltd., Bilaspur Rs. 2,000. (3) Money lying with the B. N. Ry. being the provident fund, gratuity and unpaid salary, Rs. 25,240-11-0.

The petitioner is one of the legatees under the will and he has applied for the grant of letters of administration with a copy of the will annexed. According to the terms of the will, all the property left by the deceased is given to the mother of the deceased and to the petitioner except a sum of Rs 5,000 which the petitioner is directed to spend for the 'education and

wants of the deceased's minor child Ian Martin.' The petitioner states that Miss Lumsden who is the sister of the deceased wife of the testator is about to withdraw the different sums mentioned above from the B. N. Ry. on the ground that she has been appointed a guardian of the minor and on the ground that the minor has been appointed a nominee to whom these different sums are to be paid on the death of the testator. The petitioner's case is that these sums should be disposed of in accordance with the terms of the will and that there should be an injunction restraining Miss Lumsden from withdrawing these sums and restraining the various authorities with whom these sums are lying, from paying them out, until the disposal of the application for letters of administration. Miss Lumsden opposes this application. The first ground taken on her behalf is that the application is not maintainable at law. Secondly, she says that even if this application is maintainable, no circumstances have been established which would justify the Court in granting the injunction prayed for.

I shall consider first the question regarding the maintainability of this application. I have no doubt that this application is not one which can be made under O. XXXIX, Civil P. O. It is clear from the provisions of O. XXXIX, r. 1 that before an application for injunction can be granted under that rule the applicant must show that the property with respect to which an injunction is prayed for is property in dispute in a suit. Now, this application has been made in a proceeding for the grant of letters of administration. In such a proceeding, it cannot be said that there is any property in dispute. No question regarding title to property can be decided in an application, for probate or letters of administration. This principle has been affirmed in a large number of cases of this Court. There is thus no property in dispute in the application for letters of administration out of which the present application arises. The application for injunction, therefore, is not one which can be brought within the scope of O. XXXIX, r. 1. I am supported in this view by the decision of this Court in *Nirode Barani Debi v. Chamalkarini Debi* (1).

Although the application cannot be brought within the scope of O. XXXIX,

(1) 19 Q W N 205; 27 Ind. Cas. 617; A I R 1915 Cal. 565.

r. 1, this Court is not powerless to grant an injunction otherwise than in accordance with the provisions of O. XXXIX, r. 1 if a proper case is made out. It has been held that this Court, being a Chartered High Court, has an inherent jurisdiction to grant injunctions operating in personam under circumstances and conditions other than those set out in the Civil P. O., where the ends of justice so require: *vide Mungle Chand v. Gopal Ram* (2). Bearing this in mind, I propose to examine whether the applicant has made out a good case which would justify me in exercising this inherent jurisdiction. It has been proved from the affidavits and the correspondence that out of the sum of Rs. 25,240-11-0 confined in the third item of property a sum of Rs. 19,600 is lying to the credit of the deceased in the Provident Fund of the B. N. Railway. This sum is accepted by learned Counsel for both sides as being correct. Now this amount is affected by the provisions of the Provident Funds Act (Act XIX of 1925). Section 5 (1) of this Act states that notwithstanding any disposition, whether testamentary or otherwise by a subscriber to a Railway Provident Fund of the sum standing to his credit in the Fund or any part thereof, any nomination duly made in accordance with the rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber, shall be deemed to confer such right absolutely until such nomination is varied by another nomination or is expressly cancelled by the subscriber. It is admitted that the deceased nominated his son Ian Martin as being the person to whom the sum should be paid. That being so, the disposition by the testator in his will cannot affect this sum. The railway authorities have written that they will not pay this sum to anybody until a proper guardian is appointed by the Court of the minor, Ian Martin and that they propose to pay this sum to such guardian. In my opinion, this sum of Rs. 19,600 does not form part of the estate of the deceased and it cannot be disposed of by the deceased in his will. That being so, there should be no injunction with respect to this amount.

As regards the other sums of money lying with the B. N. Railway Employees Mutual Benefit Fund, Kidderpore, and the B. N. Railway Mutual Family Death Benefit Fund Ltd., Bilaspur, and as regards

(2) 34 C 101.

the balance of the money lying with the B. N. Railway as gratuity and unpaid salary, there is a substantial question involved regarding whether these sums form the assets of the deceased's estate or whether they are the property of the minor son of the deceased irrespective of the will alleged to have been executed by the deceased. The deceased appointed his son as his nominee to receive the amount lying to his credit in the Mutual Benefit Fund and the Mutual Family Death Benefit Fund. But whether this nomination would prevail against the administrator or executor of the estate of the deceased is a question of some difficulty and it will have to be decided in proper proceedings for that purpose. I do not express my opinion one way or the other on this point. Further, it is pointed out on behalf of Miss Lumsden that she will challenge the validity of the will. In these circumstances I think that it is essential that no one should be permitted to receive these sums until the question of the validity of the will and the representation to the estate of the deceased is decided. I think this is a fit case in which the inherent jurisdiction of the Court to grant an injunction should be exercised. I accordingly direct that Miss Lumsden be restrained from withdrawing these sums, that is to say from withdrawing any of the aforesaid sums other than the sum of Rs. 19,600 till the final disposal of the application for the grant of letters of administration or until further orders.

The Secretaries of the B. N. Railway Employees Mutual Benefit Fund, Kidderpore and of the B. N. Railway Mutual Family Death Benefit Fund Ltd., Bilaspur, and the Chief Auditor of the B. N. Railway, Kidderpore, are also hereby restrained from making any payment of any of the aforesaid sums other than the sum of Rs. 19,600 mentioned above to any person till the final disposal of this application for letters of administration or until further orders. There is no order of injunction restraining any one from receiving or paying the sum of Rs. 19,600. In the circumstances of this case I consider that the costs of all parties to this application do come out of the estate.

s.

Order accordingly.

OUDH CHIEF COURT

Second Civil Appeal No. 197 of 1938

March 14, 1940

RADHA KRISHNA, J.

MATHURA PRASAD AND OTHERS—

DEFENDANTS—APPELLANTS

versus

SITA RAM AND OTHERS—PLAINTIFFS

—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (u), O. XLI, r. 23—Order held one under O. XLI, r. 23 and appealable—Oaths Act (X of 1873), s. 9—“Party”, if includes his agent and duly authorised Pleader.

Where the operative portion of the appellate order is “I set aside the judgment and decree of the lower Court and allow the appeal of plaintiff No. 3 with costs. The case will be sent back and retried according to law from the stage where it has been left by the learned Munsif,” the order is an order of remand contemplated by O. XLI, r. 23 of the Civil P. C., and an appeal lies against such order under O. XLIII, r. 1 (u). [p. 889, col. 2.]

In s. 9, Oaths Act, the expression “any party to any judicial proceeding” must be interpreted as including the Counsel or agent duly authorised representing him in the case. 114 Ind. Cas. 759 (1), relied on, *Sadashiv Rayaji v. Maruti Vithal* (2), not followed. [p. 891, col. 1.]

If a Pleader is authorised by the *vakalatnama* in his favour to do all proper *patra* in the case and to represent his client in a litigation and to present all sorts of applications which may become necessary, even though no express power to compromise the case on his behalf may have been conferred upon the Pleader, still the Pleader being a duly authorised person to represent the client would be fully entitled to bind the client by offering to abide by the special oath of the opposite party. For the purposes of s. 9 all that is necessary is that the Pleader or the agent should be considered a duly authorised agent on behalf of his party to conduct the case. [p. 891, col. 2.]

Obiter.—Apart from the written authority pointed out above, a Counsel appearing in a case from the very nature of his duties and for the purpose of a proper conduct of the case must be deemed to have implied authority to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witnesses and do such other acts which are required for the proper management and conduct of the trial.

Held, that the *vakalatnama* authorised the Pleader to do all that he considered necessary for the conduct of the case on behalf of his clients. [p. 891, col. 2.]

S. O. A. against the order of the First Civil Judge of Bahraich, dated May 30, 1938.

Mr. B. P. Misra, for the Appellants.

Mr. Hyder Husain, for the Respondents.

Judgment.—This second appeal has been filed by defendants-appellants against an order dated May 30, 1938, passed by Mr. Gauri Shankar Varma, First Civil Judge of Bahraich, reversing the judgment and decree of Shaikh Mohammad Ahmad, Munsif, Qaisarganj, district Bahraich, and the operative portion of

the order is to the following effect :—

“I set aside the judgment and decree of the lower Court and allow the appeal of plaintiff No. 3 with costs. The case will be sent back and retried according to law from the stage where it has been left by the learned Munsif.”

The appellants have described their appeal as a second appeal against the judgment and decree passed by Mr. Gauri Shankar Varma. Obviously, the lower Appellate Court did not pass any decree in the case and so no second appeal is maintainable. The force of this objection was realised by the learned Counsel for the appellants at a very early stage of his arguments and he prayed that the appeal, which is styled as a second civil appeal, may be treated as a miscellaneous appeal under O. XLIII, r. 1 (u) of the Civil P. C. Order XLIII, r. 1 (u) runs as follows :—

(1) An appeal shall lie from the following orders under the provisions of s. 104 namely (u) an order under r. 23 of O. XLI, remanding a case, where an appeal would lie from the decree of the Appellate Court ;”

Order XLI, r. 23 of the Civil P. C., runs as follows :—

“Where an Appellate Court has reversed a decree and all questions arising in the case have not been decided, it may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suits ; and the evidence (if any) recorded during the original trial shall, subject to all just executions, be evidence during the trial after remand.”

The question is whether the order passed by the lower Appellate Court falls within the order contemplated by r. 23 of O. XLI of the Civil P. C. On the facts of the case, which will be related presently, there is no doubt that the order under appeal is an order of remand contemplated by O. XLI, r. 23 of the Civil P. C. The conditions of r. 1 (u) of O. XLIII of the Civil P. C., are, therefore, satisfied, and I grant leave to the appellants to make the necessary modifications in the memorandum of appeal in the description of the appeal.

The facts of the case are that the three plaintiffs respondents filed a suit for possession of a grove as mortgagees under a deed of mortgage dated the November 29, 1893, executed by one Bishun. The two defendants are the sons of *Mst. Patan Dei*, defendant No. 3. Bishun died childless and the three defendants are alleged to be the only reversioners of Bishun.

The defendants denied the mortgage and pleaded that it was void on several grounds. They also pleaded that the plaintiffs had never been in possession as mortgagees and that their claim was barred by time.

The trial Court framed the following eight issues:—

(1) Was the mortgage-deed in suit duly executed and attested?

(2) Is the mortgage deed void and ineffective under s. 52 of the T. P. Act?

(3) Was the mortgage deed in suit executed under undue influence and fraud as alleged in para. 11 of the written statement?

(4) Have defendants Nos. 1 to 3 any paramount title in the property in suit as alleged by them? If so, to what effect?

(5) Is the suit barred by limitation?

(6) Was the judgment and decree of the Court passed on the basis of the compromise (Ex. 5) never given effect to as alleged by the defendants? If so, to what effect?

(7) To what reliefs, if any, are the plaintiffs entitled?

(8) Is the court-fee paid insufficient?

The plaintiffs finished their oral evidence and closed their evidence, except perhaps for rebuttal, on February 14, 1938. The defendants' evidence was fixed for the same date. They prayed for the examination of the village *patwari* and other witnesses on some other date. The plaintiffs' Counsel lodged a protest to the effect that the *patwari* was an important witness and piecemeal examination of oral evidence would result in great prejudice to them. The defendants were allowed to examine the *patwari* on March 3, 1938. On March 3, 1938, the plaintiffs Nos. 1 and 2 were present in person and the plaintiff No. 3 was absent. Mr. Kaul, who appeared for all the plaintiffs, was present. The defendants' Counsel stated his case and proposed to examine seven witnesses. At that stage a joint application was put in signed by the parties present in Court and by the Counsel of the parties agreeing to withdraw their respective pleas in this case and agreeing further to undertake to abide by the oath of *Mst. Patan Dei*, defendant No. 3, in accordance with the terms contained in the application. The application was verified by the plaintiffs Nos. 1 and 2 and defendants Nos. 1 and 2 in person. March 5, 1938, was fixed for the special oath by *Mst. Patan Dei*. On March 5, 1938 Mr. T. Kaul with plaintiffs Nos. 1, 2 and 3 appeared and expressed his desire to

resile from the offer of special oath on behalf of the plaintiff No. 3. This application was vehemently opposed by the defendants. The learned Munsif dismissed this application by a well-considered judgment dated March 5 1938. The order of the learned Munsif I must say discloses a firm grasp of the points of law involved in the decision of the application on behalf of the plaintiff No. 3 and is a well considered order. He rejected the application of plaintiff No. 3 to be permitted to resile from the offer. As a result, the oath was taken and the plaintiffs' suit in accordance with the oath taken was dismissed with costs.

This decree of the learned Munsif was reversed on appeal. Here I may advert to state that the suit had been disposed of by the trial Court on a preliminary point and that decree was reversed in appeal. The order of remand by the lower Appellate Court for a decision of the case on merits falls under an order of remand described in O. XLI, r. 23 of the Civil P. C., and such an order is appealable under O. XLIII, r. 1 (u) of the Civil P. C., as I have stated above.

Against the order of remand passed by the lower Appellate Court the defendants have come up in appeal. The learned Counsel for the appellants challenges the order passed by the Court below that the learned Judge has relied in support of his view on cases which have absolutely no application to the case and that he has ignored entirely the provisions of ss. 8 and 9 of the Indian Oaths Act (X of 1873). It is further contended that the learned Judge has omitted from consideration cases decided by this Court which are fully applicable to the case.

The contention of the learned Counsel for the appellants is that the word "party" in ss. 8 and 9 of the Indian Oaths Act covers "duly acknowledged agents of a party" also. From the judgment of the Court below it appears that these sections were not taken into consideration at all. I have heard the learned Counsel for the parties at considerable length and a large number of cases have been cited before me. The argument in the case has proceeded mainly upon the interpretation to be placed upon the words "any party to any judicial proceeding" in s. 9. It was further argued that a Counsel engaged to conduct the case on behalf of a party to the case has a general power to do such acts as he thinks are essential for the proper con-

duct of the case and that the Court below should have held in agreement with the trial Court that the act of Mr. Kaul agreeing to abide by the special oath of a person was binding upon his client, i. e., the plaintiff No. 3. Sections 8 and 9 of the Indian Oaths Act may be reproduced here :—

"8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst or held binding by, persons of the race, or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in s. 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation :

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question."

In s. 9 reproduced above the expression "any party to any judicial proceeding" must be interpreted as including the Counsel representing him in the case. I may on this point cite a few cases decided by this Court :—

Amir v. Mohammad Bakhsh (5 O. W. N. 1070) (1). In this case it was held that the word "party" in s. 9 of the Indian Oaths Act (X of 1873) includes a duly authorised representative and a duly authorised Pleader is entitled to make an offer on behalf of his client to be bound by an oath. In this case an earlier case of Bombay High Court in *Sadashiv Rayaji v. Maruti Vithal*, I. L. R. 14 Bombay, 455 (2) was dissented from. It would appear from the report that the Counsel who had agreed to abide by special oath of another party had a *vakalatnama* in his favour, of which the terms are embodied in this judgment. The *vakalatnama* gave the Counsel authority to file compromises and confessions of judgment on their clients' behalf. It gave authority to the Counsel to submit the dispute to arbitration and ended up with the following words :

"We accept all acts done and everything executed by our Pleader and approve of them. They will be considered as done by ourselves."

On the language of this *vakalatnama* as quoted above, it was held that the powers given by it to the Pleader were very wide and general, and if the

(1) 5 O W N 1070; 114 Ind. Cas. 759; A I R 1929 Oudh 56; Ind. Rul. (1929) Oudh 167.

(2) 14 B 455.

Pleader made an offer on behalf of his client to be bound by an oath, the offer was binding on the client.

The next case is *Jasoda v. Gopal*, (8 Oudh Weekly Notes, 880) (3). In this case the former case, i. e., 5 Oudh Weekly Notes, p. 1070 (1), has been followed.

I have had a translation of the *vakalatnama* of Mr. Triloki Nath Kaul prepared by the office and it has been put on the record. The relevant portion in question is as follows :—

"..... do hereby agree that whatever replies and defence, filing of plaint or written statements, under their signatures, or filing of an application for execution of decree, or obtaining copies for inspection, in short filing of applications of every description under their signatures, on our behalf, or filing of any document or getting it back, or receiving of decretal amounts on our behalf, under a receipt signed by them, or filing of appeal under their signatures to a competent Court and doing *pairvi* in it, or appointing any other Counsel on a further fee through a *vakalatnama*, under their signature, or through a memorandum for conducting the suit, all that we the declarants, accept and will admit as if done by us personally."

From the above it appears that the persons who gave this *vakalatnama* agreed to abide by whatever application was made over the signature of the Counsel. They further bound themselves by the replies and defence, filing of plaint and written statements under the signature of the Counsel as on their behalf. In my opinion this *vakalatnama* authorised Mr. Kaul to do all that he considered necessary for the conduct of the case on behalf of his clients.

I entertain the opinion that if a Pleader is authorised by the *vakalatnama* in his favour to do all proper *pairvi* in the case and to represent his client in a litigation and to present all sorts of applications which may become necessary, even though no express power to compromise the case on his behalf may have been conferred upon the Pleader, still the Pleader being a duly authorised person to represent the client would be fully entitled to bind the client by offering to abide by the special oath of the opposite party. For the purposes of s. 9 all that is necessary is that the Pleader or the agent should be considered a duly authorised agent on behalf of his party to conduct the case.

Apart from the written authority pointed out above, it has been held in several cases that a Counsel appearing in a case from the very nature of his duties and for the purpose of a proper conduct of the case must be deemed to have implied authority

(3) 8 O W N 880; 136 Ind. Cas. 246; A I R 1931 Oudh 350; Ind. Rul. (1932) Oudh 102.

to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witnesses and do such other acts, which are required for the proper management and conduct of the trial.

The learned Munsif after describing the circumstances of the present case came to the conclusion that on the facts of the case Mr. Kaul must have thought that abiding by the special oath of *Mst. Patan Dei* was the best act to do on behalf of his clients. I have no hesitation therefore, in holding that for the purposes of s. 9 of the Indian Oaths Act, if the offer is made by a Counsel on behalf of a party, it is not necessary that the Counsel should be specifically authorised to make such an offer or, to compromise the case generally. It is enough if he has been duly authorised to conduct the case generally on behalf of his client. The action of such a Counsel in whose favour no such authority to make an offer exists may further be upheld on the ground that he has such an implied power. On the view expressed above I must hold that the offer made by Mr. Kaul, Counsel on behalf of the plaintiff No. 3, was a good offer and binding on the plaintiff No. 3. In this view it is not necessary to consider other points that were argued by the learned Counsel for the parties, but as a large number of cases were cited during arguments I would like to express my views as regards them.

The Court below has relied upon *Tumman Singh v. Sheodardshan Singh*, (A. I. R. 1930, Allahabad, p. 162) (4) and *Rup Singh Nayal v. Mrs. Arjun Sen*, (A. I. R. 1935 Allahabad, 276) (5). In both these cases the question that is involved in the decision of the present appeal was not decided. The only point that was considered was whether it was open to the offerer of special oath to resile from his offer or not. The case-law on the point is not one sided. There are some cases in which it has been held that if an offerer resiles before an oath is actually taken, then he can do so without assigning any reason for doing that. In other cases it has been held that an offerer cannot resile except for good reasons. The two cases mentioned above discuss the same question, and the point which was raised in *Amir v. Muhamad Baksh*, (5 O. W. N. 1070) (1), was not

considered by the above Allahabad cases. In the Allahabad High Court the decision in *Wasi-us-Zaman Khan v. Faiza Bibi*, (I. L. R. 38 Allahabad, 131) (6), is quite parallel to the cases of this Court, e. g., (5 O. W. N. 1070) (1) and (8 O. W. N. 880) (3). These cases were considered in a recent case of the Madras High Court in *Valli Ammal v. Arunachala Moopanar* (A. I. R. 1938 Madras, 385) (7), and the ground of distinction, which I have pointed out above, was very clearly noted.

Jadu Sahu v. Chamra Sahu, (A. I. R. 1939 Patna, 222) (8), is the most recent case on the point. In this case it was held that where in a suit an application is filed on behalf of the defendants to the effect that if the plaintiff takes special oath and makes a statement regarding certain items of property claimed by the defendants, the same would be binding on the defendants and such an application is signed by some of the defendants and also by the Pleader appearing on behalf of all the defendants, and the Pleader adds the words "for the defendants" after his signature, any statement made by the plaintiff in pursuance of the application would be binding even on the defendants who may not have signed the application because in the absence of any qualifying words that the Pleader is signing only on behalf of the defendants who have signed, the Pleader will be deemed to have signed on behalf of all the defendants for whom he is appearing.

One strong comment against the application of *Amir v. Mohammad Baksh*, (5 O. W. N. 1070) (1) and *Jasoda v. Gopal* (8 O. W. N. 880) (3), and *Jadu Sahu v. Chamra Sahu*, (A. I. R. 1939 Patna, 222) (8), to the facts of the present case, made by the learned Counsel for the respondent, is that in all these cases the Counsel had an express authority to compromise the case, while in the case before me no such power was given, and on the other hand, the powers of the Counsel in the present case were limited. I have reproduced the *vakalatnama* in the present case above, and my reading of the *vakalatnama* is that the Counsel was given very wide powers and he could do many more acts on behalf of his clients than merely compromising the case. The power to file any kind of application by his signature on behalf of his clients is

(6) 38 A 131; 32 Ind. Cas. 348; 14 A L J 38.

(7) A I R 1938 Mad. 385; 182 Ind. Cas. 926; (1938) M. W. N. 110; (1938) 1 M L J 368; 47 L W 453; 12 R M 172.

(8) A I R 1939 Pat. 222; 187 Ind. Cas. 791; 20 P L T 131; 12 R P 69; 5 B R 327.

(4) A I R 1930 All. 162; 122 Ind. Cas. 186; Ind. Rul. (1930) All. 218; (1930) A L J 397; 52 A. 235.

(5) A I R 1935 All. 276; 153 Ind. Cas. 686; 7 R A 565; (1935) A L J 212.

a power of very wide scope, and I am of opinion that the scheme of the *vakalat-nama* in the present case conferred upon Mr. Kaul wide powers including the power to offer to abide by the special oath.

In *Wasi-us-Zaman Khan v. Faiza Bibi*, (I. L. R. 38 Allahabad, 131) (6), a lady had authorised her husband to compromise or withdraw the suit, to refer it to arbitration and to nominate arbitrators and finally the plaintiff said that every step that he might take in the conduct of the case was to be considered as having been taken by herself. It was held that the husband had power to take action under ss. 8, 9 and 10 of the Indian Oaths Act.

Disagreeing with the view of the lower Appellate Court, I hold that the decision given by the trial Court was quite correct. The result is that the appeal is allowed and the order passed by the Court below is set aside and the plaintiffs' suit is dismissed, with costs throughout.

D.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT

Reference No. 16 of 1937

March 24, 1939

DAVIS, J. C. AND TYABJI, J.

COMMISSIONER OF INCOME-TAX,
BOMBAY PRESIDENCY, SIND AND ADEN

—APPLICANT

versus

NARAINDAS & Co. LTD. (FIRM)—ASSEESSEE
—OPONENTS.

Income Tax Act (XI of 1922), ss. 26 (2), 66 (3), (2) (6)—Business transferred being agency business, whether excludes application of s. 26 — Assessee firm held could be taxed as successor — Costs payable by assessee, whether should be paid from or limited to Rs. 100 deposited under s. 66 (2)—Discretion of Court in the matter.

The facts that the business transferred is an agency business cannot, always be decisive to exclude the application of s. 26, Income Tax Act, because many businesses sell as agents the goods of others.

A certain motor company terminated in December 1930 an agency for sale of its cars given by it to another firm A, and gave it to the assessee firm from January 1931. On January 22, 1931, A sold to the assessee all its business as a going concern and the assessee firm took charge of the business and buildings as a going concern as its vendor went out. There was thus continuity and identity:

Held, that the assessee firm could be taxed as a successor of firm A within the meaning of s. 26 (2) of the Income Tax Act.

[Case-law relied on.]

Under s. 66 (6), Income Tax Act, costs are in Court's discretion. The deposit is returnable under proviso 2 to s. 66 (2) in certain circumstances. There is however no provision in the Act that costs payable by an assessee should be paid from or limited to the Rs. 100 deposited under s. 66 (2). Rupees 100 in s. 66 (2) is referred to as a fee.

Ref. made by the Commissioner of Income-tax, Bombay Presidency, Sind and Aden, dated February 4, 1937.

Mr. Partabrai D. Punwani, Advocate-General, for the Applicant.

Mr. Srikishindas H. Lulla, for the Opponents.

Davis, J. C.—This is a statement of a case to this Court in its High Court jurisdiction under s. 66 (3), Income Tax Act, by the Commissioner of Income-tax for Bombay and Sind in the matter of the assessment for the financial year 1931-32, of the assessee, Messrs. Naraindas & Co., Ltd. The question of law arising is:

"Whether in the circumstances of the case, the assessee company has been correctly taxed as successor to the Auto Car Sales Company of Jullunder within the meaning of s. 26 (2), Income Tax Act, 1922."

The learned Commissioner has assisted us with his opinion that the question should be answered in the affirmative. Now, the facts of the case are that the assessee company was the agent for General Motors (India) Ltd., in the Lahore area for the sale of its cars, and took over from a firm called the Auto Car Sales Company, the agency for General Motors (India) Ltd., which the Auto Car Sales Company held in the Jullunder, Ludhiana and Hoshiarpur areas. General Motors terminated Auto Car Sales' contract in December 1930, and granted the agency to the assessee company in January 1931. So far, it might be said there was no succession by the assessee company to Auto Car Sales within the meaning of s. 26 (2), Income Tax Act, and the ruling of this Court in *Tolaram Ramdas v. Commissioner of Income-tax, Bombay Presidency and Aden* (1). All that happened was that Auto Car Sales ceased to be the agents for General Motors for a particular area and the assessee company became the agents of General Motors for that area. Auto Car Sales did not sell their business to the assessee company. General Motors merely transferred their agency from the one to the other. The business of Auto Car Sales merely ceased to exist or was carried on elsewhere. But this interpretation of the case leaves out of account the fact that by a deed dated January 22, 1931 Auto Car Sales sold to the assessee company for the sum of one lac and sixty five thousand rupees what can only be described as their business. This is a large sum of money, and obviously would not be given except for something of value. What that is, is set

(1) 32 S L R 203; 173 Ind. Cas. 786; A I R 1938 Sind 33; 10 R S 227.

out in the deed in the following terms :

".... in consideration of the sale price of our all and single rights and ownership, lease-holders, agreement, goodwills, franchisees, contracts, assets, stocks-in-trade, accessories, spare parts, tyres, oil, petrol, furniture, fixtures, tools and machinery, new motor vehicles, about 30 second hand vehicles, building material of our Jullunder and Hoshiarpur buildings along with the lessee's rights and benefits pertaining to both these buildings debts due to us or our joint firm from third persons including bills for collection, petrol bills loans and pronotes, hire purchase account and outstandings at our Hoshiarpur Branch. And these have already been sold and transferred and possession delivered by us to the said Messrs. Naraindas & Co., Ltd.

All the account books, cash books, day books, ledgers, stock-books, agreements, correspondence, pronotes, *hundis*, and all other documents relating to the abovesaid items of sale have ere now been handed over to them with powers and rights to deal with these items and realize them as rightful transferor from us. The lists of all the debts due to us and other articles delivered have also been handed over duly signed by us."

It is true that the deed is dated January 22, 1931, and the agency terminated on January 1, 1931, but that interval of time is too short to matter. It is also clear from the very words of the deed that there was here something more than a mere transfer of an agency from one firm to another at the volition of a third party. All the essentials of the business as a going concern were sold. The fact that the vendors held themselves liable for the due payment of debts they owed to others, appears to us in no way sufficient to alter the essential nature of the transaction which was the transference of a business as a going concern from one firm to another, their successors.

Mr. Lulla for the assessee contends that there was not here the sale of a business but the sale of the assets of a business, and that the case of this Court in *Tolaram Ramdas v. Commissioner of Income-tax, Bombay Presidency and Aden* (1) completely covers this case. But that case must be kept to its own particular facts. The facts that the business transferred is an agency business cannot, in our opinion, always be decisive to exclude the application of s. 26, Income Tax Act, because many businesses sell as agents the goods of others. It is a matter of common knowledge that famous makes of cars have as their selling agents certain firms who have the right to sell these special makes and the duty not to sell others; and most businessmen would, we think, be of the opinion that the advantage in business of this kind is not all on one side, the side of the makers of the cars, for as good agents want good makes of cars, so makers of good cars want good agents.

One agent may by his skill, energy and enterprise build up a big business on the sale of a particular maker's car another agent in the same district with the same opportunities may fail. We do not think therefore that it can be said that in the transfer of an agency business the goodwill of the transferors must necessarily amount to nothing, that the name of the principal is everything. But where one firm merely gives up an agency which is given to another, and the matter there ends, there is of course no question of the successor to a business within the meaning of s. 26 (2) and this is, we think, how the case of *pfaff's machines* was regarded in *Tolaram Ramdas v. Commissioner of Income-tax Bombay Presidency and Aden* (1). That case was regarded as a case wherein the agency was taken from one firm and given to another. In this case however the agency rights of General Motors are not specifically mentioned in the deed and are not expressly sold by Auto Car Sales as they could not sell what was not theirs. The word "franchisees" may or may not be taken to include these rights, but we think it matters not. That is but one item in the sale by Auto Car Sales. What is sold is a business in motor cars as a going concern. The buildings and the lessees' rights were sold with goodwill, contracts, assets, stock-in-trade, spare parts, tyres, new and second hand vehicle, accounts, bills, pronotes, hire purchase, accounts and outstandings. In short, all that of which a business of this kind could be reasonably said to exist, was sold and the assessee company went into the buildings and took charge of the business as a going concern as Auto Car Sales went out. There was continuity and identity. This question of succession is dealt with by Rowlatt, J., in an oft-quoted passage in *Shipstone v. Morris* (2), and is referred to in a comparatively recent case by Finlay, J., in *Wild v. Madame Tusaud's* (3), where part of Rowlat, J.'s judgment in another case, *Ogston v. Reynolds* (4) at pp. 523-524, is cited in the following passage :

"In this case I am of opinion that I cannot interfere with the decision of the Commissioners. I should like again to advert to the consideration which I drew attention to in *Shipstone v. Morris* (2), namely that this provision as regards successors is designed merely with a view to preserve in a proper case where there is a succession a measure upon which the successor may be assessed in the first year of his proprietorship of the business, and that, as I pointed out, is at the root of the necessity

(2) (1929) 14 Tax. Cas. 413.

(3) (1933) 17 Tax. Cas. 127.

(4) (1930) 15 Tax. Cas. 501 (523-524).

for there being a real continuity of the business. You want to measure the income of the successor by the past history of the business; it is therefore essential that there should be a very close identity between the business in the former proprietorship and the business in the present proprietorship. Now, in the present case what troubled me at first was that the Commissioners in deciding the case, being of course primarily a question of fact, have stated that they hold that the company did not purchase a business formerly carried on, but only certain assets. Now, if that had meant that because they did not purchase all the assets, therefore there was no succession, I think that would be wrong in law. It is not easy to believe that the Commissioners should think that or say it. I do not think that is what they have done. What they say is: They did not purchase the business; it is true that they purchased some of the assets; but that is all they did. That is what I think the Commissioners intended. Now, is that a view to which they could properly come? That went to the Court of Appeal: the Master of the Rolls discusses the matter and he says quite definitely that, in his view, it is a question of fact for the decision of the Commissioners. Greer, L.J. gives a judgment to which I will refer, because the Solicitor-General quite naturally placed much reliance on it. He said: 'I think the question of succession involves, or may involve, the question as to whether there has been a long enough gap between the former business and the business which is supposed to have succeeded to it. It might well be that if there was a bankruptcy and within a week the whole of the assets were sold to the new firm, and the new firm then started to carry it on, that would not be a sufficient gap to prevent a succession happening. But, on the other hand, it might well be that in another case the bankruptcy continued for 12 months before the sale took place, and I should think if the gap was as long as 12 months then it would be quite certain that it could not be regarded as a succession in the hands of the purchaser of the assets even if it were a purchase of the whole of the assets. For intermediate periods of time the question must be a question of fact.'

That passage, I think, answers Mr. Lulla's argument that there was here only a sale of some assets of the business and not a succession and that the gap of 21 days between the transfer of the agency on January 1, and the execution of the said deed on January 22, 1931 destroyed that continuity and identity in the business which is necessary if there is to be a succession within the meaning of s. 26 (2), Income Tax Act. In fact, it would appear from the deed itself that on January 22, 1931 possession had been already given but though transfer of the agency was undoubtedly the cause of the transfer of the business, we hold that there was here a business, as part from or including the agency it matters not, which was succeeded to. The date of January 1, 1931 does not therefore finally conclude the case in the assessee company's favour.

We have been referred to two other cases, *Kanniappa Nicker & Co. v. Commissioner*

of *Income tax, Madras* (5) and *Maharaja-dhiraj of Darbhanga v. Commissioner of Income-tax* (6), but neither of these cases in our opinion assists the assessee. We think therefore the question raised must be answered in the affirmative. Lastly, Mr. Lulla asks that we should make an order that the costs be limited to the Rs. 100 deposited as the assessee was bound to deposit it under s. 66 (2) of the Act. Under s. 66 (6), Income Tax Act, costs are in our discretion. The deposit is returnable under proviso 2 to s. 66 (2) in certain circumstances. There is however no provision in the Act that costs payable by an assessee should be paid from or limited to that sum. Rupees 100 in s. 65 (2) is referred to as a fee. The question of costs in proceedings of this nature is to be fully argued in another case and the assessee may have liberty to apply to the Court hereafter for an order giving directions as to costs. We therefore now make no order as to costs which order we will make hereafter.

D. Answered in affirmative.

(5) (1937) 1 M L J 819; 168 Ind. Cas. 13; A I R 1937 Mad. 316; I L R (1937) Mad. 814; 45 L W 333; 9 R M 535; (1937) M W N 650 (S B).

(6) 12 Pat. 5; 144 Ind. Cas. 354; A I R 1933 Pat. 123; 14 P L T 171; Ind. Rul. (1933) Pat. 232.

CALCUTTA HIGH COURT

Appeal No. 169 of 1939

August 15, 1939.

NASIM ALI AND NARSING RAU, JJ.,
FIRM GANESHDAS BADRINARAIN

—DEBTEE—HOLDER—APPELLANT

versus

AMULUK CHAND OSWAL—

JUDGMENT-DEBTEE—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 39, 47—Transferee Court contemplated by s. 39—Objection to ex parte order, if can be raised under s. 47—Order overruling such objection—Appealability.

There is no express provision in s. 39, cl. (4) Civil P. O., that the transferee Court may be a Court of any pecuniary jurisdiction. The transferee Court contemplated by s. 39 must be therefore a Court of competent jurisdiction, that is, a Court which has the same pecuniary jurisdiction as the transferor Court. *Durga Charan Mojumdar v. Umatara Gupta* (1) and 6 Ind. Cas. 97 (2), relied on.

A judgment-debtor can raise an objection to the *ex parte* order of transfer under s. 47, Civil P. O. This objection is an objection relating to the execution of the decree as it is an objection relating to the first step in execution. An order overruling such an objection is one under s. 47 and is appealable. The Appellate Court has therefore to set aside the order.

A. from appellate order of the District Judge, Assam Valley District, dated June 21, 1939.

Messrs. Gopendra Nath Das and Indir Chandra Ghose, for the Appellant.

Mr. Binayak Nath Banerjee, for the Respondent.

Nasim Ali, J.—This is an appeal against the order of the District Judge, Assam Valley Districts, dated June 21, 1939, reversing an order of the Special Subordinate Judge of the same district made on March 23, 1939. The appellant obtained a money decree against the respondent in the Court of the Special Subordinate Judge on March 19, 1927. He applied for transfer of this decree for execution to the Presidency Small Cause Court, Calcutta, on February 9, 1939. On February 10, 1939, the Subordinate Judge issued the necessary certificate of non-satisfaction of decree to the Court of Small Causes, Calcutta, for execution and transferred the decree to that Court without giving any notice to the judgment-debtor. Thereafter the Small Cause Court arrested the judgment-debtor in execution of the decree. On March 23, 1939, the judgment-debtor made an application before the Subordinate Judge, Assam Valley Districts, who made the order for transfer for recalling the said order. The learned Subordinate Judge refused this prayer of the judgment-debtor. The latter thereupon appealed to the District Judge. The learned District Judge allowed the appeal and recalled the order of transfer made by the Subordinate Judge. Hence this appeal to this Court.

The first point urged by Mr. Das in support of this appeal is that the learned District Judge was wrong in recalling the order inasmuch as the order was good in law though it was made *ex parte*. The learned District Judge has found that the order of transfer was bad in law inasmuch as the decree was above Rs. 2,000 and the Small Cause Court, Calcutta, has no power to execute decrees exceeding Rs. 2,000. Mr. Das' contention is that the view taken by the learned District Judge is wrong inasmuch as there is no limitation as regards the pecuniary jurisdiction in cases coming under s. 39, cl. (i), Civil P. C. His argument is that cl. (ii) of the said Section expressly refers to the jurisdiction of the Court, but cl. (i) does not mention anything about the competency of the Court. The opening words of cl. (i) of s. 39 are in these terms:

"The Court which passed [a] decree may, on the application of the decree-holder, send it for execution to another Court."

It was argued by Mr. Das that the expression "another Court" includes Court of any jurisdiction, *viz.*, that of a Munsif or a Subordinate Judge and consequently a

decree passed by a Subordinate Judge can be transferred for execution to the Court of a Munsif. I am unable to accept this contention. Section 6 of the Code runs thus:

"Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction."

There is no express provision in s. 39, cl. (i) that the transferee Court may be a Court of any pecuniary jurisdiction. The transferee Court contemplated by s. 39 must be therefore a Court of competent jurisdiction, that is, a Court which has the same pecuniary jurisdiction as the transferor Court. This view is supported by the decision in *Durga Charan Mojumdar v. Umatar Gupta* (1), and *Sham Sundar Saha v. Anath Bandhu Saha* (2). The learned District Judge was therefore right in holding that the order of the Subordinate Judge transferring the decree for execution to the Small Cause Court, Calcutta, was bad in law.

Mr. Das next contended that the learned District Judge had no jurisdiction to set aside an order made by the Subordinate Judge rejecting the judgment-debtor's objection to the order of transfer. It was argued by him that the order of transfer, though it was *ex parte*, being an order under s. 47 of the Code was appealable and as that appeal was barred by time, the judgment-debtor was precluded from questioning the validity of the said order by another petition under s. 47, Civil P. C. I am unable to accept this view. The order for transfer was made *ex parte*. The judgment-debtor no doubt did not appeal against that order in time. There is nothing in the law which precludes him from raising his objection to the said *ex parte* order, under s. 47 of the Code. This he did. This objection is an objection relating to the execution of the decree as it is an objection relating to the first step in execution. His objection was overruled by the Subordinate Judge. The order of the Subordinate Judge therefore was an order under s. 47 and was consequently appealable to the District Judge. The District Judge had therefore jurisdiction to set aside the order of the Subordinate Judge. The points taken by the learned Advocate for the appellant fail and this appeal is accordingly dismissed. There will be no order as to costs.

Narsing Rau, J.—I agree.

s. Appeal dismissed.

(7) 16 C 465.

(2) 37 C 574; 6 Ind. Cas. 97; 14 O W N 662.

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Administration—Surety—When entitled to be discharged—*Executor adjudged insolvent—Surety, if can be released.*

The surety is entitled to protection against the executor if it be shown that the latter is wasting the estate, and thereby rendering the former liable on his surety bond. The course to be adopted, on waste by the executor, being established by the surety, is to call on the executor to furnish other security, and, on his doing so, to discharge the original surety in respect of future waste. Should the executor fail to furnish other security the probate should be revoked and the surety discharged.

Where therefore the executor by being adjudged insolvent has demonstrated that he is unable to manage his own affairs it is reasonable for the surety to believe that he is not a fit person to manage an estate of somebody else and he is entitled to be released from his surety bond. *SHI RAM v. EMPEROR* Lah. 93

Agra Pre-emption Act (XI of 1922), s. 4, cls. (1) and (7)—*Resumed muafi-holder, whether a co-sharer—His status.*

The resumed muafi-holder of specific plots of land with specific Govt. revenue in a village, without the right of having any interest in the joint lands of the mahal or the administration of its affairs is not on the same footing as a co-sharer and his status is in no case better than that of a petty proprietor without the right of having any interest in the joint lands of the mahal or in the administration of its affairs. *MANGAN LAL v. BRAHM DUTT* All. 147

s. 17—*Pre-emption decree, when can be passed.*

Under s. 17, Agra Pre-emption Act, a decree for pre-emption can be passed in favour of a plaintiff only on payment of either the "actual price" paid by the vendee or on payment of the market value of the property. *ANANT RAI v. BHAGWAN RAI* All. 4

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SEE **Plaint**

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Appeal—Objection that suit is barred under s. 47, Civil Procedure Code, if can be raised for first time. SEE **Civil Procedure Code, 1908, s. 47** 816

Arbitration—Appointment of arbitrator by one party on behalf of other party according to agreement—Communication to arbitrator but not to other party—Appointment, if incomplete.

Where a clause in the agreement states that if any party shall refuse or neglect to appoint an arbitrator within seven days after the one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then, upon such failure, the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment, and where such appointment is made and communicated to the arbitrator, it cannot be said to be inoperative or incomplete, until the other party has received notice of it. *LOUIS DREYFUS & Co. v. HEMANDAS HOTOHAND* Sind 262

Award—Interference on ground that arbitrators have erred in law.

Where the parties have chosen the arbitrators to decide their disputes outside the Courts, considering that the knowledge of law of the arbitrators is sound the Courts would be very reluctant to interfere with the decision of the tribunal and would only do so in cases mentioned in Sch. II, Paras. 14, 15 and 16 of the Civil P. O. The mere fact that the tribunal has erred in law would be no ground for interference. *RAGHUPATI DUTT v. RAM GOPAL DUTT* Cal. 80

Award—Misconduct—No disagreement between arbitrator—Omission to appoint umpire, whether legal misconduct vitiating award.

In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, no disagreement between the arbitrators occurred, the omission of the arbitrators to provide for a contingency, does not vitiate their proceedings. The omission to make the appointment is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made. *LOUIS DREYFUS & Co. v. HEMANDAS HOTOHAND* Sind 262

Award—Party accepting and receiving benefit under it—Whether can subsequently challenge its validity.

Where an award has been accepted by the parties, and one of them has received benefits under it he is not entitled at a later stage to challenge its validity. *KODUKULA KAMESWARAMMA v. KODUKULA THAMMANNA* Mad. 602

Award—Wrong construction of will by arbitrators—If binding on parties.

If the arbitrators have made any mistake in construing a will the parties are bound by the decision of the arbitrators as the latter are not only Judges of fact but also Judges of law. *RAGHUPATI DUTT v. RAM GOPAL DUTT* Cal. 80

Term in agreement that after certain period one party may nominate arbitrator on behalf of other party—Such period, when commences—Letter of appointment written before expiry of such period to be sent afterwards—Whether amounts to appointment.

The period of days after which one party in accordance with the terms of the agreement may nominate an arbitrator on behalf of the other must be so many clear days commencing from the midnight after the receipt of the letter or notice requiring the other party to nominate his arbitrator.

Where in anticipation of nomination of such an

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arbitrator a party has written letter of appointment before the expiry of the period stated in the agreement, to be sent when the necessity arose, the appointment cannot be said to be complete when the letter was written provided the formal communication to the arbitrator or to other party is not made before the expiry of the period. *LOUIS DREYFUS & Co. v. HEMANDAS HOTOHAND* Sind 262

—*Umpire, meaning of.*

The ordinary meaning of the word "umpire" is a person who is to decide upon disagreement. *LOUIS DREYFUS & Co. v. HEMANDAS HOTOHAND* Sind 262

Arbitration Act (IX of 1899), s. 19—*Fact of contract itself disputed—Arbitrators, if can decide that point—Court, if can grant stay.*

As the Arbitration Act requires a submission in writing, the fact that a contract or submission in writing exists is to be established by the person who comes to Court and applies for a stay. On the assumption that a contract which contains a submission in writing exists, an application may be made because on that assumption the arbitrators have jurisdiction. If the fact of the contract itself is disputed the arbitrators cannot decide the point, and the Court in the normal course would refuse a stay. *SRI RAM HANUTRAM v. MOHANLAL & Co.* Bom. 494

—*s. 19—S. 19, nature of.*

Section 19, Arbitration Act is in the nature of a summary procedure and does not normally include any lengthy or protracted inquiry. *SRI RAM HANUTRAM v. MOHANLAL & Co.* Bom. 494

—*s. 19—Submission in writing.*

Merely sending contract notes by a party to another without any confirmation notes signed by the other party does not amount to a submission in writing, as required by the Arbitration Act. *SRI RAM HANUTRAM v. MOHANLAL & Co.* Bom. 494

Arms Act (XI of 1878), s. 19 (f)—*Servant of gun licensee carrying gun to his master's house—If guilty under s. 19 (f).*

Servant of a gun licensee who was merely carrying the gun to the house of the master under his orders cannot be convicted under s. 19 (f), Arms Act. *AVIDI VERRASAMI, In re* Mad. 120

Assam Land and Revenue Regulation (I of 1886), s. 94—S. 94, interpretation.

Section 94 cannot be interpreted to mean that all the sums realizable as arrears of land revenue must be recovered under the provision of Chap. V, Section 94, Assam Land and Revenue Regulation should be read as subject to s. 154 by which the jurisdiction of the Civil Courts is expressly excluded in connection with certain matters only. If a process were issued under Chap. V for the recovery of a sum realizable as land revenue the provisions of Chap. V would automatically apply by virtue of s. 94, but if the party entitled to recover such a sum instituted a suit in a Civil Court for this purpose there is nothing in the Regulation to prevent the party from doing so. *RAGHUBIR SINGH CHETRI v. TEZPUR LOCAL BOARD* Cal. 593

—*ss. 154 (1) (g), 94—Claim of Local Board for recovery of money arising from breach of lease, and not connected with process issued under Chap. V—Suit in Civil Court, if competent.*

The expression "process" obviously has a technical meaning under the Assam Land and Revenue Regulation and refers to the various processes for the recovery of arrears of land revenue which are mentioned in Chap. V of the Regulation, and the methods which may be adopted in this connection are actually

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described as "processes" in s. 91 of the Regulation.

Where the claim of the Local Board arises directly from a breach of the conditions of the defendant's lease and is not connected with the processes issued under Chap. V, there is nothing in the Regulation to debar the Board from instituting a suit in Civil Court for the recovery of the money due to them. The mere fact that the Board once resorted to the revenue authorities for the recovery of their dues, does not debar them from recovering any portion of the money due to them in a Civil Court. *RAGHUBIR SINGH CHETRI v. TEZPUR LOCAL BOARD* Cal. 593

Attachment—Removal of—Costs—Illegal attachment—Proceedings to set aside—Decree satisfied in meantime—Objector, if entitled to costs.

Where a decree-holder has attached banking account of a garnishee illegally and during proceedings to set aside the attachment, the decree is satisfied and the proceedings are closed, the garnishee is entitled to his costs. *G. H. SHERRAZEE v. T. V. REDDY* Rang. 105

Award. See Arbitration 602

Bengal Agricultural Debtors Rules, r. 145—*Jurisdiction of Civil Court to decide amount of debt.*

The question as to what is the amount of a debt of a particular debtor is to be decided by the Board under r. 145, Ben. Agri. Debtors Rules. The Civil Court, therefore, has no jurisdiction to go into this question. *BHABAGOVINDA CHOUDHURI v. BHOLANATH BASAK* Cal. 93

Bengal Cess Act (IX of 1880), s. 45—*Decision by Revenue Court that cess was recoverable and claim made for its recovery was within limitation—Decision, if can be set aside by Civil Court.*

The cess which is payable under the Act may be recovered either under the Public Demands Recovery Act or by a suit. The question whether cess was recoverable in a case under s. 45 of the Act is one to be decided by the Revenue Court which issued the certificate, and if that Court has decided rightly or wrongly that the cess was recoverable and the claim made for the recovery was not barred by limitation, a suit cannot be entertained in a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction and not because the decision pronounced by the Court is not correct. *MANGTU LAL BAGARIA v. SECRETARY OF STATE* Pat. 727

—*s. 45—"Recovered," meaning explained.*

The word "recovered" which is in s. 45, Ben. Cess Act means "sued for" or "recovered by means of an action." *MANGTU LAL BAGARIA v. SECRETARY OF STATE* Pat. 727

Bengal Embankment Act (II of 1882), ss. 43, 48, 56, 57—*Removal of Sch. 'D' embankment and construction of new one in its place—Original embankment removed from Sch. 'D' by notification—New embankment does not become Sch. 'D' embankment without notification under s. 43.*

Where upon an application being made to the Collector for shifting a Sch. 'D' embankment, the Govt. orders by a notification that the embankment should be removed and a new one with drainage sluices be constructed in its place but by a subsequent notification the Govt. orders that a portion of the original Sch. 'D' embankment should be removed from the Sch. 'D' then unless the Govt. by a notification issued under s. 43, Ben. Embank. Act declares that embankment as included in the

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Sch. 'D' such portion of the new embankment does not become a Sch. 'D' embankment. The mere fact that it replaced a Sch. 'D' embankment does not necessarily mean that it must be included in the Sch. 'D' without any further notification. *JADUNATH BANERJEE v. SECRETARY OF STATE* Cal. 477

s. 68—Apportionment—Notice under s 56 or s. 57 is condition precedent.

A notice under s. 56 or s. 57, Ben. Embank. Act is a condition precedent to creation of liability of the proprietor or the tenure-holder as the case may be under the Act, and unless and until due publication or service of the notice is proved the very foundation of the liability is taken away. *JADUNATH BANERJEE v. SECRETARY OF STATE* Cal. 477

ss. 68, 56, 57—Civil Court whether can enquire into question whether Collector has apportioned costs on land not liable to be charged—Proper course for aggrieved party.

A Civil Court cannot enquire into the question whether Collector has apportioned costs on land not liable to be charged. The apportionment of costs by Collector on lands which he should not have done under the provisions of the Ben. Embank. Act is at the most an erroneous decision or an irregular exercise of the jurisdiction which the Collector undoubtedly possesses and in no sense it can be said to be a usurpation of jurisdiction by the Collector which would make the order a nullity or without jurisdiction. It is open to the party aggrieved to take an appeal against that order to the Commissioner as provided for in s. 84 or to invoke the powers vested in the Commissioner and the Govt. as provided for in s. 85 of the Act. *JADUNATH BANERJEE v. SECRETARY OF STATE* Cal. 477

ss. 68, 56, 57—Recovery of costs of repairs of several years—Notification for each repair, if necessary.

Where the costs of embankment which the Govt. seeks to recover are the costs of repairs of several years for each particular repair there must be a notification upon the parties interested, their objection must be heard, and then only can an order of apportionment be passed by the Collector under the provisions of s. 68. *JADUNATH BANERJEE v. SECRETARY OF STATE* Cal. 477

Bengal Land Revenue Sales Act (XI of 1859), s. 14 SEE Bengal Land Revenue Sales Act, 1859, s. 33

s. 14—Sale under s. 14, when effected.

It cannot be said that a sale under s. 14 is really made by the Collector after the period of ten days has expired, and after all the moneys are put in. The sale as is effected by the first payment of the entire arrears. If there are no materials, upon which the Collector can find as to whether one payment is earlier than the other, the obvious course would be to regard these payments as simultaneous, and declare both of them as to be joint purchasers. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

s. 14—Ten days' period under s. 14, whether absolute.

If the period of ten days in s. 14 expired on a holiday, the period is extended till the re-opening day. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

s. 33—Question of substantial injury, whether must be made specific ground of appeal before Commissioner.

It is certainly incumbent upon the plaintiff to establish that he has sustained substantial injury by reason of the irregularity complained of, but it is not

Bengal Land Revenue Sales Act—cont'd

necessary, that the question of substantial injury must also be made a specific ground of appeal before the Commissioner. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

s. 33—'Sale' in s. 33.

The word 'sale' is used rather loosely in the Act. 'Sale' must necessarily include the whole procedure from issue of notices under ss. 5 and 6 up till the final completion of the 'sale' in its narrower sense as the corollary to 'purchase'. A 'sale' is conducted contrary to the provisions of the Act within the meaning of s. 33 if there is any defect in any of these proceedings, not merely for defect at the time of actual auction. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

ss. 33, 14—Entire arrears paid by one co-sharer—Subsequent payment of arrears by other co-sharers within ten days—Latter, if become co-purchasers with former.

When one sharer has paid the entire arrears due any other sharer or sharers cannot by subsequently paying the money, even within ten days, could rank as co-purchasers with him. As soon as the full amount of arrears is paid by one sharer, the offer made by the Collector must be deemed to be accepted, and the purchase becomes complete. That the subsequent payments were also made by recorded sharers within ten days cannot affect the position. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

ss. 33, 14, 34—S. 33, applicability to sale under s. 14—Suit by co-sharer for declaration of his preferential title and that sale should stand entirely in his favour, if falls within s. 33.

Section 33, Peng. Land Rev. Sales Act is not confined to sales by public auction under the Act, but also applies to a sale under s. 14 of the Act. But in order to attract the operation of s. 33 the suit must be one to annul the sale and this presupposes that the party suing is the defaulting co-sharer or any other person who derives his title from him. Where the plaintiff co-sharer impeaches the rights of other co-sharers to become purchasers by reason of the subsequent deposits they made, but wants at the same time that the sale should stand and stand entirely in his favour, it is really a suit by one purchaser against another for a declaration that he has a preferential title and does not fall within s. 33 and would lie in a Civil Court, quite apart from s. 33 for having a declaration that the plaintiff is the sole purchaser, and no title was vested in any of the other co-sharers by reason of the payments they made under s. 14. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

s. 34—Effect of annulment of sale.

Per *Roxburgh, J.*—The effect of an annulment dealt with in s. 34 clearly contemplates restoration of the defaulter, assumed to be decree-holder, on certain terms and conditions. *KAMAL KRISHNA MANDAL v. HEMENDRA KRISHNA SINGHA* Cal. 286

s. 37—Auction-purchaser, if can eject under-tenant holding under-tenure partly within his estate.

The auction-purchaser is entitled to eject all under-tenants who hold their land entirely within his estate but he is not entitled by this section to eject an under-tenant who holds an under-tenure partly within his estate and partly within other estates. Where, therefore, the tenures are held by the defendants not only under the *touzi* purchased at a revenue sale by the predecessor-in-interest of the plaintiff but also under other *touzies*, these tenures cannot be annulled in part and, therefore, the plaintiff

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iff is not entitled to any relief by any way of ejectment. **ASHAMAYI BASU v. BARANAGORE JUTE FACTORY Co., LTD.** Cal. 535

— **s. 37—Revenue sale—Suit to recover possession on basis of such sale—Onus lies on plaintiff to prove that land lies within his regularly assessed estate.**

In a case in which the plaintiff is seeking to recover possession of property on the basis of a revenue sale the initial onus must lie on the plaintiff to show that the land lies within his regularly assessed estate or *mahal* and not merely that it lies within the ambit of his *zemindari*. Even if he has succeeded in discharging this onus the entry in the Record of Rights in favour of the defendants has the effect of throwing the onus back on the plaintiff in order to prove that the land did not appertain to a *niskar* tenure. Once the plaintiff has discharged the initial onus which lies upon him in a matter of this sort it would be for the defendant to prove that his case would fall within one of the exceptions to s. 37 of Ben. Revenue Sales Act. **ASHAMAYI BASU v. BARANAGORE JUTE FACTORY Co., LTD.** Cal. 535

— **s. 37—Suit to annul tenure — Defendant pleading niskar grant made prior to Permanent Settlement—Proof of long possession without payment of rent, nature of.**

It is true that in a case for the assessment of rent evidence of long possession without payment of rent might in certain circumstances lead to an inference that a former proprietor of the estate had created a rent free title in respect of the land in suit. But even in such a case it would be essential that such evidence should be of a definite character and cover a sufficiently long period to allow such an inference to be drawn. In a case in which it is sought to annul a tenure under s. 37 of the revenue sale law *a fortiori* the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *niskar* grant in respect of the tenure had been made prior to the Permanent Settlement. **ASHAMAYI BASU v. BARANAGORE JUTE FACTORY Co., LTD.** Cal. 535

Bengal Municipal Act (XV of 1932), ss. 2, proviso, 133—Assessment without preparing valuation list under new Act, validity—S. 2, Proviso, applicability—Valuation and assessment made under old Act, if kept alive by proviso.

There is no precise correspondence between the fee under the old Ben. Municipal Act and conservancy rate under the new Act. The name and the incidence are different; and it is, therefore, not possible to apply to them the language of the proviso to s. 2 of the new Act. Where the old and the new imposts correspond, the proviso obviously applies, but it is not possible to apply it in cases where there is no correspondence. A valuation list prepared under the old Act is not a valid valuation list made under the new Act.

Where property is for the first time sought to be assessed to the conservancy rate without a valid valuation list, under s. 133, Ben. Municipal Act the resulting assessment is *ultra vires*. **MUNICIPAL COMMISSIONER, DACOA v. GANGAMANI CHAUDHURANI** Cal. 605

— **ss. 15, 136, 133, 2, Proviso—Suit against Chairman of Commissioners intended against corporation—Amendment impleading Commissioners**

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themselves—It is mere correction of misdescription under O. I., r. 10, Civil Procedure Code (Act V of 1908)—S. 22, Limitation Act (IX of 1908), does not apply.

The name is not always the true criterion for determining the party really sued. The Court has to consider the nature of the allegations in the plaint and the nature of the relief sought.

Where a suit for declaration that the assessment is *ultra vires* and illegal, intended to be brought against the Corporation is through mistake instituted against the Chairman of the Municipal Commissioners instead of against the Municipal Commissioners themselves as required by s. 15, Ben. Municipal Act a subsequent amendment impleading the Municipal Commissioners themselves is merely a correction of misdescription under O. I., r. 10, Civil P. C., and not an addition of a new party within the meaning of s. 22, Lim. Act. The amendment relates back to the date of the suit as originally filed and time cannot be reckoned as from the date of the amendment. **MUNICIPAL COMMISSIONERS, DACOA v. GANGAMANI CHAUDHURANI** Cal. 605

— **s. 133. SEE Bengal Municipal Act, 1932, s. 136**

— **ss. 136, 133—Valuation and assessment distinction.**

Bengal Municipal Act, 1932, makes a careful distinction between valuation and assessment. Thus, the assessment list mentioned in s. 136 of the Act is a distinct document from the valuation list mentioned in s. 133. Although the process of assessment necessarily involves an antecedent valuation, yet the two things are different. **MUNICIPAL COMMISSIONER, DACOA v. GANGAMANI CHAUDHURANI** Cal. 605

Bengal Public Demands Recovery Act (III of 1913), ss. 3 (1), 20—Order directing certain persons to be added as parties—Their names not specified in order nor added in certificate—Whether makes them certificate-debtors

An order merely directing the addition as parties of certain persons, whose names were not specified in the order, nor added in the certificate, cannot make these persons certificate-debtors within the meaning of s. 3 (1), Ben. Public Demands Recovery Act and their right does not, therefore, pass by the sale. **BHABAT BANDHU CHATTOPADHYA v. RANENDRA KUMAR DUTTA** Cal. 276

— **s. 20—Representation — Applicability to sale in certificate proceeding—S. 146-A, Bengal Tenancy Act, if applies to such proceeding.**

Section 146-A, Ben. Ten. Act does not in terms apply to certificate proceedings. Certificate proceedings are governed by s. 20, Ben. Public Demands Recovery Act. The words "where the holding is sold in execution of a certificate" in s. 20 (1) mean "where the interests of all the tenants of a holding are bound by the sale and sold in execution of a certificate." The principle of representation recognized in respect of rent decrees would also apply in the case of sales in execution of certificates. When the amendment to Ben. Ten. Act was made by the insertion of s. 146-A, by which in the case of sales by execution of decrees it was provided that in certain circumstances the interests of certain persons not actually parties to the suit might be affected, it does not follow that this applied also to certificate sales in so far as any change was made from the law as it stood at the time when the Ben. Public Demands Recovery Act itself was passed in 1913. **BAJROGA KHATUN v. PROVINCE OF BENGAL** Cal. 301

Bengal Tenancy Act (VIII of 1885), s. 26-G—
Order passed by Revenue Officer under s. 26-G, if
can be revised under s. 115, Civil Procedure Code
(Act V of 1908).

Section 26-G, Ben. Ten. Act, empowers a Court as well as a Revenue Officer to entertain applications. A Revenue Officer on the plain language of the statute is not therefore a Court. He is not subject to the appellate jurisdiction of the High Court. The mere fact that his order might have the effect of a decree of Civil Court does not make him a Court, far less a Court subordinate to the High Court within the meaning of s. 115, Civil P. O. His order cannot therefore be revised. **SARAT CHANDRA CHAKRABURTY v. SASHI BRUSAN MANNA** Cal. 14

— **s. 26-G (5)—Order on application under, if**
appealable.

The right of appeal is the creation of the statute and should not be inferred from analogy or deduced by implication. The words "shall have the effect of a decree" in Ben. Ten. Act do not provide for an appeal. Section 26-G (5) of the Act does not take away the ordinary jurisdiction of the Civil Courts. It is optional with the mortgagor to make an application under the section and it is optional with the Court to make an order. No appeal, therefore, lies from an order passed on an application under s. 26-G (5). **ACHINTA NATH SASMAL v. GOBINDA PRASAD DAS** Cal. 530

— **s. 146-A. SEE Bengal Public Demands**
Recovery Act, 1913, s. 20 301

— **s. 148-B—Suit for rent—What plaintiff**
must establish.

It is not sufficient for a plaintiff to establish merely that the defendant is liable to pay a certain amount of rent. He must also establish the identity of the lands of the tenancy. No decree for rent should be passed until the Court is satisfied regarding the identity of the land with respect to which the rent is payable. The Court cannot leave the question of identity open because there can be no tenancy except with reference to a definite piece of land. **RADHASHYAM CHAUDHURY v. GOURINATH ROY** Cal. 154

— **s. 174—Application under—Question whether**
sale must be set aside for want of notice
under O. XXI, r. 72, Civil Procedure Code (Act V
of 1908), does not arise.

The question that the sale must be held liable to be set aside for want of notice under O. XXI, r. 72, Civil P. O., does not arise when application is under s. 174, Ben. Ten. Act. **ANIL KUMAR ROY CHAUDHURY v. AHAMMED ALI SARKAR** Cal. 121

— **s. 184—S. 184 does not overrule O. VIII,**
r. 2, Civil Procedure Code—Limitation must be
pleaded—Facts in case not clear and undisputed—
Plea of limitation not raised in trial Court—Should
not be allowed in appeal.

Section 184 (1) Ben. Ten. Act does not overrule the provisions of O. VIII, r. 2, Civil P. O. which require that the defendant must raise by his pleading all matters which raise issues of fact not arising out of the point, as for instance, limitation. Section 184 would require a suit to be dismissed if in fact it has been filed after the period of limitation and would apply even in an *ex parte* case if the facts appear clear and undisputed. Where however, the facts are not clear and undisputed. The question of limitation should not be allowed to be raised as the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial. **BAJROGA KHATUN v. PROVINOR OF BENGAL** Cal. 301

— **s. 184—Suit for possession as raiyat —**
Limitation.

Bengal Tenancy Act—concltd.

Limitation for a suit to recover possession of land claimed by the plaintiff as a *raiya* is governed by s. 184, Ben. Ten. Act and not by s. 3 or s. 29, Lim. Act. **BAJROGA KHATUN v. PROVINOR OF BENGAL** Cal. 301

Berar Land Revenue Code, 1928, s. 129 (3)—
Dispute as to right of way — Enquiry and order
passed by Tahsildar—Appeal heard by Sub-Divi-
sional Officer exercising powers under s. 32—Sub-
sequent civil suit—Starting point of limitation.

A dispute regarding a right of way which provided access to certain survey number was enquired into by the Tahsildar who was empowered to do so by Govt. Notification at the instance of the defendant and the Tahsildar passed his order on January 10, 1934, in defendant's favour. The plaintiffs thereon preferred an appeal to the Deputy Commissioner which was heard by the Sub-Divisional Officer, who decided it on March 14, 1934. An appeal to the Commissioner was decided on June 13, 1934, and a revision application made to the Local Govt. was decided on December 12, 1934. The decision having been given against the plaintiffs they filed a suit on March 11, 1935, in terms of s. 129 (3) of the Berar Land Revenue Code, 1928:

Held, that although the Tahsildar exercised the powers under the Berar Land Revenue Code under s. 129 his decisions did not have the force of the decisions of the Deputy Commissioner. The order passed by the Sub-Divisional Officer exercising powers under s. 32 became that of the Deputy Commissioner and the period on one year was to be computed from the date of the order passed by the Sub-Divisional Officer. The suit was, therefore, in time. **SAMBHOO v. PARASHRAM** Nag. 404

Bihar and Orissa Local Self-Government Act
(III of 1885), s. 118-C (3) (d)—Joint family carry-
ing on business in five different buildings: within
union—Tax, in respect of each building, if can be
levied.

Where the assessee is a joint family and this family carries on business in five different buildings within the boundaries of the Union, the Committee is not entitled to levy tax in respect of each building owned or occupied by it within the Union. Acceptance of the contention that it is so entitled will be to ignore altogether the provisions of cl. (d) of sub-s. 3 of s. 118-C, Bihar and Orissa Local Self-Govt. Act. The assessment in such a case should not exceed Rs. 5, the joint family being a person within the meaning of cl. (d) of sub-s. 3.

In such a case the assessee is entitled to the refund of the whole of the excess tax paid to the Union. **MEMBERS OF THE UNION COMMITTEE, DALSINGH-SARAT v. SAHAY SAH** Pat. 300

Bihar and Orissa Municipal Act (VII of 1922),
ss. 82, 180—Commissioner imposing tax upon
platforms on Municipal drains — No consent of
Local Government—Tax, if illegal and ultra vires.

It is impossible to exempt from the provisions of s. 82, Bihar and Orissa Muni. Act, license fees to be imposed under s. 180 of the Act, and where the Commissioners purport to fix a scale of fees imposing tax upon platforms over Municipal drains under s. 180, the imposition without the consent of the Local Govt. under sub-s. (2) of s. 82 is illegal and *ultra vires* the Commissioners. **COMMISSIONER OF THE ARRAH MUNICIPALITY v. INDER CHAND** Pat. 701

— **s. 180. SEE Bihar and Orissa Municipal**
Act, 1922, s. 82. 701

Bihar Money-lenders Act (III of 1938), s. 7.
SEE Bihar Money-lenders Act, 1938, s. 11. 132

Bihar Money-lenders Act—contd.

— s. 7 — *Rule of Damdupat under s. 7, if applies to period subsequent to institution of suit.*

The rule of *Damdupat* introduced by s. 7 of the Bihar Money-lenders Act in respect to a claim for interest for the period preceding the institution of the suit does not apply also to the period subsequent to the institution of the suit. *RAM SARUP SAH v. MUKHI SINGH* Pat. 132

— s. 8. SEE Bihar Money-lenders Act, 1938, s. 11

— s. 8.—*Discretion under s. 8 not exercised by lower Appellate Court—High Court if should exercise it.*

Where the lower Appellate Court has failed to exercise its statutory discretion under s. 8, in the matter, it is open to the High Court to pass an order in respect to interest subsequent to the date of the institution of the suit. *RAM SARUP SAH v. MUKHI SINGH* Pat. 132.

— s. 11.—*Certificate to question validity of s. 11 granted—New Act of 1939 coming into force—Question becoming not existent—Federal Court, if can still entertain appeal.*

When jurisdiction to hear an appeal is once vested in the Federal Court by the grant of a certificate, it cannot be divested by any subsequent event. A certificate is the key which unlocks the door into Federal Court, and a litigant who has once passed through that door cannot afterwards be ejected by the happening of events outside and beyond his control. It is quite immaterial that the relief which the appellants claim arises from an Act which was not law when the certificate was granted. Section 205 (2) is plain; and once a certificate has been granted, an appellant can appeal on any ground whatsoever, if the Court thinks fit to give him leave to do so. Where a certificate was granted on the question of validity of s. 11 of Bihar Money-lenders Act, 1938, but in the meanwhile the new Act of 1939 came into force, and the question ceased to exist, the certificate does not become "infructuous" and the jurisdiction to hear appeal is not taken away from the Federal Court.

Parliament never contemplated a contingency of the kind; but that is no reason why the Federal Court should not give effect to the plain language of the Act. Nor could it lightly adopt a construction which would have this result, that an appeal properly begun and continued in Federal Court was suddenly, by the action of a Provincial Legislature, taken out of its jurisdiction and transferred to the jurisdiction of the Judicial Committee. *SUBHANAND CHOWDEARY v. APURBA KRISHNA MITRA* FC 436

— ss. 11, 8, 7.—*Duty of Court under s. 11—Parties not appealing with respect to amount decreed by trial Court as principal and interest—Power of Appellate Court to reduce amount.*

Section 11, Bihar Money-lenders Act enjoins a duty on the Court, in the class of cases to which it refers to restrict the amount of interest awarded, to a sum not in excess of the principal advanced. The only conditions necessary to attract the operation of that section to an Appellate Court are that there shall be a suit by a money-lender, that the suit shall be in respect of a loan and that the appeal shall arise out of such a suit. When these conditions are satisfied the duty of an Appellate Court is plain that it must give effect to the section. Hence in an appeal even if the parties concerned have not raised a point with respect to the amount decreed by the first Court as principal and

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interest it is open to the Appellate Court to reduce that amount. *RAM SARUP SAH v. MUKHI SINGH* Pat. 132

— s. 12.—*Discretion under—High Court not asked to use—Federal Court, if can be requested.*

Federal Court would reject a request to exercise for the first time a discretion which the High Court could have been, but was not asked to exercise under s. 12 of the Bihar Money-lenders Act, (1938), a section which, the High Court has not at any time held to be void, as it has held other sections of the same Act to be. *PIETSWI CHAND LALL CHAUDHARY v. SUKHAJ RAI* FC 453

— s. 12.—*High Court using discretion—Interference by Federal Court.*

The word "may" in the opening portion of s. 12 of Bihar Act VII of 1939 has not the meaning of the word "shall." Obviously by the use of the word "may" it is intended that the Court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section. The use of the word "may" indicates that the Court is not bound to exercise at least one of the powers, and may well not exercise any of the powers at all. The language as it stands can mean only this that the Court has the discretion to exercise all or any or none of the specified powers.

When the question is one of a discretion of the High Court under old s. 12, of the Bihar Money-lenders Act, the Federal Court cannot in appeal interfere with the way in which the discretion is exercised or not exercised, unless it appears that the High Court did not apply its mind at all to the question, or acted capriciously or in disregard of any legal principle, or was influenced by some extraneous considerations wrong in law. If there can be no legal objection to the way in which discretion has or has not been exercised by the High Court, then the Federal Court would not in appeal substitute its own discretion for that of the High Court. *JAGOBIND SINGH v. LAOHMI NARAIN RAM* FC 796

Bihar Money-lenders (Regulation of Transactions) Act (VII of 1939), s. 7.—*Certificate under old Act—New Act coming into force—Appeal if can be entertained by Federal Court.*

Once the door of the Federal Court is opened to the appellant, it cannot be shut against him on the double ground that he can no longer rely on the certificate because the old Bihar Money-lenders law under which the certificate was granted to question the validity of a section of the old Act has been replaced by a new one, and he cannot rely on the new law because to avail himself of the new law he must get the certificate vacated and then go to the Privy Council. If Federal Court is not prepared to consider the old section, because it has been not only repealed but replaced, by a new section then it must consider and apply the latter, unless it can dispose of the appeal on some other shorter ground. As a special case, the Federal Court has also power to grant leave for taking such a ground under s. 205 (2) of the Govt. of India Act, and can also take account of the new Act *suo moto*. The Federal Court can take cognisance of the new Act, with a view to do justice between the parties, as the new Act has been made retrospective. *SURENDDA PRASAD NARAIN SINGH v. GAJADHAR PRASAD SAHU TRUST ESTATE* FC 612

— s. 7.—*"Document" in expression "based on document" can be used in two ways.*

Section 7 of the Act deals with two kinds of

Bihar Money-Lenders (Regulation of Transactions) Act—contd.

loan, a loan advanced and a loan based on a document. Under the second heading it takes into consideration two kinds of documents on which loan may be based, one kind may evidence the loan and the other which may not evidence the loan, but may be utilized to find out the amount mentioned in it. The document in the expression "based on a document" can be used in two different ways, in one case evidencing a loan and in another case simply mentioning a loan. This section cannot be interpreted to contemplate, that the same document may relate to two different amounts. **SINGHESHWAR SINGH v. MEDNI PRASAD SINGH Pat. 339**

s. 7—Entries in account books showing what items represent principal and what interest—
"Amount of the loan," how arrived.

The account books must be taken as a whole and where the entries therein clearly show what items represent principal and what items interest, the Court must arrive at the "amount of the loan" within the meaning of s. 7 of the Bihar Money-lenders Act, 1939, by excluding the items that represent only interest. The scheme of the Bihar Money-lenders Act emphasises the distinction between liability in respect of the principal and liability in respect of the interest and whether a party relies on the words "mentioned in" or on the words "evidence by" at the end of s. 7 of the Act of 1939, the "amount of loan" must be determined with reference to the whole document and not by confining attention to a particular entry. **SURENDRA PRASAD SINGH v. GAJADHAR PRASAD SAHU TRUST ESTATE**

F C 612

s. 7—Expression "evidenced by such document", meaning of.

The meaning of the clause "evidenced by such document" in s. 7, Bihar Money-lenders (Regulation of Transactions) Act, is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document, then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word 'loan' which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like *bahit khata*s or based on as evidenced by the handnote which for some purposes may be inadmissible in evidence, nevertheless, a Court must refer to them for the purpose of s. 7 to find out what the loan was in order to apply the rule of Damdupat adopted by Legislature with the limitations provided by the Act. **SINGHESHWAR SINGH v. MEDNI PRASAD SINGH**

Pat. 339

s. 7—Interest pendente lite—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 11.

Rule 11 of O. XXXIV, Civil P. C., which removes any conflict that there might have been between s. 34 and O. XXXIV, rr. 2 and 4, gives a certain amount of discretion to the Court, so far as interest *pendente lite* and subsequent interest are concerned. It is no longer absolutely obligatory on the Courts to decree interest at the contractual rate up to the date of redemption in all circumstances, if there be no question of the rate being penal, excessive or substantially unfair within the meaning of the Usurious Loans Act, 1918.

It may not be quite in harmony with the new provisions of the Bihar Money-lenders (Regn. of Transactions) Act, to go back to the old practice

Bihar Money-lenders (Regulation of Transactions) Act—contd.

or the old standard of high rates of interest, which were freely allowed. It may even be contrary to the spirit of the Bihar Act now to allow compound interest at a high contractual rate not only during the pendency of the suit but even up to six months after the preliminary decree to be passed hereafter. Of course, whether the Court would or would not give relief in respect of interest in excess of nine per centum simple per annum, and if so to what extent, will depend on the special circumstances of each case. The opinion of the High Court on such a matter must carry weight, where, being conscious of its discretionary power under s. 8, it has considered the case not to be a fit one for the exercise of such power.

(The *pendente lite* interest was reduced to 12 per cent. per annum simple). **JAI GOBIND SINGH v. LAOHMI NARAIN RAM**

F C 796

s. 7—Scope—Loan advanced on mortgage—
Creditor suing one of executants for separate share having already realized balance from others—
Maximum amount of interest that can be decreed.

Reading s. 7 of the Bihar Money-lenders (Regu. of Transactions) Act as a whole, it is quite obvious that it deals with a suit brought by a money-lender (against the defendant who is sued) in respect of a loan advanced (to the defendant sued against) in which a decree has to be passed (against the defendant who is sued) the amount of interest allowed prior to the suit not exceeding the amount of the loan advanced (to the defendant sued against) or if the loan (due from the defendant sued against) is based on a document, the amount of the loan (due from the defendant sued against) mentioned in or evidenced by such a document. It could not have been the intention of the Legislature that if there are several executants who have borrowed various sums and the creditor sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other *pro forma* defendants who are not really being sued. The only reasonable interpretation to put on the section is to read it as referring to the claim brought against the particular defendant who is sued, and the amount which is due from him alone and is the subject-matter of the claim. It will be in accord with the intention of the Provincial Legislature as disclosed by the various provisions in the Act for the reduction of interest to interpret the section so as to give relief to the defendants in respect of the interest which they would otherwise be liable to pay.

Where the total amount of loan is Rs. 75,000 but the liability of the defendant is only to the extent of one-sixth of this liability i. e., Rs. 12,500, the interest that would be allowed to the plaintiff against the defendant would not exceed Rs. 12,500. **BIRENDRA PRASAD SAKUL v. SURENDRA PRASAD SAKUL**

F C 622

s. 7—Scope and interpretation of s. 7.

Meaning, scope and interpretation of s. 7 of the new Bihar Money-lenders Act, 1939, considered. **SURENDRA PRASAD NARAIN SINGH v. GAJADHAR PRASAD SAHU TRUST ESTATE**

F C 612

s. 7—Scope of—Interest to which mortgagee would be entitled under Civil Procedure Code (Act V of 1908), O. XXXIV, r. 11, if can be reduced.
 Section 7 of the Bihar Act of 1939 is expressly

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limited to interest claimable upto the date of the institution of the suit. The Act has maintained a distinction between loans advanced before the Act and loans advanced subsequently. The contract for the payment of interest not having been declared illegal, but only unenforceable beyond a certain point, the creditor retains his contractual rights except to the extent to which the statute has expressly limited them. In these circumstances, it may perhaps be open to doubt whether the policy of the Bihar legislation can properly be taken into account by a Court which is considering whether there are any grounds for reducing the rate of interest to which a mortgagee would ordinarily be entitled under the provisions of O. XXXIV, r. 11 of the Code, since this would in effect be to extend the Act to a period with which the Legislature has not chosen to deal; but it may be that the wide powers of re-opening transactions originating before or after the commencement of the Act given to the Court by s. 8 of the Bihar Act of 1939 were regarded by the Legislature as conferring a much wider discretion than that given by O. XXXIV, r. 11 or by the Usurious Loans Act, 1918. *SUBHANAND CHOWDHARY v. APURBA KRISHNA MITRA* F C 436

Bihar Tenancy Act (VIII of 1885), as amended

In 1938—S. 26-B, *Proviso—Transfer of non-transferable holding before 1923—Transferee ever since in possession—Sale in execution of decree for rent against recorded tenant—Interest of transferee, if affected.*

Where a transfer of a non-transferable holding was made in 1912 and since then the transferee has been in possession, it must be assumed by reason of the proviso to s. 26-B of the Bihar Tenancy (Amendment) Act, 1938, that the transfer was made with the landlord's consent. In such a case the transferee cannot be ejected. The interest of such a transferee is not affected by the sale in execution of a decree for rent against the recorded tenant only *CHANDEIKA PRASAD SINGH v. RAM LAL SAHU* Pat. 629

Bihar Tenancy Act (VIII of 1934), s. 20-O, Sch. III, Art. 3—Applicability of s. 26-O—Distinction when landlord is plaintiff and when he is defendant—Landlord's fees, if can be deposited after appellate decree but before it becomes conclusive.

In the applicability of s. 26-O, Bihar Ten. Act, a distinction cannot be drawn between pending suits in which the landlord is a plaintiff and pending suits in which the landlord is a defendant. The title of the transferee would not become extinct by the passing of a decree against him unless and until such decree has become final as it might by the lapse of the period of limitation for an appeal and the omission of the defendant to file an appeal against the decree. The landlord's transfer fee under s. 26-O can, therefore, be deposited after the trial Court as well as the Appellate Court has decreed the landlord's suit but before such decree becomes conclusive. *JAGA SINGH v. BASDEO SINGH* Pat. 518

as amended by Act (XI of 1938), s. 48-A—Section if retrospective—Applicability to pending actions.

Section 48-A, Bihar Ten. Act, which was incorporated by Amending Act XI of 1933, by use of the words "shall be deemed to have acquired" is expressly made retrospective, and the section is applicable to pending actions. The suit shall be deemed to be still pending in appeal, even if a decree for ejectment had already been passed by the lower Courts and it was duly executed and possession taken before the

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new s. 48-A came into force. *AGIN SINGH v. BAUDEO SINGH* Pat. 580

Sch. III, Art. 3—*Applicability—Simple money decree against original tenant—Landlord getting dakhil dehani—Suit by transferee for possession—Limitation applicable—Landlord, if should take possession as landlord as such.*

Where the decree obtained is only a money decree and in execution of the decree against the original tenant the landlord obtains *dakhil dehani* from the Court, the landlord, is auction-purchaser only of the right, title and interest of the original tenant whatever that might be and not of the holding or of the tenancy right of the transferee from the original tenant. Therefore, in dispossessing the transferee the dispossession is not really in the capacity of auction-purchaser of his interest, but merely upon the excuse of being an auction-purchaser. This is clearly a case where the special limitation under Art. 3, Sch. III, Bihar Ten. Act is applicable to a suit by the transferee for possession.

Obiter.—The special two years' limitation as provided by Art. 3, Sch. III, Bihar Tenancy Act, applies even where the landlord takes possession as auction-purchaser. That Article does not provide, even by implication, that dispossession must be by the landlord. *DEORATI KUEH v. DASARATH DUBEY* Pat. 539

Art. 3—*Applicability of Art. 3—Decree for rent arrears—Holding put to sale—Landlord himself purchasing—Tenant dispossessed—Article, if applies.*

Where a landlord in execution of a decree for arrears of rent puts the holding to sale, purchases it himself and obtains delivery of possession as auction-purchaser such dispossession of the tenant is not a dispossession by the landlord within the meaning of Art. 3, Sch. III of the Bihar Ten. Act so as to make that article applicable. A suit to recover possession is governed by the ordinary law of limitation. *JAGA SINGH v. BASDEO SINGH* Pat. 518

Art. 6—"Decree under this Act"—*Suit, if should be framed in accordance with provisions of Act.*

A suit need not at its institution be framed in accordance with the provisions of the Bihar Ten. Act, so that it could result in a decree under that Act. *JANKI RAI v. RAM RAN BIJAYA PRASAD SINGH* Pat. 49

Art. 6—*Execution held governed by Art. 6.*

Sixteen annas proprietor instituted a suit for sixteen annas rents of two tenures recorded under different *khewats* held by different persons. The suit was decreed separately in respect of each of the *khewats* and separate decree for less than Rs. 500 was passed in respect of each *khewat*:

Held, that the decree-holder held two separate decrees each of them for amounts less than Rs. 500 and therefore execution in respect of either of them was governed by Art. 6, Sch. III, Bihar Ten. Act. *JANKI RAI v. RAM RAN BIJAYA PRASAD SINGH* Pat. 49

Bombay City Municipal Act (III of 1888), s. 154 (2)—Value of machinery, whether to be deducted.

Sub-section (2) of s. 154, City of Bom. Municipal Act, does not require that the value of machinery should be deducted from the rateable value of the buildings. What the sub-section says is that the value of the machinery "shall not be included in the rateable value of such building or land." *MULJEE SIOKA & Co. v. MUNICIPAL COMMISSIONER, BOMBAY* Bom. 8

Bombay District Municipal Act (III of 1901), ss. 3 (13), 50 (2), 90 (5)—Municipality declaring private street as public one—Soil of such street, if belongs to Municipality—Whether can be claimed by person.

From the definition of "public street" in s. 3 (13), Bom. District Municipal Act, it does not follow that the soil of every public street must necessarily be of the ownership of the Municipality. Section 50, sub-s (2) (f), says that all public streets, and the pavements, stones and other materials thereof and also all trees, erections, materials, implements and things provided for such streets shall be vested in and belong to the Municipality, and shall be held and applied by them as trustees. Unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. In fact s. 90, sub-s. (5), contemplates a private street being declared by the Municipality as a public street, but thereby the soil of such street does not come to be of the ownership of the Municipality. The only effect of such a declaration is that the street is allowed to be used by the public, and the public can claim a right of way over it as contemplated by s. 3, sub-s. (13) (a) of the Act. Therefore the decision of the City Survey Enquiry Officer that certain land was a public street does not declare that the Municipality was the owner of the soil of the street. On failure of a person to file a suit within one year after the decision of the City Survey Enquiry Officer, he is debarred from challenging the Municipality's claim that the land is a public street; but he is not debarred from claiming that even though it is a public street, the soil of the street belongs to him. **CHHOTALAL PANAHAND v. BOROUGH MUNICIPALITY OF NADIAD** Bom. 166

Bombay General Clauses Act (I of 1904), s. 17.
SEE **Bombay Prevention of Gambling Act, 1887, s. 6.** 459

Bombay Municipal Boroughs Act (XVIII of 1925), ss. 80, 81—Individual notice under s. 81 proved—Presumption that notice under s. 80 was properly given.

If it is proved, that individual notice was given under s. 81, Bom. Municipal Boroughs Act, the presumption as to official or legal acts under s. 114, Evi. Act, should be raised and it should be presumed that public notice was properly given of the assessment list, under s. 80, and that all formalities required for the proper assessment of the tax were followed by the Municipality. **JAMNADAS THABOomal v. EMPEROR** Sind 127

Bombay Prevention of Gambling Act (IV of 1887), ss. 3, 5, 7—Person caught actually taking bets over telephone—Conviction under s. 5.
Section 3, Bom. Prevention of Gambling Act makes "gaming" within the meaning of the Act the collection or soliciting of bets, and it makes no difference if these bets are brought by a messenger or person or sent by telephone or sent and received by telephone. It is gaming within the definition of s. 3, and in s. 7 the word "persons," includes "person" the plural includes the singular. Therefore, a person caught actually in the act of taking bets over the telephone can be rightly convicted of gaming, under s. 5. **BHAGWANDAS GHANSHAMDAS v. EMPEROR** Sind 78

ss. 4, 5—Conviction of accused under ss. 4 and 5 on same facts and acts—There should be only one punishment.

Where the prosecution have relied upon the same facts and upon the same acts of the accused to prove that the offences under ss. 4 and 5 were committed, the accused may be convicted under

Bombay Prevention of Gambling Act—concl'd.

both sections but there should be one punishment for both. **BHAGWANDAS GHANSHAMDAS v. EMPEROR** Sind 78

s. 6—Powers arising under s. 6 are outside **Bombay District Police Act (IV of 1890)—Powers under, if can be conferred on Additional Superintendent of Police by Provincial Government—Issue of warrant by such officer—Legality—S. 17, Bombay General Clauses Act (I of 1904), if applies to such case.**

Section 6, Bom. District Police Act, does not confer on the Prov. Govt. the right to confer on the Additional Superintendent of Police powers arising outside the Bom. District Police Act, and the powers arising under s. 6, Bom. Prev. of Gam. Act are outside the Bom. District Police Act. The words "specially empowered by Govt. in this behalf" in s. 6, Bom. Prev. of Gam. Act only cover the Assistant or Deputy Superintendent of Police. So that a Magistrate of the First Class or a District Superintendent of Police can exercise the power without any special authority from Govt.; but there is nothing said about an Additional Superintendent of Police. Although the Additional District Superintendent of Police is carrying out all the powers under the Bom. District Police Act, of a District Superintendent of Police, he is not in fact a District Superintendent of Police, and he cannot be given power to issue a warrant under s. 6. Section 17, Bom. General Clauses Act, 1904, does not apply to this case at all.

Hence the Additional Superintendent of Police, Panch Mahals District, has no power to authorize the issue of a search warrant under s. 6, and where the conviction turns upon the presumption arising under s. 7 on a search under s. 6, the conviction must be set aside, as the presumption does not arise. **ASGARALLI MAHAMMEDALLI HERALWALA v. EMPEROR** Bom. 459

ss. 6, 8—Money found in coat pocket of accused convicted of gaming—Seizure of, under s. 6.

It was not, the intention of the Legislature that moneys should be forfeited when there is no reason to believe that these moneys were connected with the gaming. The power of forfeiture exercisable by the Magistrate under s. 8 is discretionary. Where the money seized was found in the coat pocket of the accused, it cannot be said, in the absence of any satisfactory explanation by him that this money was not rightly seized under s. 6 and was not connected with the gaming of which he has been convicted. **BHAGWANDAS GHANSHAMDAS v. EMPEROR** Sind 78

s. 7. SEE **Bombay Prevention of Gambling Act, 1887, s. 3** 78

Bond—Instalment bond—Waiver—Default clause—Acceptance of overdue instalments amounts to waiver.

In the case of an instalment bond with a default clause that on default of any one of the instalments the creditor would have a right to sue for the whole amount, mere acceptance by the creditor of payment of overdue instalment amounts to waiver of his right to recover the whole amount and in such a case the time does not begin to run from the date on which the instalment was due. **MADAN MOHANLAL v. ZAHIR-UDDIN** Bhop. 809

Instalment bond with default clause—Instalments not paid and some becoming time-barred—Time, if begins to run against whole amount from date of first default—Creditor, whether can sue for remaining portion of debt treating relinquishment as act of waiver within Art. 75, Limitation Act (Bhopal) (IX of 1908)—Held on facts that suit was time-barred.

Bond—concl'd.

If instalment bond for the payment of debt contains a provision that in the event of failure of any instalment the creditor shall have a right to recover the whole amount thereunder and the debtor fails to pay several instalments, time will run from the failure of the instalments against the whole amount and the creditor is not entitled to forego such instalments as have become time-barred, and sue for remaining portion of his debt treating his relinquishment as an act of waiver within the meaning of Art. 75 of the Lim. Act.

If a creditor keeps quiet and does not prefer any suit to enforce his right of realizing the whole amount under an instalment bond with a default clause, time begins to run against him from the date of first default.

An instalment bond contained a default clause giving the creditor a right to realize the whole amount due in the event of failure of any instalment. No instalment had been paid and eleven instalments had become time-barred since the dates of their falling due, and a suit was brought to recover the remaining seven instalments under the bond:

Held, that the suit was time-barred. **KANAYYALAL v. ZALIM SINGH** Bhop. 221 F B
Burma Municipal Act (III of 1898), s. 43—Municipal councillor, position of—Liability for misapplication by his own acts or by his agents.

The position of councillors with regard to the Municipal fund is in law that of trustees. As trustees they would be bound to exercise over trust properties the same degree of caution and care as a man of ordinary prudence would exercise in the case of his own property. They would be liable for any loss of the trust fund which was facilitated by the gross neglect of their duties as trustees by their own acts or by the acts of their agents.

Held, on facts that the President of the Municipal Committee was guilty of acts of malfeasance, on account of loss caused by the embezzlement of the tax collector whom he had appointed without taking security, though he had no power to do so and consequently he was liable to make good the loss under s. 43, Burma Municipal Act. **U WIN TSU v. SECRETARY OF STATE** Rang. 212

Burma Prevention of Crime (Young Offenders) Act (III of 1930), s. 25—Order under—Nature of.

Per Ba U, J.—(In order of reference) the order passed under s. 25, Prevention of Crime (Young Offenders) Act, has not the same legal effect as an order passed under s. 562, Criminal P. O., as it affects the offender directly in his person and deprives him of his liberty unlike an order under s. 562, Criminal P. O. It is, therefore, a punishment within the meaning of s. 3, Whipping Act, and s. 53, I. P. O. **THE KING v. KYAW AYE** Rang. 405

C. P. Land Revenue Act (II of 1917), s. 109—Succession to tenure of protected thekedar, how governed—Hindu holder—Idea of notional jointness.

Succession to the tenure of protected thekedar is governed under s. 109, C. P. Land Revenue Act by the personal law of the deceased thekedar. The law which is to be applied is the ordinary law of Hindu succession and modified in minor details by s. 109, and irrespective of any idea of notional jointness which might arise from the principle that the tenure is impartible.

Hence where a person who after expressly denying the status of jointness with his deceased brother who was the last holder of the tenure, subsequently puts

G. P. Land Revenue Act—concl'd.

forward a claim as reversioner on the death of the widow of his deceased brother and not as a survivor, he is not entitled to succeed to the exclusion of the daughter of the last holder. In such a case no question of notional jointness arises. **NARHARI v. MAHARANI** Nag. 750

C. P. Municipalities Act (II of 1922), s. 45 (1)—Interested in contract with Municipality—Night soil auctioned—Deposit of full price, condition of sale—Highest bid accepted—Part of purchase price deposited—Auction-purchaser selling manure to another who paying full price, removing it—Subsequent purchaser cousin of member—Night soil thrown on member's field—Another member helping in removal—Members if "interested" in contract with Committee.

There was an auction sale of night soil manure belonging to a Municipality and one M purchased it for Rs. 625. Under the condition attached to the sale, he had to pay the full price immediately and until payment he was not entitled to remove the material. He paid Rs. 300. He borrowed Rs. 325 from one N who deposited that amount with the Municipal Committee. Being unable to pay off the loan, he sold the manure to N for Rs. 625 on receipt of Rs. 300 in cash and in adjustment of the loan of Rs. 325. N was the natural brother of H one of the accused. N got permission from the Committee to remove the manure. Thereon the accused got it removed through the Municipal sweepers to H's field. The other accused G who was also a member of the Committee, helped the accused H by giving Municipal sweepers, in the removal of the manure:

Held, that the contract could not be discharged until the conditions were fulfilled, i. e., by payment of the full price. The transaction could be characterised as a "contract" even after the property in the manure had passed to M, the highest bidder, and by the purchase of the manure from M after he became owner of it, H could be regarded as having become interested in a contract with the Municipal Committee.

Held, also that G who simply assisted in the removal of the stuff could be regarded as a person interested in the contract with the Municipal Committee. The word "interested", in s. 45 (1), C. P. Municipal Act, is to be interpreted in its ordinary wide sense and not confined to interest in money and includes jobbery. **HAZARIMAL v. EMPEROR** Nag. 161

C. P. Tenancy Act (IX of 1898), s. 89—Surrender—Surrender by person of his tenant-right though not in possession of holding—Validity.

The surrender of a holding properly understood signifies the relinquishment of the tenant-right in favour of the landlord as affecting the parcel of land which is the subject-matter of the contract of tenancy. Surrender signifies the merger of the tenant-right in the proprietary right so as to convert the tenancy holding into the landlord's *khudkasht*. The tenant-right which means the right to cultivate the land is distinct from actual cultivation just as title is from possession. Delivery of possession is not a necessary ingredient of a validity of a transfer of title or any kind of right recognised by law. *A fortiori*, a relinquishment of a right to be valid need not be accompanied by delivery of possession. There is nothing in law to preclude the tenant from relinquishing his tenant-right because he is out of possession. So long as he has the tenant-right, the holding is his and the relinquishment of the tenant-right must mean

C. P. Tenancy Act, 1898—concl'd.

relinquishment of the holding. The land may be in possession of a trespasser but the "holding" remains with the rightful tenant. **DATTU RAMJI MALI v. WAMAN DAMODHAR** Nag. 247

C. P. Tenancy Act (I of 1920), s. 9—Sale of occupancy holding in execution of rent decree—If free from encumbrance.

An absolute occupancy field sold in execution of a rent decree under s. 9, C. P. Ten. Act is not sold free from encumbrances. What is sold in execution of the rent decree is the interest of the judgment-debtor and where he has mortgaged the holding he holds it subject to the mortgage which he has created. The ordinary principle is that a purchaser cannot get a better title than that possessed by his vendor. **BHIKULAL v. BHAIYALAL** Nag. 785

Calcutta High Court (Original Side) Rules, Chap. XXVI—Registrar in making report regarding payment of alimony making suggestion as to amount of maintenance payable for children—No reference to him on this point—Such part cannot be confirmed.

Where the Registrar has, in making his report regarding the payment of alimony *pendente lite*, made certain suggestions regarding the amount of maintenance which should be paid for the children, the latter part of his report cannot be confirmed when there was no reference to him upon that point. **A. W. LOBO v. J. A. LOBO** Cal. 252

Calcutta Improvement Act (V of 1911), s. 24—Any portion of land intended to be acquired in pursuance of contract under s. 24, if can be abandoned by Board of Trustees.

Even apart from s. 78, Land Acquisition Act, there is nothing in the Land Acquisition Act or the Cal. Improvement Act which prevents the acquiring authority from abandoning a portion of the land in respect of which proceedings under the Act have been taken. Under s. 21, Cal. Improvement Act, very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. There is nothing in law therefore which prevents the Board from abandoning any portion of the land intended to be acquired in pursuance of a contract entered into under the provisions of s. 24, Cal. Improvement Act. **MAHESWARI v. PROVINCE OF BENGAL** Cal. 872

Calcutta Municipal Act (III of 1923), ss. 406, 407, 488—Ss. 406 and 407 cover case of person storing oil in transit as broker.

Even if the accused was storing the oil in transit as a broker, that would not take him out of the provisions of ss. 406 and 407. Sub-s (1) of these two sections is wide enough to cover such a case. **RAMESWAR MARWARI v. AMAR NATH SINHA** Cal. 425

s. 488—Conviction cannot be based on alleged plea of guilty at previous trial.

The Magistrate is in error in referring to an alleged plea of guilty at the previous trial. A conviction cannot be based on such an alleged plea of guilty. **RAMESWAR MARWARI v. AMAR NATH SINHA** Cal. 425

Caste Disabilities Removal Act (XXI of 1850)—Scope—Does not deal with succession to estate of convert.

The Caste Disabilities Removal Act is intended to deal with the rights to property of the person who is converted and not with succession to the estate of the convert. **RANBIR KARAM SINGH v. JOGINDRA CHANDRA BHATTACHARJI** All. 170

Certiorari—Writ of—Powers of High Court to issue—Chief Judge of Small Cause Court hearing appeal under s. 217, City of Bombay Municipal Act (III of 1888), acting without jurisdiction—His act, if can be controlled by writ of certiorari.

The High Court has power to issue a writ of certiorari in respect not only of the orders of subordinate Courts, but also of the proceedings of any tribunal or officer who, though not a Court, is yet acting judicially in these proceedings. Although the Chief Judge of the Small Cause Court, Bombay, hearing an appeal under s. 217, City of Bom. Municipal Act, 1888, be not a Court, his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority, his act can be controlled by the High Court by a writ of prohibition or certiorari, as the case may be. It is no doubt true that sub-s. (1) of s. 219 of the Act provides that the decision of the Chief Judge upon any appeal under s. 217 against any such value or tax shall be final. But that only means that there are no further appeals but it does not affect the power of the High Court to issue a writ of certiorari. There are two conditions to be fulfilled before a writ can be issued, namely that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. An officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. The mere fact that the order of the Chief Judge of the Small Cause Court, Bombay, is opposed to the principle of *res judicata* and that the provisions of sub-s. (2) of s. 154, City of Bom. Municipal Act, have been misinterpreted by him are not adequate grounds for the issue of a writ of certiorari. **MULJEE SIOKA & Co. v. MUNICIPAL COMMISSIONER, BOMBAY** Bom. 8

Charge. SEE TRANSFER OF PROPERTY ACT, 1882, s. 100 243

Cheating. SEE Penal Code, 1860, s. 415 123

Chota Nagpur Tenancy Act (VI of 1908), ss. 46, 47—Mortgage in violation of s. 46—Validity.

Where a mortgage has been entered into in violation of s. 46, Chota Nag. Ten. Act it cannot under that section or s. 47 form the basis of a valid decree for sale and the fact that the land subsequent to the mortgage ceases to be *rai-yati* will not validate a transaction regarding the land which was previously invalid. **MAKSUDAN LAL SAHU v. NIRANJAN NATH DAS** Pat. 266

Civil Procedure Code (Bhopal) (Act V of 1908), ss. 2 (8), 58—Ex parte decree of foreign Court awarding costs to defendant—Suit by defendant in Court in Bhopal State to recover costs based on judgment of foreign Court—Maintainability of.

The definition of 'judgment' in s. 2 (8), Civil P. C., (Bhopal) covers both an order and a decree, and equally holds good whether the decree is passed *ex parte* or on merits.

Where in a suit in a foreign Court plaintiff's witness who was under examination, absented himself and upon an adjournment being disallowed the Counsel withdrew from the suit with the result that the plaintiff's claim was rejected and she was required to pay the costs of the defendant, the absence of the witness on the date fixed for his further examination and the consequent withdrawal of plaintiff's Counsel from prosecution amounted to a default in proper prosecution of the suit on the part of the plaintiff and the suit, must be deemed to have been decided by the foreign Court *ex parte* under O. XVII, r. 2, Civil P. C. A suit based on

CIVIL Procedure Code—contd.

such a judgment to recover the costs from the defendants is maintainable in a Court in Bhopal State and is not barred by s. 58, Bhopal Civil P. O. *HARKUNWAR BAI v. KESRI SINGH* Bhop. 439

— s. 10. SEE Civil Procedure Code, 1908, s. 115 835

— s. 11—*Decision of issue between parties in prior execution proceedings under different and anterior decree—Similar matter at similar stage in subsequent suit, if can be raised.*

The decision of an issue between the same parties in a prior execution petition under a different and anterior decree, is the decision of a question arising in part of the proceedings in one suit and an attempt to raise the same matter at a similar stage of the proceedings in a subsequent suit will be barred by *res judicata*. *CHINNAPPATAN v. NARAYANA PATTAR*

Mad. 852

— s. 13(a) (b)—*Mortgage suit against minor daughter of deceased mortgagor in Osmanabad Court—Daughter's husband appointed guardian ad litem but not appearing—Court appointing its nazir as guardian ad litem and deciding case on merits—Decree for sale passed giving right to mortgagee to apply for personal decree if sale proceeds were insufficient—Suit by mortgagee for personal decree in Court in British India—Defendant held, could get benefit of cl. (a) and not of cl. (b) of exceptions to s. 13.*

The plaintiffs filed a mortgage suit against the minor daughter of the deceased mortgagor in the Osmanabad Court (Nizam's State) to recover the amount due under the mortgage deed by the sale of the mortgaged property and the balance out of the assets of the deceased mortgagor in the hands of the defendant. The defendant was then living with her husband in the Sholapur District in British India. Her husband was appointed her guardian ad litem. The defendant's husband, however, did not appear to defend the suit, and the Osmanabad Court appointed its nazir as the defendant's guardian ad litem. The nazir put in a written statement denying the mortgage, and after recording the statement of the writer of the mortgage deed, the Osmanabad Court passed a mortgage decree, which further provided that if the decretal amount was not satisfied out of the sale proceeds of the mortgaged property the plaintiffs were at liberty to apply for a personal decree against the defendant to the extent of the assets of her father in her hands. The decree was executed by the Osmanabad Court, and as the sale proceeds of the mortgaged property, were not sufficient to discharge the decretal amount the plaintiff filed a suit in the Court at Sholapur on the judgment of the Osmanabad Court, for personal decree against the defendant:

Held, that as the Osmanabad Court considered the plaintiffs' claim on its merits, and after taking evidence, disposed of the suit on the merits the defendant could not get the benefit of the exception contained in cl. (b) of s. 13, Civil P. C.

Held, also that that part of the decree passed by the Osmanabad Court against the defendant which was a personal decree against her must be regarded as a nullity.

Held, further that the Osmanabad Court acted beyond its jurisdiction in appointing its nazir as the defendant's guardian when her husband, who was her *de jure* and *de facto* guardian and had been appointed guardian ad litem by the Court itself, had never expressed his unwillingness to act

CIVIL Procedure Code—contd.

as her guardian. In such circumstances the Court acted against the interests of the minor and against natural justice by indirectly compelling her to appear in the suit by appointing its own officer as her guardian ad litem. Moreover, it could not be said that the officer of the Court who was thus appointed guardian ad litem voluntarily appeared to defend the suit. He was after all an officer of the Court and had to obey the orders passed by the Court. When the Court appointed its nazir as the guardian, he had to appear and say something. Thus his appearance could not be regarded as a voluntary submission to the jurisdiction of the Osmanabad Court. When such submission was not voluntary, then, it could not be said that the defendant rendered herself willingly amenable to the jurisdiction of the foreign. Hence, under the circumstances the personal decree passed against the defendant was an *ex parte* decree and the defendant did not voluntarily submit herself to the jurisdiction of the Osmanabad Court. She was, therefore, not bound by the personal decree against her; and the suit, based on such a personal decree passed by the foreign Court, was liable to be dismissed. *GAJANAN SHESHADRI v. SHANTABAI* Bom. 57

— s. 35—*Costs—Discretion of Court.*

Costs are always in discretion of the Court.

Held, that the Appellate Court exercised a sound discretion in the matter of the award of costs. *MAHOMED ALI KHAN v. WAJID ALI KHAN* Oudh 83

— s. 39—*Discretion under s. 39 to be exercised judicially.*

The whole of s. 39, Civil P. O., gives a discretion to the Court in the matter of transfer. That discretion must be judicially exercised. *HANMATHA PAL CHOU-DRURY v. SARADA PROBOD NATH* Cal. 67

— s. 39, O. XXI, rr. 5, 8—*Transmission of decree for execution to Sub-Court—Application for execution, when lies—Decree has to be sent to District Court under O. XXI, r. 5 only for transmission.*

An order transferring a decree to another Court takes effect from the date on which it is passed and the transferee Court has jurisdiction to entertain application for execution from the date of the passing of the order of transfer.

The decree under O. XXI, r. 5, Civil P. O., has to be sent to the District Court for mere transmission to the transferee Court and therefore no application lies to the District Court and O. XXI, r. 8 does not apply to such a case. *JULURI VENKATARATNAM v. BALABHADRUNI CHENNVAYYA* Mad. 758

— ss. 39, 47—*Transferee Court contemplated by s. 39.*

There is no express provision in s. 39, cl. (i), Civil P. O., that the transferee Court may be a Court of any pecuniary jurisdiction. The transferee Court contemplated by s. 39 must be therefore a Court of competent jurisdiction, that is, a Court which has the same pecuniary jurisdiction as the transferor Court. *FIRM GANESHIDAS BADRINARAIN v. AMULUK CHAND OSWAL* Cal. 895

— s. 46. SEE Civil Procedure Code, 1908, O. XXI, r. 63-O (1) 105

— s. 47.

SEE Civil Procedure Code, 1908, O. XXI, r. 2 428
SEE Civil Procedure Code, 1908, O. XXI, r. 58 165

— s. 47—*Application for transfer of decree, if falls under s. 47—Objection opposing such application, whether comes under s. 47—Order on such objection—Appealability.*

An application for transfer of a decree to the

Civil Procedure Code—contd.

Court which passed the decree, is one relating to the execution of the decree and comes under s. 47, Civil P. O., and an objection by a judgment-debtor to such an application is an objection which can come within the purview of s. 47. The words "relating to execution of the decree" used in s. 47, are wide enough to cover such a case. The order passed by the Court on such objection is an order coming within the scope of s. 47 and the appeal from such order is competent. *MANMATHA PAL CHAUDHURY v. SARADA PROSAD NATH* Cal. 67

s. 47—Decree against person in representative capacity—His objection in his own capacity regarding property against which decree is being executed, if can be raised by separate suit.

Where a decree is passed against a person in his representative capacity and proceedings are taken under it to obtain execution in his representative character, he is a party to the suit in respect to any question which may arise between him and the other parties relating to the execution of the decree. Hence when a decree has been passed against a person in his representative capacity, he should, in execution proceedings, in his own capacity, raise any objection with regard to the property against which the decree is being executed. Where he has failed to do so, he is debarred by s. 47, Civil P. O., from bringing, subsequently a suit for declaration that his share in the property is not affected by the decree. *R. M. S.V. CHETTYAR FIRM v. MA OHN MYAING* Rang. 254

s. 47—Objection that suit is barred under s. 47 can be allowed to be raised for first time in appeal.

Since the objection that a certain suit is barred under s. 47, Civil P. O., is purely a question of law, it can be allowed to be raised for the first time in appeal even if it was not raised in written statement. *LAKSHMADU v. RAMUDU* Mad. 816

s. 47—Objection to ex parte order, if can be raised under s. 47—Order overruling such objection—Appealability.

A judgment-debtor can raise an objection to the ex parte order of transfer under s. 47, Civil P. O. This objection is an objection relating to the execution of the decree as it is an objection relating to the first step in execution. An order overruling such an objection is one under s. 47 and is appealable. The Appellate Court has therefore to set aside the order. *FIRM GANESHIDAS BADRINARAIN v. AMULOK CHAND OSWAL* Cal. 895

s. 47—Proceedings under s. 47 between parties to suit—Auction-purchaser, if necessary party.

In a proceeding arising under s. 47, Civil P. O., between the parties to the suit the auction-purchaser is not a necessary party. The non-joinder of the auction-purchaser in the appeal is not therefore fatal to it. *AZHAR HUSAIN v. MOHAMMAD SHIBLI Nag. 791*

ss. 47, 39—Objections under s. 47, if can be taken at any stage.

A judgment-debtor can prefer objections under s. 47, Civil P. O., at any stage of the execution proceedings. Those objections have to be determined on their merits, unless a particular objection had been adjudicated upon by the Court earlier, or unless the judgment-debtor is debarred from agitating the particular objection. Where the objection, that the decree ought not to have been transferred to other Court as the judgment-debtors had properties within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree, had not been adjudi-

Civil Procedure Code—contd.

cated upon at a previous stage of the proceedings, and the order of transfer was made *ex parte*, and without giving the judgment-debtors an opportunity to contest the decree-holder's prayer for transfer, the Court ought to consider the objection on its merits. *HANMATHA PAL CHAUDHURY v. SARADA PROSAD NATH* Cal. 67

s. 47—Sons, if can challenge decree or mortgage by father on basis of which decree is passed in execution.

Section 47, applies to matters which arise after a decree has been passed and not to those which were in existence even at the time when the suit was instituted. If objections regarding the correctness or the validity of a decree are raised by a person who was a party to the suit or by one who must be deemed to have been a party, these will be barred not by s. 47, but by some other provision of law. If, on the other hand, these are being raised by a third party and are of a nature which go to the root of the matter and attack the decree itself, they could not be gone into in execution proceedings for the simple reason that an execution Court cannot be asked to go behind the decree. If persons who were no parties to the suit on mortgage against father and who have been already found not to be represented by their father, desire to challenge the decree or the mortgage on the basis of which the decree was passed, they cannot do so in execution proceedings. *LAKSHMADU v. RAMUDU* Mad. 816

s. 47—Transfer by party before decree—Transferee, if his representative.

A transferee of the interest of a party before a decree is passed against him or in his favour is not a representative of such party within the meaning of s. 47, Civil P. O. *SHIVU SHIDDA CHANGULA v. LAKHMI-CHAND TULJARAM KOTHARI* Bom. 96

s. 47, O. XXI—Sale not challenged by party to execution proceedings under s. 47—Sale confirmed and certificate granted—Suit for possession on ground that sale certificate included more property than was ordered to be sold by decree—Maintainability.

When a sale of immovable property has not been challenged by the judgment-debtors a sale certificate is granted by the Court. At the date of the grant of certificate the sale becomes absolute. The sale certificate granted by the Court to the purchaser is a formal document of title. When a sale has been confirmed by the Court and has become absolute under the terms of O. XXI it cannot be said that the sale is a nullity. The sale must be considered valid until it is set aside. Where a party to the execution proceedings has failed to challenge the sale under s. 47 or O. XXI on the ground that the sale certificate included more property than the decree directed should be sold, a separate suit for possession is not maintainable. *BARU v. AMIR SINGH* All. 294

s. 47, O. XXI, r. 58—"Representatives," in s. 47, scope of—Transferees from decree-holder or judgment-debtor, if included—Property attached in execution of decree obtained against legal representatives of deceased—Question, whether property forms part of assets of deceased raised by legal representatives or their transferees—Whether falls under s. 47 or O. XXI, r. 58.

The term 'representatives' occurring in s. 47, Civil P. O., includes not only legal representatives in the sense of heirs, executors or administrators but also representatives-in-interest, that is, any transferee of the decree-holder's interest or any transferee-

Civil Procedure Code—contd.

of the judgment-debtor's interest who so far as such interest is concerned is bound by the decree.

Where therefore, a decree is obtained against legal representatives of the deceased in respect of a debt charged against the assets of the deceased and in execution of that decree the assets of the deceased are attached, the question whether the properties attached are assets of the deceased or belong to the legal representatives themselves, raised by the legal representatives or their transferees who are bound by the decree, is a question relating to execution, discharge or satisfaction of the decree and must be determined in execution, and not by a separate suit. It is only when the judgment-debtor claims to represent the interest of a third party in whom the property is vested that the case would fall outside the purview of s. 47. In such a case as this what the judgment-debtor says is that although the property is vested in him it is so vested not beneficially but as trustee or executor for someone else. It is clear that in such a case the real objecting party is one who is a stranger to the suit and the objection having been made on his account his claim must be regarded as that of a third party and dealt with under O. XXI, r. 58.

[Distinction between the position of a legal representative of a deceased person and of a shewait of a debt pointed out.] *AZHAR HUSAIN v. MOHAMMAD SHIBLI* Nag. 791

s. 48—*Execution application not made within 12 years—Court, if can allow amendment to enable decree-holder to proceed.*

Where an application has not been properly made within the 12 years' period provided in s. 48, Civil P. O., no amendment can be allowed which would have the effect of depriving the judgment-debtor of putting forward the plea of limitation. But in special and exceptional circumstances the Court has discretion to order such amendments in order to enable the decree-holder to proceed further with execution. *JHORAMA v. VISWASABAYI, LATOHANNA DORA* Mad. 334

s. 48—*Starting point—Decree amended—Art. 182, Limitation Act, if affects s. 48—Limitation, whether begins to run from date of amendment or of original decree.*

Article 182, Lim. Act, is expressly limited to applications for execution not provided for by Art. 183 or by s. 48, Civil P. O. Inasmuch as Art. 182 clearly leaves the provisions of s. 48 untouched there can be no execution of a decree governed by s. 48 when 12 years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under s. 152, Civil P. O., but, because the Code gives the Court power to correct slips or omissions at any time it does not mean that the law of limitation is affected. A correction made in a time-barred decree leaves the decree still time-barred. *RAMACHANDRA v. PARASURAMAYYA* Mad. 176 FB

s. 52—*Property of deceased in hands of his widow as executrix and not in her personal capacity—If can be attached in execution of decree against deceased—Decree-holder, whether must file administrative suit.*

Where the widow of the deceased has property of her husband in her hands as executrix and not in her personal capacity, the property may be attached in execution of a decree against the deceased. A decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an

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administration suit when he desires to attach property *prima facie* in the hands of the judgment-debtor as such may not appeal to him. He may not therefore file an administrative suit. *SARAB SAUL SOFAER v. W. M. EZEKIEL* Rang. 370

s. 53—*S. 53, scope of.*

Section 53, Civil P. O., assumes the existence of a debt and declares in effect that the property which was liable under Hindu Law for payment for a debt incurred by the ancestor would, despite his death, continue to remain liable in the hands of his descendant as his legal representative. It was not meant to deprive the descendant of his right to contest the existence of the debt where he was in danger of losing the whole of his ancestral property. There is no provision in the section that the entire property belonging to a joint family of which the father was *karta*, would be necessarily liable for payment of debts incurred by him. *LAKSHMADU v. RAMUDU* Mad. 816

s. 58. *SEE* Civil Procedure Code (Bhopal) Act, 1908, s. 2 (8). 439

s. 66—*Three persons entering into contract for joint purchase of land about to be auctioned—Each providing money—Land purchased on behalf of them by agent of one of them—Sale certificate in name of principal alone—Others held could file suit for their shares and possession.*

Where three persons entered into a contract to the effect that they would jointly put up the money (though in different shares) necessary to purchase a certain village that was about to be put up to auction, and the village was purchased by the agent of one of them acting on behalf of all the three, but the sale certificate was issued in the name of the principal alone and the other two filed suits for their share and for possession:

Held, that s. 66, Civil P. O., was no bar to the suit. *BRUDASSAO v. SARATHMAL* Nag 60

s. 73—*Goods of judgment-debtor attached and kept in premises occupied by judgment-debtor as lessee, in possession of Nazir—Lessor, if can claim rent for period during which goods were in his premises as part of costs of realization out of sale proceeds.*

Where the goods attached by the creditors have continued to remain in possession of the Nazir in the premises which were in the occupation of the judgment-debtors as lessees, and the lease has not been terminated, the relationship between the lessor and the judgment-debtors as lessor and lessees continues unaffected and there is no privity either of contract or of estate between the lessor and the Nazir. The lessor, however, is entitled to claim rent for the period during which the attached goods were kept on the premises as part of the costs of the realization to be deducted from the sale proceeds before distribution to the judgment-creditors is made under s. 73, Civil P. O. It is claimed that this amount is payable to the applicants under s. 73, Civil P. O. *NUSSEERWANJI v. ROYAL TOTLAND* Sind 55

s. 100. *SEE* Second appeal 207

s. 100—*Finding of fact.*

In a second appeal under the provisions of s. 100, Civil P. O., the findings of fact of the first Appeal, late Court are binding upon the High Court, however gross the appellant may assert those findings to be. *U WIN TSU v. SECRETARY OF STATE* Rang. 212

s. 109. *SEE* Federal Court Rules, O. X, r. 1 670

s. 110 (2)—*Value of property involved in proceedings less than Rs. 10,000—Decision of High*

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Court affecting party's whole property worth more than Rs. 10,000—Certificate under s. 110 (2) held could be granted.

P and R were co-owners of a village owning one-third and two-thirds of the property respectively. Through the village lands ran two water channels, A and B. P brought under wet cultivation by means of channel B an additional area which resulted in a suit being filed against him by R. The suit was compromised, whereby P was restrained from cultivating any further area by using the channel. P, however, subsequently brought under cultivation more area by use of the water from channel B. This resulted in execution application being filed by R in which the High Court ultimately held that P was not entitled to draw further water from either channel. P applied for leave to appeal to the Privy Council. The value of the additional land brought under cultivation which resulted in the execution proceedings was under Rs. 10,000 but the value of the land affected by the decree was of the value of more than Rs. 10,000 :

Held, that as the decision of the High Court prohibiting P from bringing any further portion of his land under wet cultivation affected his interest in the village which was of far greater value than Rs. 10,000, the certificate under s. 110 (2), Civil P. O., could, therefore, be granted. KUPPAINTEU GURUVAPPA NAICKER v. M. MOUNAGURUSWAMI NAICKER

Mad. 731

— s. 111-A. SEE Federal Court Rules, O. X, r. 1

— s. 115. SEE Bengal Tenancy Act, 1885, s. 28-G

— s. 115. SEE Civil Procedure Code, 1908, O. XXIII, r. 1 (2)

— s. 115—*Facts and law duly considered by lower Court—Decision erroneous—If can be corrected on revision.*

If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised. Ko SAN PAW v. Ko PO YI

Rang. 350

— s. 115—*Limitation for filing revision in Rangoon High Court.*

It is a rule of practice in the Rangoon High Court that revisions may be filed at any time within 90 days of the date of the decree sought to be revised, and the applicant is entitled to utilize that rule of practice to the full. Daw Po v. U Po HMYIN

Rang. 875

— ss. 115, 10—*Trial which ought to have been stayed under U. P. Encumbered Estates Act not stayed—Order, if revisable*

An order allowing continuation of the trial of a suit which had been stayed and which ought to have remained stayed under s. 10 of the Civil P. O., is a "decided case" within the meaning of s. 115 of the Code and is capable of being revised by the High Court.

Section 115 of the Civil P. O., gives the Chief Court a discretion to make such order in the case as it thinks fit where it is of opinion that the Subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. Where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the Encumbered Estates Act, and it elects

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nonetheless to proceed with the hearing of the suit, it acts with material irregularity; and it cannot be said that when the Court passes such an order, it is any less a case decided because the decision is not with reference to s. 10 but with reference to the provisions of the Encumbered Estates Act. M. MOHD. INTISHAW ALI v. LACHMAN PRASAD

Oudh 835

— s. 122. SEE Federal Court Rules, O. X, r. 1

— s. 144 — *Application for restitution is governed by Art. 182, Limitation Act (IX of 1908).*

An application for restitution must be regarded as an application in execution and would be governed for the purpose of limitation by Art. 182, Lim Act. Consequently, a person claiming restitution would have to do so within the period of three years from the date on which the right to make the claim arose.

Held, on facts that application for restitution was in time. GANPAT GATLU v. NAVNITLAL RANOHODDAS

Bom. 354

— s. 144 — *Basis of order of restitution—Judgment-debtor held entitled to interest on decretal amount deposited by him as condition for grant of stay of execution, on reversal of decree.*

The basis of an order of restitution should not be the benefit which had accrued to the party whose decree has been reversed, but the loss suffered by the successful party as a result of the erroneous decree and the Court's orders thereunder.

A judgment-debtor applied to the Court to stay execution of the decree and the Court ordered him to furnish security for the amount of the decree as a condition precedent to the grant of stay. He, however, deposited into Court the full amount of the decree, praying the Court to order the decree-holder not to draw out the amount except on furnishing security. The Court did so order; but the decree-holder was unable or unwilling to furnish the security, with the result that the decree remained stayed and the money remained in Court. Eventually the decree was reversed in appeal and the judgment-debtor applied for restitution, including in his claim interest on the amount in deposit for the period for which it was in Court :

Held, that the interest could be awarded to the judgment-debtor. CHELIKANI SITARAMAYYA v. KOPPULA PEDDA VENKANNA

Mad. 30

— s. 144—*Distinction made by s. 144 between restitution which is properly consequential on variation or reversal of decree and which is not—Reversal of decree—Possession taken under original decree, whether always wrongful.*

Ordinarily, on the reversal of a decree for possession the judgment-debtor would be entitled to possession if claimed. The judgment-debtor would also be entitled to mesne profits during the period he was wrongfully kept out of possession. But it cannot always be said upon reversal of the decree, unless it gives clear indication of that fact, that the possession taken under the original decree is wrongful. Section 144, Civil P. O., makes a distinction between restitution which is properly consequential on the variation or reversal of the decree and restitution which is not. It emphasizes the fact that discretion is vested in the Court to make an order for mesne profits which are properly consequential on such variation or reversal. That distinction recognizes the possibility of a reversal not imprinting, on the possession taken, a wrongful character within the meaning of s. 2, sub-s. (12), containing the definition of "mesne profits." If in the order of reversal the

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character of that possession has been determined, then the question ceases. But if it is not and the Court remands the suit for determination of that question after fresh or further inquiry, then certainly it would be premature for the Court in the application by the successful appellant for restitution to make an order for mesne profits, for the Court would then be determining a question which was sub judice. **GANPAT GATLU v. NAVNITLAL RAO, HODDAS** Bom. 354

—s. 151. See Civil Procedure Code, O. XXXIX, r. 1. 305

—s. 151, O. XXXIX—*Power of Court to pass temporary injunction for preservation of property in respect of which person has filed plaint and has applied for leave to sue as pauper.*

Apart altogether from O. XXXIX of the Code, the Court has ample jurisdiction to pass an order providing for the protection and security of the property which is the subject matter of the litigation. It can pass a temporary injunction for the preservation of property in respect of which a person has filed a plaint and has applied for leave to sue as pauper. **DHANESWAR NATH TEWARI v. GHANSHYAM DASAR MISRA** All. 813

—s. 152—*Power to rectify errors in decree—Personal decree passed against legal representative—Error, if can be rectified in execution by Court passing decree.*

Where a decree on the face of it shows that a person sued in his representative capacity has been burdened with a liability which is not consonant with that capacity, the error is obviously that of a ministerial officer. In such a case the Court which made the decree and which is empowered by s. 152, Civil P. O., to rectify its error at any time, is not debarred from exercising its powers under the section, merely because that error has been brought to its notice in the course of an application, in which the decree-holder is seeking to execute the decree in a manner which the Court could never have intended when it passed the decree. **GANESH PRASAD AGARWALLA v. MONOHAR LAL MULLICK** Cal. 801

—O. I, r. 1—*Suit by vendee of mortgagor for redemption of two mortgaged properties—Decree for redemption as well as decree against mortgagor for another sum charged on one of mortgaged properties, if can be passed.*

In a suit for redemption of two mortgaged properties instituted by a vendee from the mortgagor it is not possible to grant a decree for redemption to the plaintiff against the mortgagee on payment of a certain sum and to give him a decree against his vendor for another sum charged on one of the mortgaged properties. The two claims cannot be combined. **SURAJ MAL v. CHANDER BHAN** Lah. 705

—O. I, r. 8—*Applicability—Suit by panchayat—All members not on record—Provisions of O. I, r. 8 not invoked—Suit must fail.*

Order I, r. 8, Civil P. O., is often referred to as a rule which applies when the suit is brought by a member of the public on behalf of the public or by a member of a particular community on behalf of the community or by a member of a class on behalf of that class.

Where in a suit brought by a panchayat all the members of the panchayat are not on record, nor has permission under O. I, r. 8 been obtained by those members who are on record to represent the rest of the members who are interested in the suit, the suit must fail. **NARUMAL MULCHAND v. RAIS HASHIM RAIS SAHIBDINO** Sind 883

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—O. I, r. 9—*Multifarious suit resulting in decree—Defect is considered to have been waived.*

Under O. I, r. 9, Civil P. O., suits are not to be dismissed for misjoinder or non-joinder of parties and in case of misjoinder of causes of action the Court can in proper cases call on the plaintiff to amend his plaint by limiting the relief claimed to what he is entitled to in respect of one cause of action so as to avoid embarrassment. When this procedure is followed the plaintiff can of course bring a separate suit in respect of the other cause or causes of action. But when this course is not taken nothing turns on the fact that it might have been taken. Once a multifarious suit has been allowed to proceed and has resulted in a decree, the defect is considered to have been waived and is irrelevant. **JANKI RAI v. RAM RAN BIJAYA PRASAD SINGH** Pat. 49

—O. I, r. 10. See Bengal Municipal Act, 1932, ss. 15, 136, 133, 2, proviso 605

—O. II, r. 2—*Two suits for divorce one by husband against wife on ground of her adultery and other by wife against husband on ground of cruelty—Court without going into merits and without going into alleged misconduct of wife decreeing both suits, with a note that this would not prejudice parties regarding subsequent suit in connection with marriage property—Subsequent suit by wife for partition and possession of joint property of marriage—Note by Judge in divorce suit, effect of—Husband, if debarred from proving misconduct on part of wife.*

Husband instituted a suit against his wife for divorce on the ground of her adultery. The wife brought a suit for divorce in the same Court against her husband on the ground of cruelty. The Judge without going into the merits gave two decrees for divorce. He made a note to the effect that this would not prejudice the parties with regard to anything that they might desire to establish in a subsequent suit in connection with the property of the marriage. Subsequently the wife brought a suit against her husband for partition and separate possession of the joint property of the marriage.

Held, that the note of the Judge in the divorce suit would be of no effect on the rights of the parties regarding marriage property.

Held, also that in the divorce suit although the husband did not insist upon proving his wife's guilt to obtain a divorce, he was not debarred from raising this point in a subsequent suit where the property of the marriage was involved. It was open to him to prove misconduct on the wife's part which would disentitle her from obtaining any of the joint property. **MAUNG PO SEIK v. MA PWA TIN** Rang. 380

—O. II, r. 2, O. XXIII, r. 3—*Suit for declaration of title to property—Property outside jurisdiction of Court not included—Compromise—Such property included—Compromise brought on record by date only and not made exhibit—Decree, if nullity for non-registration of compromise—Suit on compromise for possession of property which was outside jurisdiction of Court which passed decree on compromise—O. II, r. 2, if applies—Compromise, if binding—Party acting on compromise, whether can plead that it was result of pressure and undue influence.*

In a previous suit the reversioners sued the widow for a declaration that the will in her favour by her deceased husband was not valid and that she had no right to certain properties situated within the jurisdiction of the Court. The

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suit however, was compromised. The compromise dealt with another property also which was outside the jurisdiction of the Court. Some money was to be paid to the widow. The Court by its decree "ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise as a whole with this reservation that the sum stipulated shall be paid into Court within fifteen days from to-day, in case of failure the widow to be entitled to recover that amount by execution." The widow subsequently executed the decree and got the money stipulated in the compromise. The widow also gifted away the property, which was situated beyond the jurisdiction of the Court, and which was given to her by the compromise for lifetime only. A suit was instituted by the sons of the reversioners for declaration that the gifts were beyond her power. The High Court held that by not including in the suit which was compromised a claim to recover possession of these lands the reversioner had forfeited all right therein by virtue of O. II, r. 2, Civil P. O.

Held, (i) that had that claim been included in the plaint, the suit could not have been entertained. Moreover so long as that suit was undisposed of it was always possible that the Court, if it thought that there was anything in the point as to O. II, r. 2, would give leave to the plaintiff to amend by including a claim to recover possession of those lands. Consequently O. II, r. 2, Civil P. O., did not apply.

(ii) That the Court had jurisdiction to pass a decree in terms of the compromise though it included the property situated outside its jurisdiction. When it was agreed that she should have the lands for her life, there was no doubt or difficulty as to the jurisdiction of the Court to include these lands within the declaration made as to the other lands and assets. It was no longer a question of a decree for possession but merely of a judicial determination as to the reversionary rights of the plaintiff or his descendants. Whether the Court acted irregularly and failed to comply strictly with O. XXIII, r. 3 of the Civil P. O., mattered nothing. He acted by consent and within his jurisdiction his decree was enforced in execution by the widow and no proceedings had at any time been taken to have it set aside. So the non-registration of the compromise which was referred to by the Court by date though not marked as exhibit, did not affect the jurisdiction of the Court to pass the decree that the terms of the compromise should be carried out as a whole. And under Registration Act, s. 17 (i), no question of registration arose as regards decree.

(iii) Considered as a contract, the compromise was binding on the widow. The decree recorded the compromise though the compromise was not recited textually either in the body of the decree or in a schedule thereto.

(iv) That the widow took the benefit of the compromise and acted on it for many years before repudiating it. As she not only got rid of the claim of the reversioner to be the sole owner of her husband's lands and other assets, but enforced one of the terms of the compromise against him, there was more than sufficient *prima facie* evidence that she understood the transaction and that there was no pressure or undue influence.

Order XXIII, r. 3, Civil P. O., is sufficiently complied with by a reference to the compromise being made in the decree. *JAGAI SINGH v. SANGAT SINGH*

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— O. VI, r. 17—*Plaint—Amendment of at second appeal—Amendment altering nature of suit, cannot be allowed*

The plaintiff cannot be allowed in second appeal to amend his plaint by asking to be treated as a person who has by prescription acquired an absolute title as owner instead of as mortgagee, as originally alleged, with a prayer to be restored to possession of the house, since such an amendment would alter the character of the suit. *MAKSUDAN LAL SARKU v. NIRANJAN NATH DAS* Pat. 266

— O. VIII, r. 2. *See Bengal Tenancy Act, 1885, s. 144* 301

— O. IX, r. 13—*Provincial Insolvency Act (V of 1920), ss. 14, 5—Ex parte insolvency order—Application to set aside, if can be entertained.*

Order IX, r. 13 of the Civil P. O., is applicable to proceedings under the Insol Act also. Consequently an application for setting aside an insolvency order passed on a petition by the debtor, which was made *ex parte* can be entertained. *RAM PRATAP MARWARI v. LAOHMAN MISTRI* Pat. 794

— O. XXI, *See Civil Procedure Code, 1908, s. 47* 294

— O. XXI, r. 2—*Compromise of date subsequent to trial decree, if can be recorded under O. XXI, r. 2.*

Compromise of a date subsequent to the final decree in a suit can be recorded under O. XXI, r. 2, in execution proceedings. *GAYA PRASAD v. RAM CHABAN* Ail. 805

— O. XXI, r. 2, s. 47—*Decree, if can be adjusted or extinguished by executory agreement—Enforcement of such agreement in execution proceedings.*

A decree can be adjusted or extinguished by an executory agreement, if that is the intention of the parties. Though, unless that agreement merely varies the decree within certain limits, it cannot be enforced in execution proceedings of the original decree, it must be made the subject of a separate civil suit. *LACHHUMAL MORUMAL v. ATTAMUHAMMAD KHAN NABIBAKSH KHAN* Sind 428

— O. XXI, r. 2, s. 47—*Variation of decree, if adjustment of whole decree—Compromise agreement which is total adjustment of decree, if can be enforced in execution of decree which is totally adjusted or satisfied.*

A variation of a decree cannot be deemed an adjustment of the whole decree within the meaning of O. XXI, r. 2, Civil P. O. A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can, therefore, be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, it cannot be enforced in execution of a decree which is totally adjusted or satisfied. *LACHHUMAL MORUMAL v. ATTAMUHAMMAD KHAN NABIBAKSH KHAN* Sind 428

— O. XXI, rr. 5, 8. *See Civil Procedure Code, 1908, s. 39* 758

— O. XXI, r. 16—*Decree transferred to another Court—Decree-holder dying before starting execution proceedings—Legal representative cannot institute execution proceeding there until he obtains from Court passing decree an order under O. XXI, r. 16—Legal representative, when is clothed with status of decree-holder.*

When a decree is transferred to another Court and

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the decree-holder dies before starting the execution proceedings in that Court, his legal representatives cannot institute the execution proceedings there until they obtain an order from the Court which passed the decrees under O. XXI, r. 16, Civil P. C. Therefore the *darkhast* which was started by the legal representative without getting an order under r. 16, O. XXI, must be held to be bad from its inception, and cannot be legalized by any waiver on the part of the judgment-debtors or by the production of an order that may be subsequently obtained under O. XXI, r. 16, from the Court which passed the decree. Hence the transferee Court is not bound to stay the proceedings in order to enable the legal representatives to obtain such an order from the Court which passed the decree.

If a decree is once transferred to another Court for execution and the decree-holder who obtains such a transfer dies, the proper remedy for his legal representatives is to seek an order under O. XXI, r. 16, from the Court which passed the decree, and have that order remitted to the Court to which the decree is transferred for execution under O. XXI, r. 6 (c). If the application under O. XXI, r. 16, is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred for execution. It is after such an order is passed that the legal representatives are clothed with the status of decree-holders and are then empowered to institute execution proceedings in the Court to which the decree is transferred. *BRIJMOHANDAS DAMODARDAS v. SADASHIV LAXMAN NAIK* Bom. 85

— O. XXI, r. 16—*Father, sole decree-holder, dying—Decree devolving on son—Son cannot execute decree without recognition of devolution by Court passing decree.*

Even where on the death of the father who was the sole decree-holder, the decree has devolved upon his sons by the operation of law, they cannot claim to be decree-holders who can execute the decree without recognition by the Court which passed the decree of the devolution upon them of the decree. *NARAYANAN CHETTI v. PANCHANATHAN CHETTIAR* Mad. 352

— O. XXI, r. 22—*Decree amended—Limitation to be counted from date of amended decree.*

The decree contemplated in O. XXI, r. 22, Civil P. C., must, be the decree to be executed, not only when it is an appellate decree dealt with in cl. (2) but also when it is a decree which has been reviewed or amended as dealt with in cls. (3) and (4) of Art. 182, Lim. Act. Where, therefore, a decree is amended, the period of one year is to be counted from the date of the amended decree and not the original decree. *MAHESH SINGH v. GAJADHAR SINGH* Pat. 79

— O. XXI, r. 22—*Judgment-debtor dying after issue of sale proclamation—Execution, if can be continued—Legal representatives entering appearance—Notice to them under r. 22, necessity of.*

When in execution of a money decree after the issue of the sale proclamation the judgment-debtor dies, the decree holder is not at liberty to proceed with the execution against a dead man. Execution cannot be continued against the estate of a dead person without bringing on the record his legal representatives. While substituting them the Court should issue notice under O. XXI, r. 22 against them, and their objections, whatever they may have to urge, should be heard before the execution proceeding can be further continued against them.

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And the fact that the legal representatives enter appearance and file objections will not obviate the necessity of the notice because their appearance is in their personal capacity as owner of property sought to be taken in execution of a decree not passed against them and they could not be held to be judgment-debtors until the decree-holder has obtained a substitution of their names in his execution petition. *MAZHARUL HAQ v. RAGHUBER SINGH* Pat. 52

— O. XXI, r. 22—*Judgment-debtor putting in appearance and asking for adjournment of sale—Want of notice under r. 22, if can be pleaded to set aside sale.*

Want of service of notice under O. XXI, r. 22, Civil P. C., cannot be pleaded if the judgment-debtors had put in their appearance and repeatedly asked for adjournment of the sale and obviously with the knowledge of the sale. *ANIL KUMAR ROY CHAUDHURY v. AHAMMED ALI SARKAR* Cal. 121

— O. XXI, r. 22—*One of judgment-debtors dying at time of execution—One of sons substituted while another left out—Validity of sale for want of notice as regard latter's share.*

Where at the time of the execution, one of the judgment-debtors has died and one of his sons is substituted for him but another son is left out, the sale must be held to be void for want of notice under O. XXI, r. 22, Civil P. C., in so far as the share of the latter son is concerned. But as regards the shares of other judgment-debtors the sale cannot be held to be void. *ANIL KUMAR ROY CHAUDHURY v. AHAMMED ALI SARKAR* Cal. 121

— O. XXI, rr. 22, 90—*Suit against joint family—Pleader appointed by Court as guardian ad litem on behalf of minor members—In execution, another mentioned as guardian—No order removing Pleader and appointing another as guardian ad litem—Sale held unsustainable against minors—Sale also held should be set aside in its entirety.*

Once the Court has found that the legal conditions do not exist for proceeding with an execution, then there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. XXI, r. 22 must fall to the ground.

The Court appointed a Pleader on behalf of the minor members of the joint family in a suit against them, to be their guardian *ad litem*. But in the execution application no mention was made of the Pleader. The execution was sought to be taken against minors as under guardianship of another person. No notice under O. XXI, r. 22 was sent to the Pleader guardian and to the minors through him. There was no order removing him and appointing another as guardian *ad litem* so as to authorise the latter to represent the minors in the execution proceedings or to make any admission on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions:

Held, that the sale of the shares of the minors could not be sustained.

Held, also that since the sale of the entire joint family property was found to be without title against the share of the minor members, and it was not confirmed by the time when the minors objected to the sale and there was no mutual understanding between the Court and the bidders as to what was being put to sale, the sale should be set aside in its entirety and not only as against

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share of the minors. **BACHOO PRASAD SINGH v. GOBARDHAN DAS** Pat. 492

O. XXI, r. 58. SEE Civil Procedure Code, 1908, s. 47 791

O. XXI, r. 58, s. 47—*Objection by party to suit under O. XXI, r. 58 dismissed summarily as collusive—Subsequent application under s. 47, if barred by res judicata.*

Where an objection under O. XXI, r. 58, Civil P. O., made by a party to the suit to an attachment of property in execution of decree is dismissed summarily as being collusive, without any enquiry, the dismissal must be deemed to have been on the ground that objection under O. XXI, r. 58 was not competent. The question of *res judicata* does not arise in such a case and subsequent application by the party under s. 47 is not barred. **DAULAT RAM v. DR. ANANT RAM** Lah. 165

O. XXI, r. 63—*Suit under, by creditor for declaration that property was attachable and saleable in execution of his decree and that sale by judgment-debtor was void—Whether must be in form of representative suit.*

There is no statutory provision to prevent a creditor from instituting a suit under O. XXI, r. 63, Civil P. O., only on his own behalf for a declaration that the property in suit was attachable and saleable in execution of his decree and that the sale-deeds executed by judgment-debtor were ineffectual and void as far as the decrees in favour of the plaintiff were concerned. It is not necessary for the plaintiff to bring a representative suit on behalf of or for the benefit of all the creditors. **MOHAMMAD ASGAR ALI v. MOHAMMAD ISHAQ ALI** All. 383

O. XXI, r. 63—*Transfer of Property Act (IV of 1882), s. 53—Creditor's proceeding under O. XXI, r. 63—Suit, if must be in representative character.*

A creditor proceeding under O. XXI, r. 63, Civil P. O., who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of whose existence he is not aware. It is for the defendant who as debtor knows whether he has other creditors to object that there are other creditors and that a representative suit should be filed. If he does not raise such objection, the Court is entitled to hold that there are no other creditors and the plaintiff therefore can sue for himself alone for a declaration that the transfer by the defendant was fictitious and fraudulent with the object of defeating the plaintiff's claim. **SURAJ BAKHSH SINGH v. THAKUR DAS** Oudh 90

O. XXI, r. 63-C (1), (Rangoon) s. 46 — *Execution of decree against garnishee—No order under O. XXI, r. 63-C (1) passed — Legality — Attachment of debt outside jurisdiction of Court, directly—Legality.*

The proper remedy for a decree-holder on failure of the garnishee to comply with the notice under O. XXI, r. 63-C, is to act under r. 63-C (1), and get from the Court an order to the garnishee to comply with the terms of the notice. Until there has been a definite order against the garnishee to pay under r. 63-C (1), there is nothing executable directly against the garnishee as a decree. Hence no execution proceedings can be continued directly against the garnishee personally or as executor, and the attachment of his banking account is bad.

A Court cannot take out execution against a debt unless the debt is within its ordinary civil jurisdiction. Hence an attachment of a debt out-

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side jurisdiction of a Court made directly and not by precept, is illegal. **G. H. SHEERAZEE v. T. V. REDDY** Rang. 105

O. XXI, r. 89. SEE Limitation Act, 1908, Art. 166 603

O. XXI, r. 90. SEE Civil Procedure Code, 1908, O. XXI, r. 22 492

O. XXI, r. 90—*Irregularity and illegality, difference—Sale he'd few hours before advertised time—If illegality rendering sale void.*

The difference between an irregularity and an illegality is one of degree, and an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. When sale is held two or three hours before the advertised time there is an illegality, as it is more than likely that intending bidders relying on the proclamation would not turn up until too late. The mere fact that there was beat of drum in the village just before the sale was actually held would not make any difference to intending bidders from outside. There is therefore a good cause for the Court to set aside the sale on its own initiative. In any case the matter can be dealt with under O. XXI, r. 90, Civil P. O., as the illegality is at least a material irregularity. **PANNALAL v. FIRM OF HASAN DADA** Nag. 584

O. XXI, r. 99 (2). SEE Limitation Act, 1908, Art. 166 603

O. XXII—*Applicability to execution proceedings—Right to execute decree, if abates on failure to bring legal representatives of deceased judgment-debtor on record.*

Order XXII, Civil P. O., has no application to execution proceedings and the right to execute a decree does not abate or get extinguished by reason of the fact that the legal representatives of the judgment-debtor have not been brought on the record within any specified period. **GUBINDA NATH SAHA CH JUDHARY v. DURGA NARAIN SAHA** Cal. 759

O. XXII, rr. 3, 4. SEE Civil Procedure Code, 1908, O. XXII, r. 12 549

O. XXII, r. 4—*Counter-claim—Abatement of.* A counter-claim stands in the same category as a cross-suit for the purposes of the Civil P. O. The counter-claim abates by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record in the counter-claim. **HIRJI RAMJI v. DAULATRAM PATANJI AND CO.** Bom. 226

O. XXII, r. 8. SEE Civil Procedure Code, 1908, O. XXII, r. 12 549

O. XXI, r. 9—*Ignorance of death of respondent—Whether "sufficient cause" within r. 9.*

Mere ignorance of the death of a respondent is not a sufficient cause within the meaning of O. XXII, r. 9. **JAGADISH BHADUR v. MAHABHO PRASAD** Oudh 549

O. XXII, rr. 12, 8, 3, 4, 9—*Appeal out of execution proceeding—Such appeals, if exempted from operation of r. 8—Applicability of rr. 3, 4 and 8 in such case.*

Order XXII, r. 12 of the Civil P. O., does not exempt pending appeals from the operation of r. 8 of that Order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also rr. 3, 4 and 8 would never apply. **JAGDISH BHADUR v. MAHABHO PRASAD** Oudh 549

O. XXIII, r. 1—*"Other sufficient reasons,"*

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scope—Suit decided on merits—Failure to implead as defendant necessary party, whether ground for withdrawal of suit with liberty to bring fresh one, in appeal.

The sphere of "other sufficient reasons" in O. XXIII, r. 1, Civil P. C., (Bhopal) is wider than the sphere of "some formal defect."

Failure to implead even a necessary party as defendant is neither such a formal defect as can be cured in appeal nor does it afford sufficient ground to withdraw from the suit with permission to institute the same afresh after it has once been heard and decided on merits. *KISHORILAL v. SUNDARBAI*

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— O. XXIII, r. 1—*Suit for ejectment against sole defendant dismissed on merits—Application in appeal to withdraw suit with permission to bring fresh one on ground that plaintiff forgot to implead defendant's son also—Permission held could not be granted.*

Where a suit for ejectment brought against a sole defendant is dismissed on merits and plaintiff in appeal applies under O. XXIII, r. 1, Civil P. C., for permission to withdraw from his suit with liberty to bring a fresh suit on the same cause of action on the basis that he had forgotten to implead along with the defendant her son also, such permission cannot be granted as to do so would mean to re-open the entire case against the successful defendant for no fault of hers. Addition of a new defendant in such cases virtually amounts to a complete alteration in the nature of the suit, which is not permitted in law, and the help of O. XXIII, r. (1) cannot be invoked to attain this end. Moreover the plaintiff has full right to sue the son for ejectment without withdrawing his suit with leave of the Court, and without regard to the result of the suit. Thus the plaintiff's remedy against the son of the defendant remains unaffected even if his suit fails on merits. Therefore there exists no sufficient ground to allow a withdrawal under O. XXIII, r. 1. *KISHORI LAL v. SUNDARBAI*

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— O. XXIII, rr. 1 and 2, *scope of—Plaintiff granted leave to withdraw suit with permission to bring fresh one on the same cause of action, on condition of paying costs to defendant on or before certain date or before institution of fresh suit—Condition not fulfilled—Fresh suit is void ab initio.*

Under r. 1, O. XXIII, Civil P. C., a plaintiff can withdraw a suit as a matter of right without the permission of the Court; but if he does it he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to r. 2. Under the said Rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on "such terms as it thinks fit." The terms may be of any kind. They might be: (1) That the plaintiff shall pay the costs before a certain date specified in the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment. If the terms imposed are as in illus. (1) or (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing.

Where, therefore, leave to bring a fresh suit on the

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same cause of action is granted on condition of payment of costs on or before a specified date or before the institution of a fresh suit, payment must be made before the specified date or before the institution of a fresh suit. If no payment is made, the second suit is void *ab initio*. The payment of costs is a condition precedent to the institution of a fresh suit. *MA SAN MYINT v. U TUN SEIN* *Rang. 711*

— O. XXIII, r. 1 (2), s. 115—*Interpretation and scope of—"Formal defect," meaning of—Defect, should not affect merits of case.*

Clause (a) of O. XXIII, r. 1 (2), Civil P. C., is illustrative of the "grounds" referred to in cl. (b), and although the "grounds" need not be *ejusdem generis* with the ground mentioned in cl. (a), they must be "at least analogous" to it. The ground in cl. (a) requires that the suit must fail by reason of some formal defect; whereas the grounds contemplated in cl. (b) need not necessarily be fatal to the suit, but must be analogous to a formal defect.

The expression "formal defect" must be given a wide and liberal meaning, and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. This expression includes misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the suit. *RAMRAO BHAGWANTRAO INAMDAR v. APPANNA SAMAGE* *Bom. 409 F B*

— O. XXIII, r. 1 (2), s. 115—*Withdrawal allowed on ground not contemplated by r. 1 (2)—Order amounts to exercising jurisdiction not vested in Court and is revisable under s. 115.*

Where the plaintiff prays for an injunction on the basis of his being the owner of the site which he claims to be an accretion to his land as an alluvion and the suit is dismissed for want of proof, the plaintiff cannot be allowed to withdraw the suit in appeal in order to file another suit claiming title to the site in suit on the ground of adverse possession as there is no defect of form in the suit but a defect of substance arising out of his inability to prove the title on which he based his claim. Allowing the withdrawal of the suit on grounds not contemplated by O. XXIII, r. 1 (2) amounts to the exercise of jurisdiction not vested in the Court under r. 1 (2) and its order can be corrected in revision under s. 115. *RAMRAO BHAGWANTRAO INAMDAR v. APPANNA SAMAGE* *Bom. 409 F B*

— O. XXIII, r. 3—*Compromise—Court cannot select some terms and pass decree in accordance with them while neglecting others.*

Parties to a suit can compromise their differences on any terms they please and they can include in those terms any matters, whether the subject-matter of the suit or not, and, under the provisions of O. XXIII, r. 3, Civil P. C., the Court is compelled to pass a decree in accordance with the terms of the petition. It is not open to the Court to select some terms of the petition and pass a decree in accordance with those terms while neglecting the others. *DAW PO v. U PO HMYIN* *Rang. 875*

— O. XXIII, r. 3—"Lawful agreement", *scope—Agreement void on face of it, if excluded—Enquiry, whether necessary.*

The term "lawful agreement" as used in O. XXIII, r. 3, Civil P. C., excludes not only unlawful agreements i.e., the object or consideration for which is unlawful as defined in the Contract Act, but all agreements which on the face of them are void and therefore will not be enforced by the Court. For

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this purpose, no inquiry is necessary because the terms of the agreement themselves will show the defect. The Court therefore has to consider whether on the face of the agreement it is lawful or not. Word "lawful" is not wide enough to include an inquiry whether the agreement is voidable at the instance of one party. *WESTERN ELECTRIC CO., LTD. v. KAILAS CHAND* Bom. 250

O. XXXII, r. 7—*Agreement to refer case of minor to arbitration—Leave of Court, if necessary.* Every agreement by the guardian or next friend of a minor relating to a suit is subject to the leave of the Court. Agreement to refer to arbitration is an agreement within the meaning of r. 7 of O. XXXII, Civil P. C., and the leave of the Court should be taken when the case of a minor is being referred to arbitration. *UMAR GUL ALLAH DIN v. ABDUL MANAN* Pesh. 860

O. XXXIII, rr. 6, 7—*Petition for leave to sue in forma pauperis—Collector performing functions of Government Pleader under s. 6 forwarding report of Tahsildar that petitioner was pauper—Whether itself evidence in case—Government Pleader opposing application—Jurisdiction of Court to decide matter on evidence.*

A report of the Tahsildar that the petitioner who applied for leave to sue in forma pauperis was unable to pay the court-fees, forwarded to the Court by the Collector who has been appointed to perform the functions of the Govt. Pleader under r. 6, O. XXXIII, Civil P. C., in not in itself evidence in the case. It is for the Govt. Pleader who appears for the Secretary of State in the case to decide whether to accept the report of the Tahsildar which, was merely forwarded by the Collector, or to oppose the application made by the petitioner. Where he chooses the latter course and the Court after discussing evidence comes to the conclusion that the petitioner is not pauper it has not acted with any material irregularity in the exercise of its jurisdiction. *HASAN DIN v. THE SECRETARY OF STATE FOR INDIA* Lah. 134

O. XXXIV, r. 11. SEE Bihar Money-lenders (Regulation of Transactions) Act, 1939, s. 7 436, 796

O XXXIV, r. 14—*Decree on basis of hundi—Security bond creating mortgage for satisfying decree—Decree-holder, if precluded from executing decree by O. XXXIV, r. 14.*

Where the decree obtained is on the basis of a hundi and a mortgage is created by a security bond for the purpose of satisfying decree, the decree-holder is not precluded from executing the decree by O. XXXIV, r. 14. *KANJESHWAR NATH v. BENARES BANK, LTD., SAHARANPUR* All. 741

O. XXXIV, r. 14, s. 11—*Lease by mortgagee back to mortgagor, part of mortgage transaction and merely machinery for realizing interest—Suit for rent under lease—Under decree in such suit equity of redemption, when can be sold.*

When a lease back is part of a transaction of mortgage and is merely a piece of machinery for realizing the interest on the mortgage, a suit for rent under that lease would in fact be a suit to realize the interest on the mortgage and under a decree in such a suit the equity of redemption could not be brought to sale unless the suit was actually framed as a suit on the mortgage. The fact that the mortgage was on one day and the lease on the next day has very little bearing on the question whether the lease and the mortgage form part of the same transaction. Nor the fact that an advance by way of security for

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rent was paid necessarily makes the lease something separable from the mortgage. Similarly the fact that the lease is expressed as ending on the same date as the date on which the right of redemption begins, is a clear indication that both the deeds form part of one and the same transaction. *CHINNAPPAYAN v. NARAYANA PATTAR* Mad. 852

O XXXIX SEE Civil Procedure Code, 1908, s. 151 813

O. XXXIX, r. 1—*Power of Chartered High Court to grant injunction apart from provision of O. XXXIX, r. 1.*

Although the application cannot be brought within the scope of O. XXXIX, r. 1, a Chartered High Court is not powerless to grant an injunction otherwise than in accordance with the provisions of O. XXXIX, r. 1 if a proper case is made out. A Chartered High Court, has an inherent jurisdiction to grant injunctions operating in personam under circumstances and conditions other than those set out in the Civil P. C., where the ends of a justice so require. *STANLEY AUSTIN CARDIGAN MARTIN, In the goods of* Cal. 886

O. XXXIX, r. 1—*Proceeding for grant of letters of administration—Application for injunction restraining certain persons from paying money belonging to estate lying with them, to certain persons—If falls under O. XXXIX, r. 1.*

It is clear from the provisions of O. XXXIX, r. 1, Civil P. C. that before an application for injunction can be granted under that Rule the applicant must show that the property with respect to which an injunction is prayed for, is property in dispute in a suit. In a proceeding for the grant of letters of administration it cannot be said that there is any property in dispute. No question regarding title to property can be decided in an application, for probate or letters of administration. An application made in such proceedings for an injunction restraining certain persons from withdrawing certain sums alleged to appertain to the estate of the deceased and restraining various authorities with whom these sums are lying, from paying them out, until the disposal of the application for letters of administration, cannot be brought within the scope of O. XXXIX, r. 1. *STANLEY AUSTIN CARDIGAN MARTIN, In the goods of* Cal. 886

O XXXIX, rr. 1, 2, s. 151—*Enforcement of mortgage, if waste or damage of property—Suit by mortgagor at Agra for reduction of interest under s. 33, U. P. Agriculturists Relief Act (XXVII of 1931)—Suit by mortgagee on mortgage in Bombay Court—Mortgagee, if can be restrained by injunction from proceeding with his case at Bombay.*

The enforcement of a mortgage can never be characterized as an attempt to waste or damage any property.

The lawful exercise of a right vested in a person cannot be legally restrained by the Court under r. 2, O. XXXIX, Civil P. C.

A mortgage contained properties situated outside U. P. The principal and interest due under a previous mortgage formed part of the consideration of this mortgage and the deed stated that the first mortgage was satisfied and discharged. The mortgagor paid some instalments according to the terms of the mortgage on account of the interest but subsequently being advised that he was paying higher rate of interest than what he was bound to do as an agriculturist, a suit was filed by the mortgagor under s. 33, U. P. Agri. Relief Act, in the Court at Agra against the mortgagee. While

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this suit was pending the mortgagee brought a suit in Court at Bombay which had jurisdiction, for the enforcement of the mortgage. The mortgagor applied to the Court at Agra for the issue of an injunction restraining the mortgagee from proceeding with the Bombay suit and the application was granted. The suit at Agra was, however, dismissed and the injunction came to an end. An appeal was preferred by the mortgagor and he asked for an issue of an *ad interim* injunction which was rejected. An appeal was preferred to the High Court from this order and an application for temporary injunction, pending the disposal of appeal was made:

Held, that O. XXXIX, r. 2 and s. 151, Civil P. C., had no application. The mortgagee had a right to bring the suit in Bombay and his action was neither illegal nor dishonest nor even improper and hence the injunction restraining him from proceeding with the Bombay case could not be granted. *ABBU DAYAL v. LALDAS MAGANLAL* All. 305

O. XLI, rr. 10 (2), 19—Order rejecting appeal under O. XLI, r. 10 (2)—Appealability—Order refusing to restore such appeal, if appealable. An order rejecting an appeal under O. XLI, r. 10 (2), Civil P. C., is not a decree and is not therefore appealable as such. It is not appealable even as an order under O. XLIII, r. 1.

Order XLI, r. 19 is not applicable in a case where the date on which the appeal was rejected under O. XLI, r. 10 (2) was not fixed for the hearing of the appeal. An order therefore refusing to restore the appeal so rejected is not appealable. No power is vested in the Court to allow the appellant to proceed with his appeal even if he is put to great hardship in not allowing him to proceed with it. *KUTIKA KUEB v. SRIDHAR MISHRA* All. 31

O. XLI, r. 20—Proper party—Party interested in result of appeal, if can be added after limitation.

Where the real contesting respondent is duly impleaded, another person who is supporting the case of the appellant and is interested in the result of the appeal, can be impleaded as a proper party under O. XLI, r. 20, Civil P. C., even after the period of limitation has expired. *RAM RATTAN v. FAZAL HAQ* Lah. 839

O. XLI, r. 22—Refusal of Appellate Court to extend time for filing cross-objection—Interference in second appeal.

It is entirely discretionary with the Court of Appeal below to extend the time for filing cross-objections and in refusing to extend time it cannot be said that it committed an error of law which could be interfered with in second appeal. *AMULYA KRISHNA BANDOPADHYAYA v. RARULI PIONEER CO-OPERATIVE BANK, LTD.* Cal. 416

O. XLI, r. 23. SEE Civil Procedure Code, O. XLIII, r. 1 (u) 889

O. XLI, r. 33—Decree against some defendants and others exonerated—No appeal by plaintiff, but defendants against whom whole decree was passed appealing with a prayer that decree might be passed against other defendants as well—Appeal held competent.

The plaintiff having got a decree against some of the defendants, was content with the decree and did not appeal against the other defendants who were exonerated, but an appeal was preferred by some of the defendants against whom decree was passed praying that a decree might be passed against the

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other defendants as well in order that their liability might be reduced:

Held, that O. XLI, r. 33 of the Civil P. C., applied and that the appeal was competent. *RANESAWAR PRASAD SINGH v. KAMPRETA THAKUR* Pat. 634

O. XLIII, r. 1 (u), O. XLI, r. 23—Order held one under O. XLI, r. 23 and appealable.

Where the operative portion of the appellate order is "I set aside the judgment and decree of the lower Court and allow the appeal of plaintiff No. 3 with costs. The case will be sent back and retried according to law from the stage where it has been left by the learned Munsif," the order is an order of remand contemplated by O. XLI, r. 23 of the Civil P. C., and an appeal lies against such order under O. XLIII, r. 1 (u). *MATHURA PRASAD v. SITA RAM* Oudh 889

O. XLV, r. 2. SEE Federal Court 796

O. XLV, r. 7, 9, 17. SEE Federal Court 670

Rules O. X, r. 1
O. XLV, r. 17 added by Government of India (Adaptation of India Laws) Order, 1937—No certificate—Application under O. XLV, if proper.

Rule 17 which has been added to O. XLV by the Govt. of India (Adaptation of India Laws) Order, 1937, assumes that a certificate under s. 205 of the Constitution Act has already been given.

Where a certificate had not been granted at the time the judgment was pronounced, the party interested might bring the matter to the notice of the Court by an application, but that will not be an application under O. XLV. *PRITHWI CHAND LALL CHOUDHARY v. SUKRAJ RAI* FC 453

Sch. II, Para. 17—Power of guardian to refer dispute arising inside family, to arbitration.

The guardian mother of minor has authority to agree to refer the disputes arising inside the family to the decision of arbitrators under Para. 17 (1), where she finds that it is for the benefit of the minor. *RAG UPATI DUTT v. RAM GOPAL DUTT* Cal. 80
Companies Act (VII of 1913), s. 171—Winding up order—Subsequent suit without leave—Jurisdiction of Court to grant leave to continue suit, under s. 171—Jurisdiction of Court to dismiss suit on application for leave.

Under s. 171, Companies Act, leave to proceed with a pending legal proceeding can only be granted where that proceeding has been instituted prior to the winding up order. The Court has no jurisdiction to give the plaintiff leave to continue a suit instituted without leave subsequent to the winding-up order. The Court has inherent jurisdiction to dismiss a suit on an interlocutory application for leave to continue the suit. *HARNARAIN MISHRA v. KANHAIYALAL LOHAWALLA* Cal. 880

Company—Dividend—Arrears of dividend and interest thereon are not debt—Company's obligation to pay them, nature of—Second preference share declared "subject to income-tax"—"Subject to tax" in declaration, meaning of.

There is a distinction between the current dividends on the second preference shares and the arrears of dividend and interest thereon payable under the scheme of arrangement. The arrears of dividend remain arrears of dividend and can only be paid out of profits. Such arrears or the interest thereon do not become a debt due from the company different in character from the obligation to pay current dividends.

Where the dividends on the second preference

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shares are declared "subject to income-tax" it cannot be said that there is no declaration of dividend except after deduction of tax at the standard rate. The words "subject to tax" mean no more than subject to tax properly deductible, and where no tax is properly deductible, the words have no effect on the amount of dividend declared. **BAL LALITA RATANCHAND KHIRMOPAND v. TATA IRON AND STEEL CO. LTD.** Bom. 389 F B

Liquidation—Debt not presently payable, if can be set-off against money owing to company.

A debt, although not presently payable, can be set off against moneys owing to a company in liquidation. To allow such a set off would not amount to a fraudulent preference. **TRAVANCORE NATIONAL AND QUILON BANK, LTD, In the matter of** Mad. 531

Compromise—Compromise otherwise valid and binding on minor—Question whether it was for benefit of minor held could not be discussed in suit for declaration that compromise is void.

If the compromise is otherwise valid and binding the question whether or not it was for the benefit of the plaintiff, cannot be debated and discussed in a suit for a declaration that the compromise is not binding on him. That was a question to be determined by the Judge who granted the permission for the compromise. **SAT DEO PRASAD v. DEBI BADAL** All. 299

Time essence of contract—Compromise between parties that amount due under mortgage decree should be paid by instalments and that mortgagor should furnish additional security within specified time—Time essence of contract—Failure of mortgagor to furnish security within time—Court held could not enlarge time.

The plaintiff obtained a mortgage decree against the defendant and then the parties came to a compromise whereby the defendant agreed to pay the balance under the decree in certain instalments and that in addition to the properties covered by the mortgage decree, he would furnish further security and execute a bond and register it within one month. It was further agreed that time was of the essence of the contract, and that on failure to pay any one of the instalments or on failure to furnish security within the time specified, the plaintiff would be at liberty to proceed with the sale for the amount due against the properties covered by the mortgage decree and the security bond. The security was not furnished by the due date but was shortly furnished and the first instalment was duly paid. The plaintiff applied for the sale of the property:

Held, allowing the application that the Court could not enlarge time specified in the compromise petition for furnishing security. **O. R. M. M. S. P. S. V. CHETTYAR v. O. V. R. A. T. FIRM** Rang. 223

Vakalatnama held gave power to the Pleader to enter into compromise on behalf of minor.

By a vakalatnama extensive powers concerning the conduct and prosecution of the suit on behalf of a minor were given to a Pleader and he was *inter alia* authorized to appoint arbitrators, to file compromise (*sulahnama dakhil karen*) and to file documents and it was stated in the vakalatnama that all the acts done by the Pleader would be accepted by the minor:

Held, that the vakalatnama conferred very wide powers in very general terms on the Pleader, and as such, the vakalatnama must by necessary implication be deemed to have authorized him to enter into the compromise. **SAT DEO PRASAD v. DEBI BADAL** All. 299

Confession. SEE Criminal trial 481, 586

Contempt of Court—Defendant's written statement containing defamatory matter regarding plaintiff's son—Plaintiff applying to Court for striking out these matters—Notice on defendant, by plaintiff's son, demanding payment of damages within certain time or else he would institute action for defamation—Application and notice held no contempt of Court.

Where in a suit the defendant files a written statement describing the plaintiff's son with a defamatory and abusive epithet, and the plaintiff makes an application to the Court for striking out the defamatory epithet and his son serves a notice on the defendant demanding payment of damages for defamation within certain time or that an action would be brought for defamation, the application and the notice do not amount to contempt of Court. **BALDEO SAHAJ v. SHIVA DATT SHARMA** All. 65

Object of proceedings for contempt—Article in newspaper containing comments on finding of Magistrate held amounted to contempt of Court—Tendering of apology by accused, if sufficient for securing immunity from punishment.

The principle underlying the cases in which persons have been punished for attacks upon Courts and interferences with the due execution of their orders is not the protecting of either the Court as a whole or the individual Judges of the Court from a repetition of them, but the protecting of the public and especially those who either voluntarily or by compulsion are subject to its jurisdiction, from the mischief they will incur if the authority of the tribunal be undermined or impaired.

An article in a newspaper containing comments on the finding of the Magistrate in an inquest under s. 176, Criminal P. O., into the death of a person which are tantamount to imputations of deliberate perversity, incapability and partiality to the Police on the part of the Magistrate are calculated to bring into contempt, the Magistrate, in his capacity as such and for the publication of such article the editor and the publisher of the newspaper are liable to be dealt with for contempt of Court. The mere fact that an apology has been tendered by the accused is not a sufficient reason for securing immunity from punishment. **ADVOCATE-GENERAL, BURMA v. MAUNG OHIT MAUNG** Rang. 308

Contempt of Courts Act (XII of 1926), s. 2—Sub-Divisional Magistrate holding enquiry under s. 176, Criminal Procedure Code (Act V of 1898), is Court Subordinate to High Court within meaning of Act.

The words 'Subordinate Court' in the Contempt of Courts Act were used in a wide sense as including any Court over which the High Court has superintendence for the purposes of s. 85, Govt. of Burma Act, 1935, that it is to say, all Courts subject for the time being to its appellate jurisdiction. The Sub-Divisional Magistrate when holding an inquiry under s. 176, Criminal P. O., is acting as a Court Subordinate to the High Court for the purposes of the Contempt of Courts Act. **ADVOCATE-GENERAL v. MAUNG OHIT MAUNG** Rang. 573

Contract—Illegal. SEE Contract Act, 1872, s. 23

Penalty—Money payable by instalments—Failure of instalment rendering money paid liable to forfeiture—Provision held penalty.

Where in an agreement to pay money by instalments it is provided that in case of default the money already paid would be forfeited, the provision is a penalty. In such a case, if there is a default a reasonable sum by way of damages only

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can be claimed. *MADAN THEATRES, LTD v. NARAYAN DAS* Oudh 849

— *Proposal and acceptance—Rent—Landlord and tenant—Landlord sending notice of enhancement of rent—Tenant protesting—Tenant continuing in possession—Liability for enhanced rent.*

It is not open to a landlord to claim enhancement of rent simply by serving a notice giving expression to his wish that he wants enhanced rent for the premises. There may be contract either express or implied by conduct. Where a landlord serves a notice demanding enhancement at a certain rate upon the tenant and the tenant agrees to pay that enhancement either in express terms or by his conduct in not protesting against it and continuing to occupy the premises, he becomes liable for the enhancement, but where he lodges a protest against the enhancement, whether that protest is based upon tenable or untenable grounds, it cannot be said that there has been any implied acceptance of the proposal on behalf of the landlord and no contract has come into existence and the tenant is not liable for the enhanced rate of rent. What is material is whether there is an acceptance of the proposal by conduct express or implied or not. *KASHI PRASAD v. SAJJADI BEGAM* Oudh 575

— *Stranger to, when can sue on it.*

A stranger to a contract can sue upon it at any rate in the following circumstances, namely, (a) where a party to the contract agrees with the stranger to pay him direct or becomes stopped from denying his liability to pay him personally and (b) where the contract creates a trust in favour of the stranger. *DAW PO v. U PO HMYIN* Rang. 875

— *Time essence of.* SEE *Compromise* 223
Contract Act (IX of 1872), s. 2 (d)—*Consideration may move from third person.*

"Consideration" as defined in s. 2 (d), Contract Act, shows that the consideration may move from a third person and need not necessarily move from the promisee. *DAW PO v. U PO HMYIN* Rang. 875

— s. 23—*Contract illegal—Illegality not pleaded—If should be enforced.*

Courts should not enforce illegal contracts even if the illegality has not been pleaded by the defendant. *KO PA TU v. AZIMULLA* Rang. 269

— s. 23—*Contract to transfer property to another in consideration of latter's giving false evidence on behalf of former—Legality.*

Where one person enters into agreement with another person to transfer certain property to him on the latter's agreeing to give false evidence on behalf of the former the agreement is void as the consideration for the agreement is illegal and opposed to public policy. *KO PA TU v. AZIMULLA* Rang. 269

— s. 63—*Agreement to remit—Consideration necessary.*

Where the decree-holder has actually remitted a portion of the debt due to him and not merely promised to remit it, no consideration is necessary. Actual remission is not completed until he accepts the part payment in full satisfaction. For an agreement to remit, consideration is necessary. *KAMASWAMI v. GURUKAR KUDRAPPA* Mad. 338

— s. 65—*Conflict between s. 65, Contract Act (IX of 1872), and s. 68, Madras District Municipalities Act (V of 1920).*

Section 65, Contract Act was meant to cover those agreements as well which are discovered to be void from their inception while ss. 96 and 97, U. P. District Municipalities Act or ss. 68 and 69, Mad. District Municipalities Act, 1884, apply to contracts

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only. The distinction between an agreement and a contract must not be lost sight of. It would thus appear that the provisions of s. 65, Contract Act, were only intended to come into play when an agreement was discovered to be unenforceable at law according to the rules laid down in ss. 96-97, U. P. District Municipalities Act or ss. 68 and 69, Mad. District Municipalities Act. The result is that instead of their being any conflict between the special and general laws we find that the general law would permit a party to get relief when on account of a special law the agreement cannot be considered to be enforceable or in other words characterized as a contract. *MADURA MUNICIPALITY v. K. ALAGIRISAMI NAIDU* Mad. 780

— s. 65—*Money paid under void contract repaid to vendee—Suit by him for damages for breach of contract—Claim for interest on ground of negligence of vendor—Article of Limitation Act applicable—Interest from date of payment of money to date of suit, if can be granted in absence of proof that money earned interest during such period—Limitation Act (IX of 1908), Arts. 35, 97, 62.*

The second part of s. 65, Contract Act, namely "or to make compensation for it," only comes into play when the advantage cannot be restored. Interest on sum paid under void contract would only be payable after the advantage has been refused to be restored.

The claim for interest on the ground of negligence on the part of the vendor in overlooking the provisions of the law, cannot be granted as it is equally the vendee's duty to know the law. For this reason also the claim for interest is not sustainable. Further, the claim for interest based on negligence of the vendor is governed by Art. 36, Lim. Act and not by Arts. 97 or 62.

Where a contract of sale is found to be void and the amount paid under it is repaid by the vendor to the vendee, the vendee is not entitled to any interest on the amount from the date of its payment to the date of the institution of the suit for damages by the vendor for breach of contract if it is not proved that the amount had earned any interest in the hands of the vendor. *DISTRICT BOARD FERROZPORE v. BALWANT RAI* Lah. 742

— s. 65—*Suit under s. 65, nature of—Interest on amount of compensation.*

In a suit on the basis of a contract, a party is trying to enforce its terms while in a suit under s. 65, a party merely asks for restoration or compensation as the agreement has not matured into a contract and he wants to be placed in the position in which he would have been if no agreement had been entered into.

In the absence of any contract, there is no liability to pay any interest and the same cannot be decreed. *MADURA MUNICIPALITY v. K. ALAGIRISAMI NAIDU* Mad. 780

— ss. 65, 70—*Contract of sale unenforceable for want of sanction under s. 68, Madras District Municipalities Act (V of 1920)—Vendee unable to restore goods—Must make compensation.*

The language of s. 65, Contract Act, includes agreements which are destitute of legal effect from their inception. When an agreement is discovered to be unenforceable and not illegal and when a party has not been guilty of any conduct which would disentitle him to come to Court there appears to be no reason why the principle underlying s. 65 should not be given effect to. It would be extremely inequitable to find that when a contract has

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not been entered into by authorized persons or is found to be unenforceable for want of certain formalities, the advantage gained by a party should not be, when it was not intended to be gratuitous, restored or compensated. The relief which a person asks for under s. 85, Contract Act, has not been forbidden by any law and it cannot be legitimately argued that in trying to secure such a relief he is attempting to do indirectly what he had been forbidden by law to do directly.

So where a contract of sale is found to be unenforceable for want of a sanction under s. 68, Mad. District Municipalities Act, the vendee who has received the goods but is unable to restore them must make compensation for that under s. 65 or s. 70, Contract Act. *MADURA MUNICIPALITY v. K. ALAGIRISAMI NAIDU* Mad. 780

— s. 70. SEE Contract Act, 1872, s. 65 780
— ss. 196, 65, 70—S. 196 if refers to contracts expressly forbidden either by persons ratifying them or by law—Option of ratification, exercise of.

Section 196, Contract Act, refers to contracts which have been entered into by persons on behalf of others without their knowledge or authority but not to contracts which have been expressly forbidden either by those persons who are alleged to have ratified them later or by law. Moreover, an option of ratification could be held to be capable of being exercised within a reasonable time of the act purported to be ratified and not after the expiry of the period for which the option was open. *MADURA MUNICIPALITY v. K. ALAGIRISAMI NAIDU* Mad. 780

Copyright—Musical composition—Talkie film adopting title of song but not repeating in any form its words—Whether infringement of performing right in musical composition—Passing off—Such use of title, if constitutes "passing off."

There cannot be an infringement of performing right in a musical composition (assuming it to exist) unless there has been a public performance of the musical composition by the defendant. A musical composition is performed by audible reproduction, by the voice of or by musical instruments or by mechanical methods of reproduction. But where not a word of the song is repeated in any form in the talkie film except that the title is thrown on the film at the outset, this does not constitute infringement of performing right in musical composition.

In general a title is not by itself a proper subject-matter of copyright. As a rule a title does not involve literary composition and is not sufficiently substantial to justify a claim to protection. That statement does not mean that in particular cases a title may not be on so extensive a scale and of so important a character as to be a proper subject of protection against being copied. Where the theme of the film is different from that of the song there is no ground in copyright law to justify the claim to prevent the use of the title of the song for the film which is too unsubstantial to constitute an infringement, especially when used in so different a connection.

It cannot be said that in no circumstances can there be a "passing off" by the use of the same title for a literary, artistic or musical work though it is difficult to imagine such a case where there are no circumstances calculated to mislead other than the mere title. A title may, however, be used in the case of a book or newspaper under such condi-

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tions that persons may be deceived into buying the defendant's book or newspaper under the impression that they are buying that of the plaintiff. Similarity of name may be strengthened by similarity in make up, and in subject-matter, and by other circumstances. Nor is such a claim limited to things sold, though it is commoner in that class of case. It is not impossible that there might be "passing off" of such a nature that persons might pay to go to a performance of the defendants' work under the impression that they were going to witness the plaintiff's work. Such cases are perhaps not very likely to occur, but there may conceivably be the same element of likelihood of deception, whether designed or not, as to involve an invasion of the plaintiff's Common Law rights and a disturbance of his business interests. But the thing said to be passed off must resemble the thing for which it is passed off. A frying pan cannot be passed off as a kettle.

Where a talkie film uses the title of a song but the theme of the film is different from that of the song and the song is not sung at any performance, there is no "passing off." *FRANCIS DAX & HUNTER LTD. v. TWENTIETH CENTURY FOX CORPORATION LTD.* P C 449

Co-sharers—Mortgage by one co-heir of his own share as well as that of others without their consent—Suit by mortgagee—Appointment of Receiver—Rights of enjoyment of other co-heirs, if prejudiced.

The possession of one co-heir is possession not only for himself but also for other co-heirs. The fact that he had without their consent, purported to mortgage not only his own share but also theirs is not in itself an indication that his possession had become adverse to theirs. The mere fact that a Receiver was appointed in the mortgage suit brought by the mortgagee against the mortgagor co-heir would not prejudice them in the enjoyment of their right they being persons with paramount rights, not parties to the action and actually in possession of those rights. *S. I. S. K. R. CHETTYAR FIRM v. FAROK AHMED* Rang. 460

— One of two co-sharers of ex-proprietary tenancy accepting whole of ex-proprietary rent in lieu of profits—Whether estopped from subsequently claiming profits.

Where in a suit for arrears of rent on the ex-proprietary holding, one of two co-sharers of the *khewat* number, accepts the whole of the ex-proprietary rent from the other co-sharers who is the ex-proprietary tenant in lieu of his share of the profits, he is estopped from subsequently claiming a share of profits in the remaining portion of the *sir land*. *GHASITOO MAL v. ASA RAM* All. 369

— Sale of house by tenant to one co-sharer—Other co-sharers can sue for joint possession of site by removal of materials.

All the co-parceners in a joint *patti* or *mahal* are joint owners of the site of the houses of tenants and *raiyyats* situated in that *patti* or *mahal*. If the tenants or *raiyyat* dies without leaving any heir or abandons the house the right to the joint possession of the site and the materials vests in all the co-sharers and in such a case one co-sharer has no right to take possession of the materials or of the site to the exclusion of the other co-sharers. It is also clear that a tenant or a *raiyyat* has the right to transfer the materials of the house to any person he likes provided the materials belong to him and there is no custom prohibiting such a transfer. A sale of his house by a tenant or *raiyyat* to one of the co-sharers, does not entitle that co-sharer to

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retain possession of the house along with the site to the exclusion of the other co-sharers. The tenant or *raiyat* has a disposing power only so far as the materials of the house are concerned and has not a transferable interest in the site of the house. The retention of possession by one of the co-sharers of the house of a tenant or *raiyat* that has been purchased by him furnishes the other co-sharers with a cause of action for a suit for joint possession of the site by removal of the materials. The question of special damage does not arise and the cause of action in such cases is constituted by the invasion of the right of the co-sharers to joint enjoyment of the site of the house. *DARSHAN SINGH v. PRAG SINGH* All. 39

Suit by other co-heirs for declaration of rights as co-owners—Whether must seek remedy against Receiver—Mortgagee's claim in such suit for charge on their shares—Relevancy.

In a suit for the declaration of their rights as co-owners, they need not seek any remedy against the Receiver. The claim of the mortgagee in such a suit that he had a charge on their property which they must redeem is entirely irrelevant. The co-heirs need not ask for the further relief of partition. *S. L. S. K. R. CHETTYAR PIER v. FAROK AHMED Rang. 460*

Costs. SEE Attachment 105
Court Fees Act (VII of 1870), s. 7—Suit instituted on March 1, 1937, i. e., before amendment of Act in 1938—Law applicable—Plaintiff in possession of house in suit, requiring cancellation of sale deed alleged to be obtained by fraud—Court-fee payable.

Suit brought on March 1, 1937, before the amending Court Fees Act of 1938 was passed, will be governed by the provisions of the Act as it stood unamended.

The provisions of the Court Fees Act as it stood before the amending Act was passed and even those of the amending Act clearly show that the Legislature has made a distinction in the amount of court-fee between suits for possession of immovable property and those seeking reliefs other than possession in respect of immovable property, the court-fee required in the case of the latter suits being much less than that required in suits for possession.

Where the plaintiff is herself in possession of the house in suit and all that she requires is cancellation of the sale deed which she said was obtained from her by fraud and undue influence in such a suit, she cannot be required to pay *ad valorem* court-fee on the market value of the house which is the court-fee payable on a suit for possession. The plaintiff can therefore be allowed to pay court-fees only on declaratory relief. *ORI LAL v. RAHIM ZADI Oudh 454*

s. 8 (c) as amended in Bengal—Suit for declaration that plaintiffs were entitled to perform religious ceremonies every year in court-yards of defendant's palace—Enquiry under s. 8 (c), if justified.

The plaintiffs instituted a suit against a Ruling Chief for a declaration to the effect that they were entitled to perform certain religious ceremonies on the occasion of the Moharrum every year in one of the court-yards attached to the defendant's palace and they also asked for a perpetual injunction prohibiting the defendant from interfering with the plaintiffs by alleging his own title.

Held, that there was no difficulty in forming an estimate as to the extent of the loss which would be incurred by the defendant if the plaintiffs succeeded in their suit. Obviously in a case of this

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sort the extent to which the defendant's property will be depreciated should be taken to correspond to the value of the benefit which the plaintiffs seek to obtain if they succeed in their suit. From this point of view, therefore, there was objective standard of valuation which would justify the Court in holding an enquiry under s. 8 (c), Court Fees Act. *SAURISH CHANDRA ROY v. GOPAL OSTAGAR Cal. 51*

Criminal Procedure Code (Act of 1898), ss. 10, 438—District Magistrate invested with powers under s. 10 has also other powers not contemplated by Code.

From the mere fact that the District Magistrate has been invested with certain powers under s. 10, it does not follow that he has not other powers which are not contemplated by the Criminal P. O. He is in addition the Collector of the district. He is also the District Officer and in those capacities he has to perform many functions which are not covered by the Criminal P. O. *BEJOY KRISHNA DEB v. SHYAM NARAIN SINGH Cal. 310*

ss. 75 (2), 205, 540-A—Magistrate writing to another Magistrate to return warrant unexecuted—Effect.

A warrant is an order addressed to a certain person directing him to arrest the accused and to produce the accused before the Court. The warrant may have a further provision for admitting the accused to bail. But in each case the warrant is an order directed to someone to arrest a certain accused and bring him before the Court, and the person to whom it is addressed may if he is a Magistrate or Police Officer endorse the warrant to some one serving under him. When the Magistrate writes to the District Magistrate in another province asking him to return the warrants unexecuted then it is clear that the warrants are cancelled. Section 75 (2), Criminal P. O., does not require that there should be any formal order on the record, of cancellation. *JAGDISH NARAIN BAJPAI v. EMPREOR All. 682*

s. 106—Expression "offences involving breach of peace," meaning—Conviction of accused under s. 294, Penal Code (Act XLV of 1860) — Order under s. 106, when can be made.

The expression "offences involving a breach of the peace" in s. 106, Criminal P. O., means offences in which the commission of a breach of the peace is a necessary ingredient, or offence the commission of which has actually led to a breach of the peace (irrespective of the party by which that breach is committed). It is impossible to construe the word 'involve' as equivalent to the words 'likely to lead to.' The mere use of abusive language in a public place is not of itself a breach of the peace, though of course it is likely to lead to one. It is not one of the offences affecting the public tranquillity mentioned in s. 106. The words "breach of the public peace" have not only in popular usage but in law, the significance of a disturbance of the peace by something more than mere abusive or obscene words, that is to say, by resort, if not to actual violence, to threats of it. In other words, the word 'peace' is used as a synonym for security rather than for tranquillity. Where therefore an accused person is convicted of an offence under s. 294, I. P. O., an order under s. 106 cannot be made unless there is a finding that active criminal intimidation or assault, etc., have actually occurred in consequence of the obscene abuse. *THE KING v. MAUNG KYI NYO Rang. 149*

s. 106—Order under, when can be passed—Conviction under s. 323, Penal Code (Act XLV of

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1860), set aside and one under s. 342, Penal Code maintained—Order under s. 106, if can be passed.

One has to see not whether on the facts the persons against whom an order under s. 106, Criminal P. C., is passed did commit a breach of the peace but whether they were convicted of an offence which necessarily involves a breach of the peace. If the offence is one in which a breach of the peace may have been committed in the circumstances of the case but which in other circumstances does not necessarily involve a breach of the peace, an order under s. 106 of the Criminal P. C., cannot be passed. Where the Judge has set aside the conviction under s. 323, I. P. C., leaving only the conviction under s. 342, I. P. C., an order under s. 106, Criminal P. C., cannot be passed. *AKHTAR HUSAIN v. EMPEROR*

Oudh 808

— s. 110—"Offences involving breach of the peace," meaning of.

The words "offences involving a breach of the peace" in s. 110 (e), Criminal P. C., mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. *MAUNG PO AUNG v. THE KING*

Rang. 609

— s. 110 (e)—"Habitually," meaning of.

The word "habitually" in s. 110 (e), Criminal P. C., implies frequent practice or use. It implies a tendency or a capacity resulting from the frequent repetition of the same acts. *MAUNG PO AUNG v. THE KING*

Rang. 609

— s. 144. SEE Criminal Procedure Code, 1898, s. 145

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— s. 144—Order spending itself—Interference by High Court.

It is not the usual practice of the High Court to interfere with an order which has spent in its force unless there are special reasons for such interference. *RAMA BARIK v. EMPEROR*

Pat. 511

— s. 144—Starting of rival business in close proximity to previously established one—Order under s. 144 against person interested in rival business, if can be issued.

A Magistrate, as an emergency measure, has power to stop, by an order under s. 144, Criminal P. C. the holding of a Jhat, or the exercise of his rights by a man on his own land. But a man, who holds a hat on his own land, is perfectly entitled to do so and that by itself is not a wrongful act. Competition in trade, unless illegal methods are adopted, is not a wrongful act. When a rival business is started in close proximity to a previously established business the person interested in the latter is bound to object to the former and some sort of strained feeling is inevitable. This by itself is no ground for restraining the new comer from carrying his trade unless he is doing or is likely to do any wrongful act which may lead to a breach of the peace. In such a case the best course is to prohibit the doing of the wrongful act or if necessary, to bind down the wrongdoer under s. 107, Criminal P. C. But an order more or less of a permanent nature is not justified under s. 144, Criminal P. C., which is meant for speedy remedy. *RAMA BARIK v. EMPEROR*

Pat. 511

— s. 144, 145—No real dispute as to possession—Imminent danger of breach of peace—Order under s. 144 is proper—Order under s. 145, when becomes necessary.

It is only where there is a dispute likely to cause a breach of the peace concerning any land or water or boundaries thereof and the dispute

Criminal Procedure Code—contd.

requires to be decided on evidence that resort to s. 145, Criminal P. C., becomes necessary; and for this purpose the dispute has to be a real dispute and not a mere pretence on behalf of one of the contesting parties. Where there is no such real dispute, orders under s. 144 are not improper. There may even be occasions where an order is first appropriately passed under s. 144 and the proceeding is afterwards converted into one under s. 145 in order to pass an even more appropriate and permanent order.

Where A is in possession of the land and continuing it and B is trying to take the possession of the same land and the Police report that there is imminent danger of a breach of the peace an order under s. 144 is proper one as there is no real dispute about possession at all. *BRUNESHWAR PRASAD v. ROMMOY ROY*

Pat. 139

— s. 144 (3)—Scope—Order to general public prohibiting them from doing certain acts "within limits of Nawadah Union Committee," held sufficiently described particular place within meaning of s. 144 (3).

Sub-s. (3) of s. 144, Criminal P. C., has nothing to do with the nature of the order, but is merely one of the four sub-sections which refer to the manner of promulgation and to the duration of an order under sub-s. (1).

Where an order is passed under s. 144 to the public generally, prohibiting them from doing certain acts "within the limits of Nawadah Union Committee," the order sufficiently describes a particular place within the meaning of s. 144 (3) when the limits of the Union Committee are clearly and specifically defined. *In the matter of MADAN KISHORE*

Pat. 135

— s. 145 SEE Criminal Procedure Code, 1898, s. 144

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— s. 145—Inquiry under sub-s. (1).

Sub-s. (1) of s. 145 does not contemplate any sustained inquiry before the making of the preliminary order. It is in the highest degree absurd for a Magistrate to delay the passing of a preliminary order while he undertakes a prolonged inquiry extending over several hearings. *MUHAMMAD ALI YAR MUHAMMAD v. SHAMSUL HAQ PIR ZIALDIN SHAH*

Sind 636

— s. 145—Inquiry under sub-s. (4) whether obligatory after passing order under sub-s. (1)—Order under sub-s. (6), if must follow subsequently.

Sub-ss. (1), (4), (5) and (6) of s. 145, Criminal P. C., are complementary. Once an order has been passed under sub-s. (1), it is obligatory for a Magistrate to make the inquiry provided for in sub-s. (4) subject only to the obligation under sub-s. (5) to terminate the proceedings in the circumstances therein contemplated. The words of sub-s. (4) "The Magistrate shall then....." are mandatory. The word 'then' refers to the stage when in compliance with the order under sub-s. (1) the parties have put in their written statements and attended the Court. On the completion of the inquiry under sub-s. (4) a final order under sub-s. (6) must follow, it being obvious that the holding of the said inquiry is a condition precedent to the making of the order under sub-s. (6). An order under sub-s. (6) cannot be made without having held any inquiry under sub-s. (4). *MUHAMMAD ALI YAR MUHAMMAD v. SHAMSUL HAQ PIR ZIALDIN SHAH*

Sind 636

— s. 145—Land cultivated by heirs of zamindar on his behalf—Person squatting on such land—Heirs declaring to be heirs of such person in

Criminal Procedure Code—contd.

respect of same land—Whether amounts to forcible ousting of zamindar.

Where after a person has squatted on the land of zamindar cultivated by the heirs of zamindar on his behalf, the heirs declare they are heirs of that person in respect of the same land such a declaration in such circumstances cannot amount to forcible ousting of the zamindar. MUHAMMAD ALI YAR MUHAMMAD v SHAMSUL HAQ PIR ZIALDIN SHAH

Sind 636

s. 145—Magistrate, if and when can cancel his order under s. 145 (1) or terminate proceedings.

Sub-sections (4) and (5) of s. 145, Criminal P. O., are not exhaustive and are not intended to prevent a Magistrate from terminating proceedings under s. 145, Criminal P. O., when he is satisfied that the very cause and reason of proceedings under s. 145, Criminal P. O., has ceased to exist. The Magistrate can cancel his order under sub-s. (1) or terminate the proceedings when, upon other information, or, it may be, on his own information he is satisfied that no dispute likely to cause a breach of peace exists. However as proceedings are instituted upon some information, so they should be terminated likewise upon some information and ordinarily it is desirable before a Magistrate terminates proceedings of this sort in the exercise of powers which by necessary implication, the section confers, that he should have on record a Police report or other information to the effect that no dispute likely to cause a breach of the peace exists. But where, the diary shows that the parties attended the Court from time to time, talked about a compromise and then finally stayed away and did nothing for months, that might be said to constitute information which would justify a Magistrate in his opinion that no dispute likely to cause a breach of the peace existed any longer and would justify his order terminating the proceedings. MUHAMMAD AYOOB SAIFUDDIN KHAN v. GULZAR MEHAR

Sind 752

s. 145—Words of Proviso to sub-s. (4) mean two months before date of preliminary order under sub-s. (1).

An inquiry under sub-s. (4) of s. 145, Criminal P. O., is as to possession on the date of the preliminary order under sub-s. (1) and the words of the proviso "within two months next before the date of such order" are precise and unambiguous. These words afford no scope for holding that in those cases where a Magistrate does not make a preliminary order within two months of the dis-possession, the party complaining is still entitled to proceed under s. 145. Those words mean two months before the date of the preliminary order. MUHAMMAD ALI YAR MUHAMMAD v. SHAMSUL HAQ PIR ZIALDIN SHAH

Sind 636

ss. 145, 144—Bona fide dispute as to possession of land—Proper way is to proceed under s. 145 and not under s. 144.

In the case of bona fide disputes with regard to possession of land the proper method of dealing with the dispute is by a proceeding under s. 145 of the Criminal P. O., and not by a proceeding under s. 144. BHIKHALI TEWARY v. ACHAI BAR KUER

Pat. 349

s. 145—"Actual possession" has no reference to any right to possess.

What the Magistrate is concerned with in proceedings relating to disputes as to immovable property under Chap. XII, Criminal P. O., is not the right to possess the subject-matter of dispute but the actual possession thereof at the date of the order under cl. (1), s. 145. The expression 'actual posses-

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sion' is plain and unambiguous and has no reference to any right to possess. RAHIMALISHAH ALISHAH v. EMPEROR

Sind 627

s. 162—Statements by witnesses to investigating officer at time of identification of accused—Admissibility.

The statements made by prosecution witnesses, to the investigating officer at the time when they picked out the accused as the person who had committed the offence are hit by the prohibition contained in s. 162, Criminal P. O., and are inadmissible. KRISHNA KAHAR v. EMPEROR

Cal. 129

s. 164. SEE Criminal Procedure Code, 1898, s. 339 (2)

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s. 164—Admission of incriminating facts by accused to Magistrate under s. 164 or to Court during trial—Admissibility under ss. 18 to 21, Evidence Act (I of 1872).

Considerations which attach to the question of the admissibility of a confession made under s. 162, Criminal P. O., are different from the considerations which attach to a confession made before a Magistrate. The protective provisions of s. 162, which apply, to statements by accused persons to the Police, or at least to accused persons who are at first witnesses, have their origin in the infirmities which it is believed, may affect the evidence of the Police in India as to statements made by accused persons. Such considerations are obviously not applicable to statements made to Magistrates either under s. 164 or s. 342. An admission of incriminating facts made by an accused person to a Magistrate under s. 164, or a statement made to the Court during the course of the trial is admissible in evidence for what it is worth against the person who makes it under ss. 18 to 21, Evi. Act. ALLAHWARAYO DARYAKHAN v. EMPEROR

Sind 576

s. 164—Statement recorded under s. 164—Its return to witness or Pleader is illegal.

Under sub-s. (2) of s. 164, Criminal P. O., statements or confessions recorded are to be forwarded to the Magistrate by whom the case is to be tried or inquired into. Returning of statements recorded under s. 164 either to witnesses or to the Pleader is wholly illegal. T. M. MOHAMED CASSIM v. G. S. T. SHAIK TAUMBY SABIB

Rang. 77

ss. 164, 337—Procedure to be followed in recording statement of accused after tender of pardon.

In recording a statement after an acceptance of pardon, the Magistrate has the power of administration of oath or solemn affirmation under s. 164, Criminal P. O. The proper procedure then to be followed by a Magistrate is to record the statement of the approver immediately after, and not before, tendering pardon. A statement so recorded is clearly admissible in evidence under s. 339 (2). HORILAL v. EMPEROR

Nag. 203

s. 192—Case under s. 427, Penal Code (Act XLV of 1860), transferred to Third Class Magistrate—Trial by latter is without jurisdiction—Illegality held not curable by s. 537, Criminal Procedure Code (Act V of 1898).

The Court's jurisdiction must be determined on the allegations made in the complaint and on the complainant's statement in support of the complaint.

If the Magistrate to whom a case is transferred under s. 192, Criminal P. O., lacks jurisdiction to try the case the order of transfer is bad in law. A First Class Magistrate taking cognizance of a case under s. 427, I. P. O., cannot transfer it to a

Criminal Procedure Code—contd.

Third Class Magistrate. It may be that after a trial, it is found that the case has been materially exaggerated; but unless it has been found at the very outset that the allegations are exaggerated with the intention of seeking a particular Court for redress the statement of the complainant in a criminal case and the statement of the plaintiff in a civil case has to be accepted for the purpose of jurisdiction. Hence, the trial of the case by the Third Class Magistrate is illegal. The case is not covered by s. 537, Criminal P. O., as a question of jurisdiction is involved and a defect of jurisdiction is not curable by s. 537. *MATHRA v. KAMTA*

Oudh 553

— s. 205 (1)—Warrant issued subsequently recalled—Accused before Magistrate—Accused, if can be allowed to appear by Pleader.

The word "ever" in "whenever" in s. 205 (1), Criminal P. O., implies different occasions and is in contrast to the words used in the previous s. 204 about issuing a summons in the first instance. In the case where a warrant had been issued and recalled and a summons then has been issued s. 205 will apply by virtue of this word "whenever." The same result follows when the accused being before the Magistrate he does not think it necessary for him to issue summons for his appearance. In such a case he can allow the accused to appear by Pleader. *JADISH NARAIN BAJPAI v. EMPEROR*

All. 682

— s. 225. SEE Criminal Procedure Code, 1898, s. 233 862

— ss. 233, 225, 537—Charge under s. 420, Penal Code (Act XLV of 1860), covering many cases of cheating—Defect, if curable, when no prejudice is caused.

Lumping of various cases of cheating in a charge under s. 420, I. P. O., should be avoided. But where by such a defect no prejudice is caused to the accused, and there is no miscarriage of justice, the defect is curable under ss. 225 and 537, Criminal P. O. *CHANDRA NARAIN JHA v. THE KING-EMPEROR*

Pat. 862

— s. 239 (d). SEE Criminal Procedure Code, 1898, s. 537 361

— ss. 239 (d), 537—Joint trial—Tests.—Common object.

The question of joinder and misjoinder depends on the form of the accusation made rather than on the facts actually proved at the trial. The nature of the charge is really the crucial point. Before a joint trial can be held to be permissible or justifiable it must be established that each one of the accused was so connected with the other accused that the act done by one of them may be said to have been done conjointly with the other.

The fact that the accused are all servants of the same master and so connected with the same person, does not necessarily involve connection with each other for the purposes of the offences charged. Similarly common purpose would not be enough to make offences part of the same transaction, if the offenders act independently. Where the accusation does not involve anything from which it could be said that the accused are charged with different offences as forming part of the same transaction joint trial cannot be held. *NATHU CHAUDHURY v. EMPEROR*

Pat. 361

— s. 248—Withdrawal of complaint against some accused—If involves withdrawal of whole complaint.

There is nothing in s. 248, Criminal P. O., which involves a withdrawal of the whole complaint merely

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because the complaint is withdrawn as against some of the accused. *SOUTH INDIAN GENERAL ASSURANCE CO., LTD. v. THE REGISTRAR OF LIFE-INSURANCE COMPANIES, MADRAS*

Mad. 220

— s. 250—Accusation must not only be false but also frivolous or vexatious.

It is only when the Magistrate is of opinion that the accusation against the accused was not only false but also either frivolous or vexatious that he can act under s. 250, Criminal P. O. The reason is that this section is not to be applied except in cases which are frivolous or vexatious. It is not intended to be applied in serious cases which are to be dealt with under the provisions of s. 211, I. P. O. It is for this reason that a Magistrate must find that the case is frivolous or vexatious before he has jurisdiction to deal with the matter under s. 250. *MA PU v. MAUNG TUN PE*

Rang. 744

— s. 250—Complainant to pay compensation to each of several accused—Proper order for imprisonment in default.

Where a complainant has to pay compensation to each of several accused the imprisonment which the Magistrate orders in default of payment should be ordered in respect of default of payment to each of the accused. *MA PU v. MAUNG TUN PE*

Rang. 744

— s. 263 (h)—Judgment, writing of—Duty of Magistrate pointed out.

If a Magistrate thinks that all that is necessary for him to say by way of judgment is that the sentences of an accused to imprisonment or fine, then he is not doing his duty properly. Cases have to go to the higher Courts when persons are convicted and the Magistrates should understand that it is their duty to write their judgments carefully. They may be concise and they need not be elaborate, but they should show on the face of them that the cases of both parties have been carefully and properly considered. Section 263, cl. (h), Criminal P. O., enjoins that a brief statement of reasons for the order should be given by the Magistrate. It is absolutely necessary that this should be done, otherwise the general public is likely to lose faith in the administration of justice. *DAL CHAND v. EMPEROR*

All. 642

— ss. 297, 423 (2)—Trial by jury—Misdirection—Duty of Court—Charge of cheating—Failure to explain to jury necessary ingredients—Whether misdirection.

In a trial by jury it is the duty of the Judge to explain to the jury the necessary ingredients which the prosecution has to prove before the charges can be held to be established. This is particularly necessary in a case where the main charges are of cheating. Where the cheating consisted mainly of false representations to the complainant by the accused that he would arrange to have certain contracts obtained for himself and for the complainant and the allegation of the prosecution is clearly that at the time he made these representations they were false in the sense that he had no intention of fulfilling them, it is clearly necessary to point out to the jury the difference between a promise which is not intended to be kept at the time it is made and a promise which is intended to be kept at the time it is made but is subsequently broken. In the latter case the offence would not necessarily be one coming under the legal definition of cheating. Failure to do so amounts to misdirection. *ARNOLD MONTEATH MATHEWS v. EMPEROR*

Lah. 456

— s. 387—Reference under—High Court, if can go into evidence irrespective of whether there was any misdirection or misunderstanding of law.

Criminal Procedure Code—contd.

The Court in a reference under s. 307, Criminal P. O. is entitled to go into the evidence irrespective of whether there was any misdirection or misunderstanding of the law or not. *EMPEROR v. DULLU KURR* Pat 387

— s. 337. SEE Criminal Procedure Code, 1898, s. 339 (2) 203

— ss. 339 (2), 164—*Statement of confessional nature recorded before tender of pardon, not strictly according to provisions of s. 164—Admissibility of, against accused in his trial after forfeiture of pardon.*

Any statement made by an accused person before he receives pardon under s. 337 must, if it is of a confessional nature, be recorded strictly in accordance with the procedure prescribed for the record of confession by ss. 164 and 361, or the statement of the accused after he has been pardoned may be recorded in his character of a witness under s. 164, Criminal P. O., or his statement may be one which is recorded formally as that of a witness examined in the course of an enquiry or trial. The word "statement" contemplated in sub-s. 2 of s. 339, appears primarily to refer to a statement made by him as a witness as contemplated in sub-s. 2 of s. 337 in the course of an enquiry or trial. It may also include a statement recorded under s. 164 after the tender of pardon but it can in no case include a confessional statement made by an accused person before the tender of pardon unless it was recorded in accordance with the strict procedure provided for recording confessions.

Hence a statement made by the accused, of a confessional nature, before he had been tendered pardon and after he was put on solemn affirmation, is inadmissible against him in his trial after he has forfeited the pardon if it is not recorded as a confession in the manner prescribed by ss. 164 and 361. It is also otherwise inadmissible for the reason that the accused was induced to make that statement implicating himself and others on the promise of a pardon. *HORILAL v. EMPEROR* Nag. 203

— ss. 339 (2), 337, 164—S. 339 (2) to be read in conjunction with s. 337—S. 337 does not contemplate recording of statement by accused as preliminary to tender of pardon.

Sub-s. 2 of s. 339, Criminal P. O., has to be read in conjunction with s. 337. Section 337 itself does not contemplate and authorise the recording of any statement by the accused as a preliminary to the tender of pardon. *HORILAL v. EMPEROR* Nag. 203

— s. 342—*Mere failure to record examination of accused does not result in miscarriage of justice when Magistrate has considered the statements.*

When a Magistrate has considered the statements of the accused they cannot possibly be prejudiced by the mere fact that he did not reduce those statements to writing in the proper column provided in the summary register. It would therefore be absurd to say that the mere failure to record the examination has resulted in a miscarriage of justice. *KHAN MOHAMMAD v. EMPEROR* Pesh. 769

— s. 352—*Holding of trial at place other than Court house—Procedure to be followed.*

Whether the Magistrate should hold the trial at a place other than his Court-house is a matter purely within the discretion of the Magistrate himself. Where he decides to hold the trial in the jail premises he must pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise, if accused persons consider

Criminal Procedure Code—contd.

that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his court-house. If, however, the District Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Local Govt. himself straightway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial shall be held elsewhere. It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside of it. If the Magistrate then wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the necessary authorities who are in control of the premises in which the Magistrate desires to hold the trial. *THE KING v. U K. EMBEIN* Rang. 640

— ss. 415, 439—*"Any two or more of the punishments," meaning of.*

Section 415, Criminal P. O., refers to two or more punishments of different kinds. It has no application in a case in which two non-appealable sentences of fine have been passed and the aggregate amount of fine does not exceed Rs. 50.

An accused who was convicted of rioting only and was sentenced to pay a fine of Rs. 20 filed an appeal under s. 415-A. He alleged that as two other accused who were convicted at the same trial and sentenced to pay two fines Rs. 20 for rioting and Rs. 25 for an offence under s. 355, I. P. O., had a right of appeal under s. 415-A he had also the right of appeal.

Held, that none of the accused had any right of appeal as there was no combination of punishments in one sentence within the meaning of s. 415. *In re PALUVADI VENKATARAMAYYA* Mad. 103

— ss. 423 (2), 297—*Trial by jury—Misdirection—Interference by High Court—'Erroneous' in s. 423 (2), meaning of.*

If the High Court finds in a case of trial by jury that there is a misdirection it has to examine the evidence to see whether the verdict was erroneous and has caused a failure of justice. If it cannot so find, it cannot interfere. One meaning of word 'erroneous' s. 423 (2), Criminal P. O., is that if the Court after examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably without being perverse or unduly foolish have come to any other decision it will not interfere. It is, however, clear from s. 423 (2), that even if there is a misdirection, the High Court is not entitled to alter or reverse the verdict or verdicts unless these verdict or verdicts are "erroneous" by reason of such misdirection and before the High Court interferes it must also find that there has been a failure of justice under s. 537. *ARNOLD MONTBATH MATTHEWS v. EMPEROR* Lah. 456

— ss. 433, 438. SEE Criminal Procedure Code, 1898, s. 522 (3) 407

— s. 438—*"Proceeding" in s. 438—Order of District Magistrate not judicial one—No penalty exacted for its non compliance—Interference by High Court under s. 438.*

The word "proceeding" used in s. 438 must be a proceeding as referred to in s. 435, that is to say, a proceeding before any inferior Criminal Court. The High Court will not interfere where the Magistrate or other officer is acting in an executive and

Criminal Procedure Code—contd.

not in a judicial capacity. It is only when an order has been made, and for non-compliance of that order some penalty has been exacted that the High Court will interfere.

Held, that the High Court could not interfere under s. 438 as the order of the District Magistrate was not a judicial order and secondly, because the order was not enforceable and no penalty had been exacted under it. *BEJOY KRISHNA DEB v. SHYAM NARAIN SINGH* Cal. 310

s. 439. SEE Criminal Procedure Code, 1898, s. 476 521

s. 439—Revision—Interference with conviction on facts.

Obiter.—Where the grounds taken for saying that the Magistrate was wrong in convicting accused are all grounds of fact and not connected with any question of law, High Court cannot interfere in revision with conviction. *In re PALUVADI VENKATARAMAYYA* Mad. 103

s. 476.

SEE Criminal Procedure Code, 1898, s. 482 470
SEE Evidence Act, 1872, s. 41 867

s. 476 (as amended in 1923)—Applicant, if entitled to adduce evidence outside record of proceedings out of which application arises, to show that evidence, in those proceedings was false.

In deciding whether it is in the interests of justice that an inquiry should be made the Court is not confined to the record of the proceedings, but is entitled to take into account and consider information otherwise acquired. The applicant is entitled to adduce evidence outside the record of the proceedings out of which the application arises to show that evidence given in those proceedings was false. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.* Bom. 867

s. 476 (as amended in 1923)—Application under, when should be made.

Under s. 476 as it now stands the application need not be made in the course of the proceedings out of which it arises, or immediately thereafter. Whether the Court would accede to an application made long after the termination of the proceedings out of which it arises is a matter which would arise upon the merits and would no doubt depend upon all the circumstances. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.* Bom. 867

s. 476 (as amended in 1923)—Proceedings under—Costs, if can be awarded.

Proceedings under s. 476 being of civil nature Court would have jurisdiction to award costs. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.* Bom. 867

s. 476 (as amended in 1923)—Stranger to proceedings in which offence is committed can apply under s. 476.

Section 476, Criminal P. O., as amended, contains words which were not present in the former section, namely "whether on application made to it in this behalf or otherwise." Therefore it is open to the Court to entertain an application under s. 476 at the instance of a stranger to the proceedings out of which the application arises and in the course of which the offence is alleged to have been committed. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.* Bom. 867

s. 476—Discretion as to making complaint under s. 476 exercised by single Judge of High Court—Interference with, by appellate Bench in appeal.

The power to lay a complaint under s. 476, Criminal P. O., is a discretionary power, and an appellate

Criminal Procedure Code—contd.

Bench of the High Court would not interfere with the exercise of his discretion by a single Judge of the Court unless it could be shown that the discretion had been exercised under some misapprehension or error which was plain on the face of the record. *TAN BA OHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT* Rang. 754

s. 476—Jurisdiction of Court to make complaint of abetment of offence under s. 205 Penal Code.

A complaint of abetment of forgery is a complaint of an offence punishable under one of the sections of the Code named in s. 195 (1) (b) namely s. 205, I. P. O. Moreover, the phrase in s. 476, Criminal P. O., "any offence referred to in s. 195, sub-s. (1), cl. (b)," must mean any offence to which s. 195, sub-s. (1), cl. (b) has reference. The Court therefore has jurisdiction to make a complaint of abetment of an offence under s. 205, I. P. O. *TAN BA OHENG v. REGISTRAR, ORIGINAL SIDE, HIGH COURT* Rang. 754

ss. 476, 439—Proceedings under s. 476—

Finding that inquiry into offence is expedient in interests of justice, if necessary—Mere omission to record such finding—Interference in revision.

In proceedings under s. 476, Criminal P. O., the Court should record a finding that it is expedient in the interests of justice that an inquiry should be made, but the absence of such a finding does not mean that the point has not been considered and when it is clear that the Court has considered that an inquiry was necessary in the interests of justice and that a *prima facie* case had been made out the High Court should not necessarily interfere in revision merely because the words of s. 476 have not been copied out. *DWARKAPRASAD v. EMPEROR* Nag. 52

ss. 482, 476—Application under s. 476 to file complaint for offence under s. 175, Penal Code (Act XLV of 1860)—Transfer of, to District Court on abolition of Court—Application dismissed by complaint made under s. 482—Competency of.

An application under s. 476, Criminal P. O., was made, to the Subordinate Judge to file a complaint against the defendants for an offence under s. 175 I. P. O. The Sub-Court was abolished and the application was transferred to the District Court and it was dismissed on the ground that s. 476 Criminal P. O., was not applicable. But a complaint was made under s. 482 of the Criminal P. O.

Held, that the complaint was not competent as the District Court did not order the production of any document nor, could the alleged offence under s. 175, I. P. O., be said to have been committed in the view or presence of the District Court. *EMPEROR v. AYANOLERI KOVILAGATH SANKARA VARMA RAJAH* Mad. 471

ss. 522 (3), 433, 438—S. 522 (3), applicability—Whether gives right of appeal against order passed under s. 522.

Sub-s. (3) of s. 522, Criminal P. O., only applies to the Court which is dealing with the original matter either as a Court of Appeal, confirmation reference or revision in relation to that matter. It does not give any sort of right of appeal by itself against an order passed under s. 522. *MOHAMMAD SHARIF v. DIWAN SINGH* Lah. 40

ss. 522 (3), 438, 433—Court of reference in s. 522 (3), what is—Court having power to report case under s. 438, if Court of reference.

A Court of reference in sub-s. (3) of s. 522 Criminal P. O., can only be interpreted as meaning a Court which has the power to refer and that i

Criminal Procedure Code—conold.

only a Court empowered under s. 433. A Court which has power to refer the case for orders to the High Court under s. 438 is not a Court of reference. *MOHAMMAD SHARIF v. DIWAN SINGH* Lah. 407—s. 537.

SEE Criminal Procedure Code, 1898, s. 192 553
SEE Criminal Procedure Code, 1898, s. 233 862

ss. 537, 239 (d)—*Infringement of s. 239 (d)*
—*Defect, if curable.*

The infringement of the provisions of s. 239 (d), would, if made out, constitute an illegality as distinguished from an irregularity, so that the conviction would require to be quashed, and that s. 537 can be of no avail to remedy the defect. *NATHU CHAUDHURY v. EMPEROR* Pat. 361

s. 540-A—S. 510-A, scope and applicability.

Section 540-A, Criminal P. O., is a general section which will apply to cases of all kinds whether the accused is in jail custody or whether he is on bail or whether he is appearing in obedience to a summons. *JADISH NARAIN BAIJPAI v. EMPEROR* All. 682

s. 546 A. SEE Merchandise Marks Act, 1889, s. 14 77

Criminal trial—Confession—Admissibility in part.

A Court is not bound in law to accept a confession as a whole. If the Court is satisfied that part of a confession is true and part is false, it can accept such portion as it finds to be true and reject the false portion. *EMPEROR v. JATE URAON* Pat. 586

Confession—Murder—Accused confessing but introducing in it circumstances to avoid conviction for murder—Evidence showing and Court satisfied that violence amounted to murder—Accused can be convicted of murder on his confession.

Where an accused confesses to having caused the death of a woman and admits having robbed her after death, but, during that confession he introduces into it circumstances with a view to excuse himself from a conviction for murder, and it is clear from the medical evidence and the Court is satisfied that the woman lost her life not in the least in the manner described by the accused but that by violence to the neck and pushing of the cloth into her mouth by the accused, the violence amounts to murder and the accused can be convicted of murder upon his confession. *EMPEROR v. DEYYAM CHINNAYYA* Mad. 481

Criminal Courts—Complicated questions relating to rights to property, power to decide

A Criminal Court is not an appropriate tribunal to decide complicated questions relating to rights of property such as game birds between landlord and tenant. *ADVOCATE-GENERAL, ORISSA v. BHIKHARI CHARAN MAHANTI* Pat. 825

Murder—Death caused as direct result of stabbing by accused—Offence committed is murder—Fact that immediate expert medical attention would have saved deceased does not change nature of crime.

Where an accused has stabbed the deceased on a vital part of the body and the deceased has died as a direct result of that injury and the injury is one which in the ordinary course will cause death, the accused is guilty of murder. The mere fact that the deceased might have been saved if expert medical attention had been afforded at once makes no difference as to the nature of the crime. *MAHANTI SUREBRAMULU, In re* Mad. 632

Onus to prove guilt—General rule that it always lies on prosecution is subject to exception in s. 105, Evidence Act (I. of 1872).

The general rule that the onus always lies on the prosecution to prove the guilt is subject to statutory

Criminal trial—conold.

exception contained in s. 105, Evidence Act. The prosecution cannot claim a verdict of guilty because the accused puts forward a false defence. The guilt must be determined on the strength of the prosecution evidence alone, but where the accused puts forward a plea that he did commit the offence charged but in circumstances that excused or mitigated, the prosecution in such cases can show that no such circumstances exist and so the claim is averted. With the rejection of the defence version however the duty of the prosecution does not end and they have still to show that the accused caused death in circumstances which make the offence murder and in this sense the onus never shifts from the prosecution. *BHAG SINGH PAKHAR SINGH v. EMPEROR* Lah. 15

Private defence, right of—Accused held had right of private defence and did not exceed that right.

Held, that under the circumstance if the accused hit back and caused injuries to his assailant which ultimately resulted in death, it could not be said that he exceeded the right of private defence, if at the time he inflicted the injuries he did not realise that they were of a very serious nature. The accused, therefore, had in the circumstances a right of private defence which he did not exceed in protecting himself against his assailant. *MOHAMED HABIB v. EMPEROR* Pat. 846

Verdict of jury—Verdict erroneous on one of the charges only—Whole trial, if must be set aside.

Where the verdict of the jury on one of the charges only is found by the High Court to be erroneous, it can set aside that verdict and uphold conviction on other charges on which the verdict is not found to be erroneous. It need not set aside the whole trial. *ARNOLD MONTEATH MATHEWS v. EMPEROR* Lah. 456

Custom—Custom, how to be established.

Custom is a question of fact and it has to be established by proof in the shape of instances, etc., and a finding as to custom cannot be based on mere inferences. The *riwaj-i-am* would undoubtedly raise a strong presumption in plaintiff's favour, if it is held to be applicable to the parties. *BABU RAM v. SARUPI* Lah. 218

Proof of.

A custom to be legal must be proved to have been in existence for a time preceding the memory of man. *LABH SINGH v. GURBAKSH SINGH* Lah. 465

Question of fact.

Custom is not a matter of inference but of fact. *LABH SINGH v. GURBAKSH SINGH* Lah. 465

Wajib-ul-arz—Entries in—Effect.

Wajib-ul-arzes sometimes record not custom but the wishes of those who dictated them or their conception of the law on the subject.

Held, that the *wajib-ul-arz* of Isapur could not be taken as establishing the alleged custom of exclusion of sisters and sister's issue. *PIRTHI PAL KUNWAR v. SURAJ KUNWAR* Oudh 179

Custom (Punjab)—Gaur Brahmans of Karnal town—Burden to prove that they are governed by custom lies on them—Their settlement in town from time of Mughal Emperors or being notified as agricultural tribe, whether proof that they follow custom.

Where the parties are Gaur Brahmans and are residents of Karnal town the burden of proof as regards the alleged custom lies on them and the burden is heavy as the parties are Hindus of the highest caste.

The mere facts that the Gaur Brahmans have been

Custom (Punjab)—concl'd.

settled in the town of Karnal from the time of the Mughal Emperors and that Gaur Brahmins of Karnal District have been also notified as an agricultural tribe would not necessarily show that Brahmins of Karnal town follow custom. *BASHO RAM v. SARUP*
Lah. 218

— *Onus—Kalals of village Dewatwal in District Ludhiana, held do not follow custom in matters of alienation of ancestral property.*

Kalals of village Dewatwal in the Ludhiana District, are not primarily an agricultural tribe and are not governed by custom in the matters of alienation of ancestral property. They have not by their association with the agricultural tribes in the village since 1841 adopted their customs. The mere fact that the Kalals in some other places have adopted agricultural custom would be no evidence to support the contention that Kalals of Dewatwal follow custom. Customs are apt to vary with the local history of a tribe. *LABH SINGH v. GUR BAKHSH SINGH*
Lah. 465

— *Onus.*

The burden of proof always lies on the party alleging a custom and the burden is all the more heavy where the tribe to which that party belongs does not usually depend on agriculture but follow a variety of occupations. *LABH SINGH v. GUR BAKHSH SINGH*
Lah. 465

Cutchi Memon—Will—Law applicable.

The provisions of the Muhammadan Law with regard to wills apply to a Cutchi Memon. *ABDUL HAMEED v. MOHAMMAD YOUSUF*
Mad. 414

Debtor and creditor—Suit for portion of debt jointly owned is incompetent—Plaintiff's becoming joint owner of debt by assignment makes no difference.

A suit for a portion of a debt, jointly owned by various persons is incompetent. It makes no difference that the plaintiff became a joint owner of the debt by assignment, and was not originally a joint owner. *TULSI RAM NARULA v. GIAN CHAND-AMAR NATH*
Lah. 507

Decree—Ex parte—Suit for rent against A, B, C and D—Decree ex parte only against D and suit dismissed against rest—On motion by D to which A, B and C were not parties case remanded for re-trial—Decree then passed against all—A, B and C, if bound by it.

A suit for rent instituted against A, B, C and D was dismissed as against the first three and was decreed *ex parte* against D on his failure to file a written statement. D filed a motion to which A, B and C were not made parties. The motion was heard and the case was remanded for re-trial. The suit was then decreed against all the four defendants:

Held, that as A, B and C were not parties to the motion they did not consent to the order passed therein and could not appeal against that order. It was open to them to take any objection they chose and to ignore the order passed on the motion. They were in no way bound by that order. Inasmuch as the suit had already been dismissed against A, B and C no decree could be passed against them in the subsequent suit. *RADHASYAM CHAUDHURY v. GOURINATH ROY*
Cal 154

Deed—Construction—Precedents, value of.

It is not very profitable to attempt to construe a document by reference to authorities; the words of each document must be taken and the Court must ascertain, as best it can, what the intention of the parties was in accordance with the terms expressed by them. *MATHURA SINGH v. PALAKDHARI RAI*
Pat. 484

Deed—concl'd.

— *Construction—Surety bond—Surety guaranteeing payment due on mortgage—Interest on that amount also held included.*

Where the contract of guarantee for payment of amount advanced on mortgage runs: "if your money is not realized from the said mortgaged property..... then you shall be entitled to realize your money, from my person and property," the phrase 'your money' means, 'whatever is due to you' which includes interest on the principal amount of the mortgage. *DALJIT SINGH v. HARKISHAN LAL SAIH*
All. 152

Defamation.

See Penal Code, 1860, s. 499

721

See Penal Code, 1860, s. 500

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— *Suit for—Privilege—Statements in written complaint found to be false—If protected.*

In a civil action for damages for defamation in respect of statements made by a person in a written complaint to a Magistrate the statements are privileged though they are found to be false. *BRIJLAL PRASAD v. LALDAS*
Nag. 764

— *Suit for—What plaint must allege.*

A plaint in a case of defamation ought to allege not only the publication, and set out not only the words, but that they were published or spoken to, at any rate, some named individuals at a particular time and place specified in the plaint. *BRIJLAL PRASAD v. LALDAS*
Nag. 764

Defence of India Act XXXV of 1939, s. 2—

Rules under—Rr. 34 (6) (g), (6) (p)—Increase in price of pair of dhotis by 10 per cent. over the price ruling on September 1, 1939—Offence under Rules if committed—Absence of order fixing price—Effect.

An increase of roughly 10 per cent. in the price of a pair of dhotis can hardly be said to be an act likely to cause fear or alarm to the public or to any section of it, within the meaning of r. 34 (6) (g), whatever other consequences it may have on the public mind. Such an act is not likely to have any bearing on the efficient prosecution of the war and the defence of India or the public safety nor can it be said to prejudice the public interest within the meaning of r. 34 (6) (p).

Profiteering was not intended to be included in the definition of "prejudicial act" in r. 34 (6).

In the absence of any order fixing the price of cloth in the district it cannot be held that the accused has committed any offence under the Defence of India Rules if he increases the price of a pair of dhotis roughly by 10 per cent. over the price ruling on September 1, 1939. *KSERILAL KEDIA v. EMPEROR*
Pat. 533

Divorce Act (IV of 1869), s. 36—"Net income," meaning of.

Net income merely means income after allowing for the cost of collection, income-tax and similar deductions. It does not mean any sum which is left over after the husband has spent all that he considers necessary for his maintenance. *A. W. LOBO v. J. A. LOBO*
Cal. 252

— *s. 44—Decree dissolving marriage passed by District Judge and confirmed by High Court—Application for custody of child—Forum.*

Where a decree for dissolution of marriage is passed by a District Judge and confirmed by the High Court, the High Court has no jurisdiction to hear an application for the custody of the child or arrears of maintenance. The jurisdiction to entertain such application lies in the District Judge. *PHILIP WILLIAM RAVANSHAW v. GLADYS ISABEL*
Lah. 272 S B

Dying declaration. *See* Evidence Act, 1872, s. 32
280 F B

Easement—Light and air—Wall existing between two houses from beginning—Ancient apertures in it before other house is built, if can be closed—Agreement to treat lower part of wall as joint—If would extinguish easement of light and air through windows in upper wall.

The party, who wants the whole wall to be treated as a joint wall, must establish that there was a party wall in the beginning and that it had been subsequently raised by the other co-owner or that there was an agreement to treat the whole wall as joint. If the wall exists from the beginning and there are ancient apertures in it before the other house is built they cannot be blocked up unless there is an agreement to close them when the other house is raised, and the agreement to treat the lower part of the wall as joint would not have the effect of extinguishing the already acquired easement of light and air through the windows in the upper wall. *BAI RATANGAVERI v. MANILAL MAHIPATRAM MEHTA*
Bom. 717

Election. *See* Minor 4

Evidence—Admissibility—Person in possession—If can rely on unregistered patta to explain nature of possession.

Where a person relying on the unregistered patta is admittedly in possession he is entitled to refer to the unregistered patta for the purpose of explaining the nature of his possession, that is to say, for the purpose of explaining that he was let into possession as a tenant. *KUAR RAI v. BABURAM KUER*
Pat. 583

Appreciation—Nervous witness, value of.

A witness's evidence should not be rejected merely because he has appeared nervous in the witness-box. *SANTU v. MAIKU*
All. 747

Presumption—Party's failure to go into witness-box—Presumption—Party pardanashin lady, effect.

A party's failure to go into the witness-box raises a strong presumption against the truth of her case. The fact of her being a pardanashin lady is not a sufficient excuse for her not getting herself examined even on commission. *SHUBRATAN v. SHABBI ALI*
Oudh 317

Evidence Act (I of 1872), ss. 18 to 21. *See* Criminal Procedure Code, 1898, s. 161 576

s. 32—Conviction, when can be based on uncorroborated dying declaration.

There may not be corroboration of the nature contemplated by s. 157, Evi. Act, or matters provable under s. 158, and the only direct evidence may be a statement by the deceased made admissible by s. 32. It does not, however, necessarily follow that this evidence is insufficient to support a conviction. In such a case the surrounding circumstances will have an important bearing. The evidence of an accomplice is tainted, and s. 114, Evi. Act, (illus. b) says that the Court may presume that he is unworthy of credit unless corroborated, but a dying declaration is on a much higher plane and the Act places no such restriction on its acceptance.

It is not possible to lay down any hard and fast rule when a dying declaration should be accepted, beyond saying that each case must be decided in the light of the other facts and the surrounding circumstances, but if the Court, after taking everything into consideration, is convinced that the statement is true, it is its duty to convict, notwithstanding that there is no corroboration in the true sense. The Court must, of course, be fully convinced of the truth of the statement and naturally it could not be fully convinced if there were anything in the

Evidence Act—contd.

other evidence or in the surrounding circumstances to raise suspicion as to its credibility. *GUARUSWAMI TEVAR, In re*
Mad. 280 F B

s. 41. *See* Evidence Act, 1872, s. 44 867

s. 44—Probate decree—Application under s. 476, Criminal Procedure Code—Criminal Court's jurisdiction to decide that probate decree was forgery—Applicability of s. 44 to application under s. 476, Criminal Procedure Code.

Where in the testamentary suit in which probate decree was passed, a stranger makes an application under s. 476, Criminal P. O., the proceedings under s. 476 must be regarded as independent, and when the applicant in the affidavit upon which the application is based admits the decree and there is no question of the decree being proved against him by the adverse party, s. 44, Evi. Act does not apply to this application. Although the Criminal Courts have no jurisdiction to revoke the probate it has full jurisdiction to decide that it was a forgery in a criminal case in which the party offering the evidence of forgery admits the probate to be valid and admits the title of the executor, but seeks to show what means he used in order to become so. Having regard to s. 44, Evi. Act, it would be equally open to the party offering the evidence of forgery to prove that the probate decree was obtained by fraud, if it were set up against him by the accused, instead of admitting the probate and the title of the executor. In the case of an application under s. 476, although s. 44, Evi. Act, does not apply, evidence of forgery is admissible in the same manner as it would be admissible in a criminal case, the applicant admitting the validity of the probate decree and the title of the executors. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.*
Bom. 867

ss. 44, 41—Judgment in probate suit is judgment in rem—Stranger's right to impeach decree in rem—Party against whom judgment is set up, if should bring separate suit.

A judgment in a probate suit is a judgment in rem.

By reason of s. 44, Evi. Act, the law in India is different from that in England, and in India the argument that a decree in rem even of a foreign Court cannot be contested at all, or can be contested only by the parties to the suit in which it was pronounced, cannot be accepted, and further in India a decree in rem which is relevant under s. 41, can be contested on the ground of fraud or collusion which does not go to the jurisdiction of the Court. Apart from s. 44, a stranger to a suit in which a decree in rem has been passed may impeach that decree for fraud and have it set aside if the fraud be proved. It is not necessary for the party against whom a judgment is set up to bring a separate suit to have it set aside, but he may show in the suit or proceeding in which it is set up against him that it was obtained by fraud. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.*
Bom. 867

ss. 44, 41—Whether applies to civil and criminal proceedings.

Section 44, Evi. Act enables any party to a suit or other proceeding to show that a decree proved by the adverse party against him was obtained by fraud. The section would, apply in any proceedings, civil or criminal, if the decree sought to be challenged is proved by the adverse party. It cannot be said that it applies only in a suit for revocation of a probate. *BHAGWANDAS NARANDAS v. D. D. PATEL & Co.*
Bom. 867

s. 49—Document making gift of piece of

Evidence Act—contd.

land and relinquishment of reversionary rights, not registered—Whether admissible for collateral purpose of proving relinquishment.

Where an unregistered document executed by a reversioner contains relinquishment of reversionary right and also an agreement to make a gift of a piece of land to the donee even if the document requires registration so far as the gift is concerned it can be admitted in evidence for the collateral purpose of proving the relinquishment of reversionary rights under s. 49, Evi. Act. *NAND LAL v. LAKHMI*

Lah. 865

s. 68—Certified copy of registered deed produced—Person challenging deed not denying that it is copy of deed—Attesting witnesses, if must be produced.

Where, when a certified copy of a registered deed of gift is produced, a party challenging the deed does not specifically deny that it is the copy of the deed, in such a case under Proviso to s. 68, Evi. Act, the production of an attesting witness is not essential. *NAND LAL v. LAKHMI*

Lah. 865

s. 68—Word "execution"—Proviso to s. 68, meaning of, in case of mortgage bond—Express denial of attestation—Provisions of s. 68 must be complied with.

The word 'execution' as used in the proviso to s. 68, Evi. Act, in the case of a mortgage bond which under the law requires attestation, means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as a mortgage. This includes attestation, and where attestation is expressly denied the mortgagee is not exonerated from the duty of complying with the provision of s. 68, by calling an attesting witness. *HARE KRISHNA PANIGRAHI v. JOGNESWAR PANDA*

Cal. 644

ss. 68, 49—Deed of adoption or gift requires no attestation in Punjab—Operation of s. 68 is precluded.

There is no law in force in the Punjab requiring a deed of adoption or gift to be attested by witnesses and this by itself would preclude the operation of s. 68, Evi. Act. *NAND LAL v. LAKHMI*

Lah. 865

ss. 68, 71—S. 71 is exception to rule in s. 68—"Execution," in both sections, meaning of—Mortgage deed—Attesting witness turning hostile—Mortgagee can give evidence to prove attestation by others.

Section 71, Evi. Act, is one of the exceptions to the rule relating to proof of documents, required by law to be attested, which is laid down in s. 68, Evi. Act. The Rule in s. 68 is stringent rule and it cannot be relaxed except under circumstances provided for in the Act itself. One of such exceptional circumstances is to be found in s. 71.

The same meaning must be given to the word 'execution' in s. 71 as in s. 68, Evi. Act. In the case of a document which is not valid without attestation execution not only means signing by the executant but it means and includes attestation as well which is the last of the series of acts necessary to give completeness and formal validity to the deed. Hence it would be necessary to call an attesting witness under s. 68 not merely to prove the signature of the executant but to prove attestation as well and if such witness turns hostile or refuses to prove execution or attestation other witnesses may be called for the same purpose.

A mortgagee being grantee of the instrument cannot witness the execution of the document made to

Evidence Act—contd.

himself nor can he take its acknowledgment, but when the attesting witnesses turns hostile he is certainly competent to give evidence not as an attesting witness but as a witness to prove attestation by others. The Legislature, has not left the fate of attested documents completely at the mercy of the attesting witnesses. The plaintiff's duty is at an end as soon as he calls one of the attesting witnesses under the provisions of s. 68, Evi. Act. If the witnesses turn hostile the plaintiff is not helpless and he is entitled to adduce other evidence as laid down in s. 71. This other evidence, would include his own evidence as well. *JAIKARANDAS AGARWALLA v. PROTAPSI AGARWALLA*

Cal. 718

ss. 71, 68 Proviso—Attesting witness not before Court—Applicability of s. 71—Summons taken out against attesting witness—His failure to appear—No further steps taken—Further evidence cannot be let in under s. 71.

In a case where the attesting witnesses are not before the Court, s. 71, Evi. Act, has got no application. In such cases it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such witnesses is not possible either legally or physically, the plaintiff can avail himself of the provisions of s. 69. Where the plaintiff has simply taken out summons against the attesting witness and on his failure to appear has done nothing further later on, no further evidence under s. 71 can be let in. *HARE KRISHNA PANIGRAHI v. JOGNESWAR PANDA*

Cal. 644

s. 90—Production of certified copies—Presumption

No presumption under s. 90, Evi. Act can be raised on the basis of the certified copies. The mere production of the certified copies did not relieve the person producing them from the necessity of producing evidence as regards the execution of the originals. *JIWAN v. KESHO DAS*

Lah. 848

s. 92 proviso (1). SEE Registration Act, 1908, s. 28

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s. 92 Proviso (3)—Applicability—Whether can be applied to nullify effect of document.

Section 92, proviso 3, Evi. Act, speaks of the existence of a separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property which may be allowed to be proved. This clearly presupposes that in a case to which it could be applied the contract, grant or disposition of property itself remains intact, but that the condition precedent pleaded must in its very nature be extraneous to the contract, grant or disposition itself and as agreed must come into existence before the obligation attaches thereunder.

Where in a case on a promissory note the facts pleaded do not aim at proving a condition precedent to the attaching of the legal liability to the document, but lay the axe at the very foundation of it nullifying entirely the effect of the promissory note and its existence, s. 92, Proviso 3, is not applicable and such evidence will not be allowed. *OHHAGANLAL KALYANLAL SINGH v. JAGJIWANDAS GULABDAS*

Bom. 41

s. 92, Proviso (4)—Mortgage deed registered—Deed containing express term that payment to be made in a certain way and discharge to be endorsed therein—Subsequent oral agreement varying terms of deed to prove discharge, admissibility. It is always open to a mortgagor to prove that on a certain day he discharged the mortgage. But when

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in a registered mortgage deed there is an express term that payment should be made in a certain way and unless endorsed on the deed it should not be regarded as payment at all, the mortgagor will not be allowed to prove discharge of the mortgage by subsequent oral agreement which goes to vary the terms of the mortgage. *KRUB LAL CHAUDHURI v. BROHAN MANDAL* Pat. 63

s. 114—Applicability to criminal cases.

Section 114, Evi. Act applies not only to civil suits but also to criminal cases. *AMNADAS THAROMAL v. EMPEROR* Sind 127

s. 115—There must be creation of belief and a person must act on it.

The creation of a belief alone is not what s. 115, Evi. Act, requires. It is further necessary that the person who is made to believe something must act upon that belief. *RANBIR KARAN SINGH v. JOGINDRA CHANDRA BHATTACHARJEE* All. 170

s. 118—Infant witness—His competency, if must be tested before his examination.

Section 118, Evi. Act, vests in the Court the discretion to decide whether an infant is or is not disqualified to be a witness by reason of understanding or lack of understanding. This discretion must be exercised in a judicial manner. The proposition that the competency of the witness should be tested before his examination is commenced is not quite justified by the provisions of s. 118, Evi. Act. *KRISHNA KAHAR v. EMPEROR* Cal. 129

s. 163—Applicability to criminal trials—

Signed statements of witnesses to Police made use of by Counsel for accused to contradict witnesses in cross-examination—Entire statements excluding irrelevant portions should go in as evidence.

Section 163, Evi. Act, is applicable to criminal trials as well as to civil actions. Where therefore the Counsel for the accused make use of the signed statements of the witnesses in the Police diary at the cross-examination in order to contradict their evidence at the trial, the entire signed statement of the witness to the Police excluding only such portions as are not relevant to the case should go in as evidence. This would bring on the record those parts of the signed statement which were corroborative of the witness's evidence at the trial.

In this case however, it was held that in the particular circumstances, the accused could not be compelled to give as evidence the signed statement in question as there was no formal notice or requisition from the accused calling for the document and while producing the Police diary the Govt. Counsel said that he would not rely on the strict technicality meaning thereby that he would not require the Counsel for the accused to put the document in evidence. *EMPEROR v. MAKHAN LAL DUTT* Cal. 138

Execution—Step-in-aid. See Limitation Act, 1908, Art. 182 803**Transfer of decree to another Court—Transmitting Court, if loses seisin of decree.**

When a decree has been transmitted for execution to another Court, the transmitting Court does not lose entire seisin of the decree. So far as the Court of transfer is concerned, it continues to have jurisdiction over the execution proceedings until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree the circumstances attending such failure. *GOBINDA NATH CHOWDHARY v. DURGA NARAIN SAHA* Cal. 759

Executor—Liability—Executors of deceased debtor giving security by equitable mortgage over asset of deceased's estate to one of creditors in respect of debt due from estate—Personal liability of executors—Security given in consideration of creditor's forbearance to sue for two years and promising to pay interest for that period—Executors held personally liable for interest for aforesaid period, but not for whole debt.

If the executors of a deceased debtor think fit for consideration to give security by deposit of title-deeds over an asset belonging to his estate to one of his creditors in respect of a debt due from the estate, the transaction may or may not be one to which other creditors or persons can take exception. But if it is not intended that the executors should assume personal liability for the secured debt there is nothing in the T. P. Act or in the law of India to make them so liable by reason that they have granted the security or by reason that they have done so by deposit of the testator's deeds.

Where in consideration of the creditors' forbearance to sue for a period of two years the executors gave security for the testator's debt by equitable mortgage of the right, title and interest of the testator making it clear at the time that the payment to the creditor was conditional upon the sufficiency of the assets and depended upon the future of land values and the executors also undertook to pay interest on the debt for the aforesaid period of two years:

Held, that the promise to pay interest not having been expressly qualified, in the context there was not enough to show that the promise was intended as conditional upon the sufficiency of the testator's assets having regard to the limited period of time (two years) to which it extends and the circumstances of the transaction. The executors not having made it clear that their words of promise were not to be taken in the direct and simple sense of a personal covenant, made themselves personally liable for the interest which accrued during the two years with interest thereon.

Held, also that the fact that the executor was to assume liability for the interest alone and that only for a defined period did not impose a liability for the whole of the debt. *JAMSHEDJEE JEEJIBHOY v. SORABJI BYRAMJI WARDEN* P. C. 773

Liability of—When personally liable.

Where a person is only a debtor in his capacity as an executor, and not personally liable, there is no warrant whatsoever for attaching his personal banking accounts. If the executors have no banking accounts that could be attached, the only remedy is to attach property of the estate of the deceased, unless it is shown that the executor has been mixing up estate money with his personal property. *G. H. SHEERAZER v. T. V. REDDY Rang.* 106

Federal Court—Appeal—Point not constitutional—

No certificate on point under Civil Procedure Code (Act V of 1908), O. XLV, r. 2—Point, if can be argued as of right—Leave under s. 205 (2), Government of India Act, 1935, (2) & 26 Geo. V, Ch. 42).

In an appeal before the Federal Court where the ground taken is not a constitutional ground at all, and the appellants neither have appealed for nor obtained the certificate referred to in O. XLV, r. 2, Civil P. O., they are not entitled to argue it as of right. The Federal Court may, however, grant leave under s. 205 (2) of the Government of India Act. *JAIGOBIND SINGH v. LAOHMI NARAIN RAM* F C 796

Federal Court Rules—O. X, rr. 1, 2 and 3—

Appeal—Failure to deposit printing costs—Appeal,

Federal Court Rules—concl'd.

not yet admitted—Non-compliance with O. X, rr. 1, 2 and 3 of Federal Court Rules, if can be excused.
 Rules of the Federal Court are framed to be kept and not to be broken; but they are framed for the purpose of assisting justice and not for the purpose of enabling it to be defeated. If, therefore, a strict adherence to the rules is likely to deprive a litigant of advantages which the Provincial Legislature clearly intended to give him, by the new Bihar Act of 1939 then the Court may properly exercise the dispensing power conferred by O. XXXVII, Federal Court Rules in order that substantial justice may be done.

If the justice of the case requires it, Federal Court is entitled to excuse the applicants from compliance with so much of O. X of the Federal Court Rules as requires them (1) to have the record prepared and printed in the High Court, and (2) to lodge their petition of appeal in the Federal Court within sixty days of the admission of the appeal by the High Court.

But if the litigants ask for the indulgence of the Federal Court, it is necessary for them to show the utmost good faith and to make a complete disclosure of all relevant facts. *LACHMESHVAR PRASAD SHUKUL v. GIRDHARI LAL CHAUDHURI* FC 670

O. X, rr. 2 and 3. SEE Federal Courts Rules, O. X, r. 1 670

O. XXXVII, r. 1. SEE Federal Court Rules—O. X, r. 1 670

Forfeiture Act (IX of 1859) s. 20—Section, if repealed by Act VIII of 1868—Mortgagor turning rebel—Property confiscated—Redemption suit by person claiming to be owner must be brought within one year of date of confiscation.

Section 20, Forfeiture Act, was intended to be a permanent bar against subsequent suits in Civil Court. It has remained in force up to the present day and is not repealed by Act VIII of 1868. The section requires that persons who have any claim that they are owners of property which has been confiscated as the property of another should bring such a claim within one year from the attachment or seizure of the property which they claim. Consequently where the property of a mortgagor who has turned a rebel is confiscated a suit for redemption by person claiming to be its owner is barred if brought more than one year from the date of confiscation. *KUNJAS KUNWAR v. KRISHNA DEO SINGH* All. 185

Fraud—Proof of—Suspicion not enough.

The party alleging fraud is bound to establish it by cogent evidence and suspicion cannot be accepted as proof. Unless, therefore, the proved circumstances are incompatible with the hypothesis of the person charged with fraud having acted in good faith, they cannot be accepted as affording sufficient proof of fraud. *HANSEAJ GUPTA v. DEBRA DUN-MUSSOORIE ELECTRIC TRAMWAY Co., LTD.*

PC 787
 Government of India Act, 1935, (25 & 26 Geo. V, Ch. 42), s. 205. SEE Federal Court Rules, O. X, r. 1 670

s. 205 (2), SEE Federal Court 796

s. 214. SEE Federal Court Rules O. X, r. 1. 670

s. 224 (2)—High Court, if can question order of Village Headman under s. 10 of Regulation (XI of 1816).

The order of the Village Headman under s. 10 of Regulation XI of 1816, was not subject to appeal or revision except under s. 107, Govt. of India Act of 1915, and cl. (2) of s. 224, Govt. of India Act,

Government of India Act—concl'd.

1935 excludes the jurisdiction of the High Court to question the order in such cases. *In re PERIANNA PILLAI* Mad. 92

s. 224 (2) — Powers of High Court to issue writ of certiorari, if curtailed.

Sub-section (2) of s. 224, Govt. of India Act, does not curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact s. 223 preserves those powers. All that sub-s. (2) of s. 224 means is that the High Courts cannot so interpret sub-s. (1) of that section as to usurp the powers which they did not possess before. *MULJEE SICKA & Co. v. MUNICIPAL COMMISSIONER, BOMBAY*

Bom. 8
 s. 226 (1)—Confiscation of goods by Customs Authorities under s. 167 (36), Sea Customs Act (VIII of 1878)—Suit by owner for declaration that order was illegal—Jurisdiction of High Court to entertain it on original side.

Where the goods of the plaintiff have been confiscated by the Customs Authorities under s. 167 (36), Sea Customs Act on the ground that the plaintiff removed them with the intention of defrauding the revenue, after they had been landed and before they had been passed through the Customs House, and the plaintiff brings a suit for a declaration that the order of confiscation was illegal with a prayer for return of the goods, or for a decree for their value, the Original Side of the High Court has no jurisdiction to entertain such a suit. The Court cannot examine the circumstances to see if the action of the Authorities was lawful, because, no irregularity of procedure and no error in the conclusions arrived at can *per se* exclude the application of the Govt. of India Act. *THIN YEN v. SECRETARY OF STATE* Cal. 542

Grant—Construction—Grantor creating annuity in favour of his daughter and her lineal descendants—Some lineal descendants of daughter dying without leaving lineal descendants—Annuity held could be claimed by lineal descendants of daughter that might be living—Shares to be calculated on principle of per stirpes.

A person executed a document creating an annuity in favour of his daughter and her lineal descendants, which contained a clause providing that none but the lineal descendants of the grantee would be entitled to have this allowance and that the daughters and other agnatic relations of the said daughter would not be entitled to the allowance. Some of the lineal descendants of the daughter who enjoyed the annuity themselves died without leaving any lineal descendants:

Held, that it was not the intention of the donor that the shares of these persons would lapse and revert back to the grantor and his heirs, if the other lineal descendants of the original grantee are alive. The annuity could be claimed by the lineal descendants of the original grantee who may be living at any particular time and the shares amongst them should be calculated on the principle of *per stirpes* and not *per capita*. *JYOTISH CHANDRA CHAUDHURI PROFULLA CHANDRA SANJAL* Cal. 330

Construction—Inam in favour of Math—Alienation register showing grant in favour of mahant personally—Effect.

A certain grant, according to the *sanad* and the decision of Inam Commissioner, was made to the Math itself for its maintenance and not to the mahant personally. But in the alienation register the grant was entered as *jat* or personal inam:

Held, that the fact that for some reason or other the inam was entered in the alienation register as a *jat* or

Grant—concl'd.

personal *inam* did not make it any the less an *inam* to the Math, and that, being an *inam* to the Math, it was subject to all the conditions which attach to such *inams*. *SHANKARCHARYA v. CHANMALAPPA*

Bom. 513

— *Grant not from Crown—Right to recover assessment or rent—Presumption.*

The grants which are not grants from the Crown must be construed in favour of the grantees. Unless, therefore, the right to recover assessment or rent is expressly reserved the presumption would be that that right was also granted. *SHANKARCHARYA v. CHANMALAPPA*

Bom. 513

— *Handwriting—Inference—Document appearing to be in handwriting of certain person—Such person must explain it—No explanation but evasive answers—Court can infer that document was in his handwriting.*

Where a writing on the face of it appears to be that of a certain person it is for that person to explain the document and the entries to be found in it. If such person instead of offering any explanation chooses to take shelter behind the evasive reply that he did not know whether the document was in his handwriting, the Court is right in inferring that the document was in that person's handwriting and in holding that it was for that person to explain it. *TOTA RAM v. ZALIM SINGH*

All. 277

— *Highway—Rights of public.*

The public have right to use every part of the public street, not merely the metalled portion in the centre. *KASTURI LAL SANT LAL v. MUNICIPAL COMMITTEE, JAGRAON*

Lah. 686

— *Rights of public, interference with—Injunction, suit for—Municipality proposing to sell part of public street in front of person's shop—Person's frontage of unusual value likely to be affected—If can sue Municipality for injunction—Damages, whether can be assessed in such case—Injunction, if can be granted.*

For owners of houses abutting on a public highway, the question of frontage means a great deal, and if anything is done by those in whom the highway vests, which interferes with the rights of the owners with regard to the highway, and which tends to diminish the comforts of the occupants of the houses, the owners have an actionable claim against them.

Hence where a Municipal Committee proposes to sell a portion of a street in front of a person's shop for the purpose of building shops and the person has not merely a frontage but it is a frontage of more than usual value because his is the first shop in the *mandi* which persons coming from the station towards the main gate of the *mandi* would have to pass and his shop would be shut out by the buildings proposed to be erected he is entitled to sue the Municipality for an injunction restraining them from selling the proposed land.

In such a suit the damages likely to be suffered by the plaintiff are not in the nature of things, capable of accurate assessment and a mere general statement made by the plaintiff in his evidence that the value of his houses has been reduced by Rs. 2,000 or Rs. 3,000 cannot be taken as being equivalent to an accurate estimate by him of the damages which he would suffer. *KASTURI LAL SANT LAL v. MUNICIPAL COMMITTEE, JAGRAON*

Lah. 686

— *Hindu Law—Adoption—Authority—Testator by will authorising both widows separately to make adoption—Construction of will.*

Where by a will the testator authorises both his

Hindu Law—cont'd.

widows separately to make adoption the instrument should be construed on the assumption that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal, very unusual and not practised among Hindus. The testator cannot therefore be intended to have authorized simultaneous adoptions by the widows. It must be inferred that he must have contemplated following the ordinary rules of Hindu Law whereby the refusal to adopt by the senior widow or her consent would be a necessary preliminary to a valid adoption by the junior widow. Where there is no such refusal or consent by the senior widow, the adoption by the junior widow is invalid. *AKUTHOTA BYRE GOWDU v. MUNIAMMAL*

Mad. 745

— *Adoption—Bringing up child and describing him as adopted, whether valid adoption.*

The bringing up of a child, even with the intention of giving one's property to him and describing him as having been adopted, do not constitute adoption in the sense as understood in Hindu Law. *RANBIR KARAM SINGH v. JOGINDRA CHANDRA BHATTACHARJI*

All. 170

— *Effect on family partnership.*

Ordinarily in Hindu Law the rights of an adopted son arise at his adoption. Even in the case of an adoption by a widow, though the adoption by her is for her husband still the adoptee's rights do not relate back to the death of the husband. But in the case of a trading partnership the adopted son takes the place of the deceased as from the date of his death, thus preventing its automatic dissolution. Under the ordinary law a firm of partnership dissolves upon the death of a partner and his heir does not *ipso facto* become its member since the continuance of a partnership depends upon the mutual consent and confidence of the partners. These incidents have, however, no application to an ancient family trade in which partnership continues unaffected by the deaths of old members and the births of new ones. As such, a partnership of which the father was a member would continue in spite of his death, the son taking the father's place whether then living or posthumous. As such if a person was afterwards adopted his adoption relates back to the death of the father, so that the partnership is deemed to continue with him added as a partner from the date of the father's demise. *KESRI SINGH v. HAR KANWAR BAI*

Bhop. 19

— *Last surviving co-parcener's widow taking boy in adoption—Vesting of estate in him—Adoption by widow of predeceased co-parcener, if can divest.*

Where after the death of the last surviving male co-parcener his mother takes a boy in adoption, the adopted son divests his mother of the property inherited by her. But there is a termination of the co-parcenary and the adoption by the widow of any other predeceased co-parcener does not divest the property from the son adopted by the mother of the last surviving coparcener. *RUDRAPPA YELLAPPA SATENNANVAR v. MALLAPPA MALLESHAPPA*

Bom. 360

— *Widow of predeceased brother adopting subsequent to partition between remaining co-parceners—Adopted son, if entitled to share.*

A co-parcenary consisted of two brothers and a son of one of them. After the death of one of the brothers leaving behind him his widow, the remaining brother and his son made a partition of the family property. Subsequently the widow of the pre-deceased brother adopted a son who brought a

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suit against the partitioning members for half share in the family property :

Held, that though the adoption was valid, the adopted son was not entitled to half-share in the property which had already been partitioned.
IRAPPA LOKAPPA VASTRAD v. RAGHAYYA MADIWALAYYA
Bom. 504

— Alienation — Father—Antecedent debts—
Distinction between mortgage for antecedent debt
and for new debt—Effect of.

Although at first sight it seems that there is little distinction in principle between a mortgage given for an antecedent debt, and a mortgage for a debt incurred for the first time when the mortgage is executed, yet, if the distinction is observed, it will tend to preserve the property in the family as it will render it more difficult for a Hindu father to incur debts which might ultimately have the effect of dissipating that property. NACHIMUTRU GOUNDAN v. BALASUBRAMANIA GOUNDAN Mad. 735

— Father — No legal necessity—No consent of sons—Any son, if can set it aside as far as it affects his interest—Nature of co-parcenary property.

An alienation made by a father, who has sons then living, not being one for legal necessity or for payment of an antecedent debt, if made without their consent may be set aside according to the Bombay law by any one of the sons partially so far as it affects his interests in the property.

Nature of co-parcenary property explained. JIVAJI KESHAV BAPAT v. VENKATESH KRISHNA BYODGI
Bom. 663

— Father—Object of restriction on father's right of alienation—Property in hands of father or manager, if trust for family.

The underlying object of the restriction upon the father's power to alienate joint family property is the conservation of the family substance for the benefit of the existing and future members of the family. In a loose, though not in a strict legal sense, the family property in the hands of the father or the manager may perhaps be termed a trust for the family itself conceived as a continuing unit. NACHIMUTRU GOUNDAN v. BALASUBRAMANIA GOUNDAN Mad. 735

— Debts—Antecedent—Alienation of ancestral property by father for antecedent debts—Son impugning alienation—Burden lies upon him to prove that debts were for immoral purpose—Such burden not discharged—Whether it must be shown that debt was for legal necessity or family benefit—Effect of alienation upon son's liability when it is sale and mortgage, explained.

A son is under a pious obligation to pay his father's debt which is not immoral, illegal or Atyavaharika. But this does not empower the father to alienate his son's share in the ancestral property except for a legal necessity or for the benefit of the family or for the payment of an antecedent debt not incurred for immoral or illegal purposes. Once it is proved that there was an antecedent debt, genuinely independent of the subsequent transaction of alienation, or that the alienee inquired and believed in good faith that such a debt existed, and that the alienation was made for satisfying that debt, then the burden of proving that the antecedent debt was incurred for immoral or illegal purposes lies on the son who impugns the alienation. That burden is not discharged by merely showing that the father was leading an extravagant and dissolute life, but it must be prov-

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ed that the particular antecedent debt was incurred for immoral purposes or was connected with some act of immorality. If this is not proved by the son, then it is not necessary to consider whether the antecedent debt was incurred for any legal necessity or for the benefit of the family. If the alienation challenged be a sale, it would not be set aside if a substantial portion of its consideration was required for a legal necessity or for the benefit of the family or to pay off an antecedent debt which was not immoral or illegal, although the remaining portion was not so required. The material question to be considered in such cases is whether the sale itself was justified. If so, the sale will be upheld as a whole. But the case of a mortgage stands on a different footing. If a part of its consideration is for legal necessity or for the benefit of the family or for the payment of such an antecedent debt as to justify the alienation, and the other part is not so, yet not being borrowed for an immoral or illegal purpose, is such that the son is under a pious obligation to pay it, then the former alone will be a charge on the son's interest in the property, while the latter is not binding on the son as a mortgage debt, but only as an unsecured debt of the father. RAGUNATH RAMCHANDRA JEE v. RAMCHANDRA NARAYAN JEE Bom. 71

— Debts—Antecedent — Debt by father by exchanging villages—Subsequent mortgage in favour of stranger to pay off this debt—At time of incurring debt, subsequent mortgage in contemplation—Debt, if deprived of its character of antecedency.

Where father incurred debt by exchanging villages and subsequently executed a mortgage in favour of a stranger to pay off the earlier debt, the earlier debt is an antecedent debt, in fact as well as in time. The character of the debt cannot be altered by the fact that at the time of incurring the debt the father knew that he would not be able to meet the liability and had in contemplation the execution of the subsequent mortgage to pay the debt. RAM KUMAR SINGH v. PARAM SINGH All. 215

— Antecedent—Word "rina," interpretation of—Unascertained liability of partner, whether debt according to Hindu Law.

The significance of the sanskrit word rina for apportioning rights or liabilities, must not be determined by reference to its English equivalent but by the original sanskrit word itself, giving to it just the meaning in which it is used or understood in the parent language in its literal or even colloquial sense. The word 'debt' is not the exact equivalent of rina in sanskrit at any rate with all the technical import that that word carries. The words dhana and rina coupled together in the texts, are used in a comprehensive sense, for describing all varieties of divisible assets and liabilities. As dhana includes in its connotation all varieties of property and assets, there is no reason why rina should not be held to include all varieties of obligations and debts as well.

Hence, the unascertained liability of a partner in partnership is a debt according to Hindu Law although until the settlement of partnership accounts the relationship of debtor and creditor does not exist. NACHIMUTRU GOUNDAN v. BALASUBRAMANIA GOUNDAN Mad. 735

— Father—Mortgage of ancestral land—Suit against father—Sons not impleaded—Father dying after preliminary decree—Sons brought on record—Question regarding alienability and bind-

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ing nature of debt not allowed to be raised—Sons, if in separate suit can dispute the existence of debt.

The pious duty of a son which makes him liable to pay his father's debt assumes the existence of certain debts which have to be paid. The question of illegality or immorality would only arise when the debts were in fact incurred. It is only when a debt is proved to exist and found not to have been incurred for immoral or illegal purposes, that the father could be said to have been sued in a representative capacity. So where in a suit against father on mortgage of ancestral property the sons are not impleaded but are brought on record after the death of the father after the passing of the preliminary decree and are not allowed to raise the question regarding alienability of the mortgaged property and binding nature of the debt, the sons, in a separate suit are not precluded from disputing the existence of debt itself. *LAJSHMADU v. RAMUDU* Mad. 816

Debts—Father—Surety debt—Liability of son—Pious obligation.

Under the Mitakshara the son is liable to pay the debt incurred by the father as the result of being a surety for payment of money lent and for delivery of goods. This liability of the son, however, is not higher than the pious obligation that rests on him for the payment of his father's personal debts, and is limited to his interest in the joint family property. *DALJIT SINGH v. HARKISHAN LAL SAH* All. 152

Son's liability—Father defending suit on behalf of minor daughter and setting up false will—Father ordered to pay costs personally on that account—Liability of sons for such debt.

Where the Court orders the father to pay personally the plaintiff's costs in a suit in which the father defends his minor daughter, for setting up a false will, although the father is not party to the suit, such a debt must be said to be a debt tainted with illegality or immorality for which his sons cannot be held liable. The costs of the appeal must be dealt with in the same way as the costs of the suit, if in prosecuting the appeal the father is acting in the same illegal and immoral way. *VEDULA LAKSHMINARASIMHAMURTI v. MEDURI VENKATA JOGISO MAYYAJULU* Mad. 861

Son's liability—Surety debt by father.

Under the Hindu Law of the Mitakshara School a son is liable for the debts of his father on account of suretyship for the payment of money. *KANJESHWAR NATH v. BENARES BANK LTD., SAHARANPUR* All. 741

Joint family—Interest of undivided member attached in execution of money decree against him—Attachment released on objection by other members of joint family that property was sold to them—Suit to set aside sale as fictitious—Defendant dying—Plea that there is no property against which decree could be executed, if can be taken.

When a suit is brought against a member of a joint Hindu family for a declaration that the sale deed in favour of the defendant's nephews who formed along with the defendant the joint family of the property attached by the plaintiff in execution of his money decree was fictitious and fraudulent and was executed with the object of defeating the plaintiff's claim against the defendant, and the defendant dies during the pendency of the suit in the original Court, it cannot be said that as he was a member of a joint Hindu family, there was no longer any property

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against which the plaintiff could proceed. If the undivided interest is attached during his lifetime it may be sold after his death whether the order for sale was made in his lifetime or after his death. The contention would be sound if the undivided interest of the defendant had not been attached in his lifetime in the execution of a decree against him for his personal debt.

There is no rule which forces a decree-holder to ask for execution against the whole of the undivided share of a Hindu co-parcener when the sale of only a part of it would be sufficient. *SURAJ BAKSH SINGH v. THAKUR DAS* Oudh 90

Joint family—Partition—Separation taking place—Presumption as to remaining members.

When one member of a jointly family separates, there is no presumption either that the remaining members have also separated or they continue joint; it is a question of fact in each case to be proved like any other fact by evidence. *SRI RAM v. SITAL PRASAD* Oudh 571

business—Business carried on by member in partnership with stranger—Presumption that it is joint family business.

Under Hindu Law, there is no presumption that a business carried on by a member of a joint family in partnership with a stranger is joint family business. The presumption of Hindu Law that, where a nucleus is proved, all properties standing in the name of its members, were acquired out of the family funds and belong to the family, cannot be extended to cases of partnership with strangers. *BEOPAR SAHAYAK BANK LTD., MEERUT v. KHILLO* Lah. 385

Jointness—Presumption—Joint execution of security bond by brother—Presumption.

Execution of a security bond jointly by brothers does not necessarily show the jointness of the family as even strangers can join in executing a document. *PIRTHI PAL KUNWAR v. SURAJ KUNWAR* Oudh 179

Presumption—Presumption as regards cousins.

The presumption of union is stronger in the case of brothers than in the case of cousins, and the farther you go from the founder of the family the presumption becomes weaker and weaker. *PIRTHI PAL KUNWAR v. SURAJ KUNWAR* Oudh 179

Maintenance—Mother, right of—Priority over personal debts of her sons.

The mother has got a right of maintenance over the joint family property and it must have priority over the personal debts of her sons or step-sons. *BEOPAR SAHAYAK BANK, LTD, MEERUT v. KHILLO* Lah. 385

Partition—Evidence of—Conduct of parties.

Where there is no definite evidence of separation taking place at a particular time the separation of a family can be proved by the conduct of the family and the attendant circumstances.

The partition of joint estate consists in defining the shares of the co-parceners in the joint family and it is not necessary that there should be an actual division of the property by metes and bounds and the definition of shares may be proved by an entry in the Record of Rights showing the shares of each member of the family, and, further such an entry will be evidence of the severance of the joint status. *PIRTHI PAL KUNWAR v. SURAJ KUNWAR* Oudh 179

Shares—Mother's share—Succession to—Mother living jointly—Effect on succession—Stridhan.

Hindu Law—contd.

According to the Mitakshara Law, the mother or the grandmother is entitled to a share with sons or grandsons dividing the family estate between themselves but she cannot be recognized as owner of such share until the division is actually made as she has no pre-existing right in the estate except a right of maintenance. Where she is allotted her share in the partition yet her share is not partitioned she cannot be said to have become the owner of the share allotted to her and it remains in the joint family.

The rule that in cases governed by the Mitakshara the share allotted to a mother on partition is not her *stridhan* and that on her death it passes not to her *stridhan* heirs but to the sons or grandsons out of whose portion it was taken out, is a general rule applicable to a case in which all the members of a joint Hindu family have separated. It cannot apply to a case in which though one of the members of a family has separated the mother has continued to live jointly with the other members, for in the latter case it is obvious that the members who continued joint will form a joint Hindu family and succession to the property held by them will be governed by the rules of Hindu Law applicable to a joint family. *SRI RAM v. SITAL PRASAD* Oudh 571

Religious Endowment—Math—Alienation—Effect—Whether binds successor.

In case of an *inam* of the nature of a *devasthan inam* the *mahant* or *Shankaracharya* for the time being would have no power to alienate the Math property whether by sale or permanent lease so as to bind his successors except in the case of legal necessity. The *mahant*, therefore, who has made the *inam* grants has no power to alienate permanently the right of the Math to recover assessment from the lands, or in other words to grant the lands permanently free of assessment. The grant would in each case endure only during the life-time of the *mahant* who made it, and succeeding *mahants* would be entitled to repudiate the grants and to recover assessment within 12 years of his becoming *mahant*. *SHANKARACHARYA v. CHANMALAPPA* Bom. 513

Math—Suit for possession of property alleging its illegal transfer by previous persons in lawful possession thereof—Plaintiff must show some right or title to claim possession—Mere worship of image does not constitute math or give right to plaintiff to bring suit for possession of zamindari property.

No doubt anyone who is a worshipper at a temple or of an image, if he obtains permission under s. 92, Civil P. O., can bring a suit for the declaratory reliefs allowed by that section, but where a suit is not one under s. 92, but a suit for possession of property alleged to have been illegally transferred by previous persons, who were in legal possession of that property, the plaintiff would have to show some right or title to claim possession. The mere worship of the image does not constitute a *math*, nor does it give the plaintiff any right to bring a suit for the possession of *zamindari* property. *BABA JAGTANAND BRAMCHARI v. BAHIMDEO* All. 496

Succession—Atma bandhus—Sister's daughter and remoter male bandhu, when former is nearer in propinquity.

In a case of competition between a remoter male *bandhu* and a sister's daughter who, under the Mitakshara Law, which applies to Sind, is not one of the female heirs specially mentioned, the general rule is that she must be postponed to male heirs. *TULSIBAI v. GAFUMAL NARAIN DAS* Sind 347

Hindu Law—contd.

Brothers—Dayabhaga School.

The principle of law according to the Dayabhaga School is that if a brother dies leaving another brother who was living jointly with him that would not entitle the joint brother to have preference over a separated brother unless the former could be said to have re-united. *JYOTISH CHANDRA CHAUDHRI v. PROFULLA CHANDRA SANYAL* Cal. 330

Widow—Maintenance—Contract with husband's co-parceners to receive fixed sum per annum even in case of changed circumstances, is valid and binding on her.

A contract by a Hindu widow with her husband's co-parceners to receive a fixed sum per annum for maintenance and not to claim any increase in future even in case of change of circumstances is a valid agreement and binding on her. *KODUKULA KAMESWARAMMA v. KODUKULA THAMMANNA* Mad. 602

Mutation in name of widow—Effect.

There is no presumption that mutation in the name of a Hindu widow is by way of consolation. *PIRTHI PAL KUNWAR v. SURAJ KUNWAR* Oudh 179

Will—Testator bequeathing moiety in favour of son R—Other moiety to be held in trust for R's male issue—In case of R's death without male issues this other moiety to go to R. D. Trust Estate—Gift to Trust Estate, if void—This gift, when takes effect.

In truth, inheritance is not donation, and a bequest is not a donation *de praesenti* between living people. It is to be recognised that the Hindu Law has been greatly influenced by the notion of "relinquishment in favour of a sentient being" as the basis of a gift and of inheritance, but this principle has not been allowed to arrest the development of the Hindu Law of wills. The doctrine that there must be acceptance at the time of relinquishment has different values according as it is applied to gifts *inter vivos* or is extended by analogy to bequests or inheritance, though by a theory of some refinement heir and donee were once thought to be equally governed by the same principle. The theory, is sometimes put by saying that the estate cannot remain in abeyance. Thus it appears that property in the heir must arise immediately upon the death of the ancestor in the same manner as the property of the donee arises immediately upon relinquishment by the donor. But it must needs be admitted that the rigour of this theory, even if it be not destructive of all future gifts, is inconsistent with any recognition of contingent or executory bequests. It has effect (save in so far as the Legislature has abrogated it: Hindu Wills Act, 1870 Hindu Disposition of Property Act, 1916), to limit the class of persons who are capable of taking under a will, restricting it to persons who either in fact or in contemplation of law are in existence at the death of the testator. But it does not remain as a further obstruction to the taking by such persons of a beneficial interest known to and permitted by the law. Indeed, if an estate in remainder can be limited to take effect on the natural determination of a life estate and may be so limited upon a condition which may never be fulfilled if a gift over on condition may be good though in defeasance of an absolute estate granted by the will, there is no principle of Hindu Law to be saved by refusing to recognise a limitation to take effect upon condition in the future because it lacks "support" from a particular estate. It cannot be disputed that if a conditional limitation is in-

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valid, the interest, unless otherwise disposed of by the will, must go to the heir. But if limited interests are to be recognised, there is no reason to hold that because a prior interest goes to the heir as such a conditional limitation or any other limitation is bad at Hindu Law.

The principle of Hindu Law which prevents an estate being in abeyance is an important doctrine of the law of inheritance and it has important consequences as regards adoption. The rule is that the right of succession vests immediately on the death of the owner. Apart from the case of a child *en ventre sa mere* or of an adopted child, the estate once vested in an heir will not be divested by the subsequent birth of a person who would have been a preferable heir had he been alive at the time of the death of the last owner. In like manner, though the doctrine is not really the same, delivery in some sense is necessary at Hindu Law to distinguish the completed gift from the mere promise. But neither of these doctrines nor yet the principle that a man cannot devise an interest of a nature and quality unknown to the Hindu Law (e. g., descendible in a manner unknown to that law) conflict with the principle that where there is a will the heir can as such take only that part of the testator's property which is not disposed of by the will. He will take by descent and by his right of inheritance whatever is not validly disposed of by the will and given to some other person.

A testator bequeathed a moiety of his estate to his only son R and as regards the other moiety it was provided that it was to be held by R and certain other persons in trust for R's male issue. It was further provided that in case of R's death without male issue this other moiety was to go to a certain trust known as R. D. Trust Estate:

Held, that merely because of the failure of the testator's disposition of the interest in favour of the R. D. Trust Estate during the life-time of R, the bequest in favour of the R. D. Trust was not invalid. This gift to R. D. Trust took effect on the death of R without leaving male issue, who as heir of the testator would take the prior interest for his own life in this moiety such interest not having been disposed of by the will. The contention that the testator's directions to regulate the devolution of his property though within limits laid down by law would fail if the heir took any interest immediately upon the death of the testator, was fallacious, for it assumed that the complete interest in the property had devolved on the heir, which was the very point in dispute. *GADADHAR MULLICK v. OFFICIAL TRUSTEE OF BENGAL* **PC 108**

Hundi. See Negotiable Instruments **419**

Hundi or bill of exchange, nature of—Bilateral document, if hundi—Hundi drawn by A on his own firm in favour of B—Document is pro-note—Such document not properly stamped under Arts. 39 and 12 (b), Bhopal Stamp Act is inadmissible under s. 33.

A *hundi* or a bill of exchange being a negotiable document is drawn by one person who is called a drawer, on another person who is called a drawee, who is ordered to pay the amount thereof to a third person who is the holder. Thus three persons are parties to a bill of exchange. A document which is not of this nature is not legally a *hundi* or bill of exchange. A document which is only bilateral cannot be called a bill of exchange.

Where therefore a *hundi* is drawn by A on his own firm ordering the amount thereof to be paid to B after

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certain days, the transaction virtually is that A borrowed money and passed a *hundi* drawn on himself as security for the debt to B. It is thus a clear case of the execution of a promissory note pure and simple. Such a document if not properly stamped as required under Arts. 39 and 12 (b), Bhopal Stamp Act is inadmissible in evidence under s. 33 of the Stamp Act, even on payment of proper duty and penalty. *RAM NARAIN v. NEMI CHAND* **Bhop. 225**

Suit on—Defendant admitting execution—Burden of proving consideration.

Where in a suit based on *hundi* the defendant has admitted its execution, the burden of proving that it was without consideration lies heavily on him. *RAM NARAIN v. NEMI CHAND* **Bhop. 225**

Inam—Desabandam inam—Alienability

Where the lands were granted to the plaintiff's ancestors by way of *desabandam inam* and the burden of keeping the tank, apparently an irrigation source, in repair was transferred to the *inamdar*, an alienation of such an *inam* is against public policy and void. *LAKSHMADU v. RAMUDU* **Mad. 816**

Income Tax Act (XI of 1922), ss. 4, 66—Permanent lease granted—Salami received by lessor once for all, whether capital receipt or income.

Per *Fazl Ali, J.*—Income in the Income Tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium or *salami* which is paid once for all and is not recurring payment, hardly satisfies this test. If the premium represents the whole or part of the price of the land it cannot be income.

Per *Manohar Lall, J.*—It would be impossible to lay down a hard and fast rule that a *salami* can in no case be taxable but the question would depend upon the facts and circumstances of each case.

Where a certain amount was received by a lessor as *salami* once for all at the time of granting a permanent lease:

Held, that the *salami* must be treated as capital receipt and not as income. *COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA v. VISHESHWAR SINGH* **Pat. 691**

s. 4 (3)—“Income as used in s. 4 (3), scope of.

Per *Braund, J.*—The word “income” as used in the sub-s. (3) of s. 4 embraces every form of receipt of the kind which but for the exemption would, or might, have been embraced by the words “income, profits or gains” in s. 4 (1). *COMMISSIONER OF INCOME-TAX v. INDRA SEN* **All. 554 F B**

s. 4 (3) (vii)—Betting, when vocation.

It cannot be said that betting, under no circumstances, can constitute vocation or occupation of a particular individual and, that the winnings from the same cannot amount to profits or gains chargeable to income-tax. Where the assessee has offered bets on numerous occasions such betting, in the case of the assessee, does certainly constitute his vocation or occupation. *COMMISSIONER OF INCOME-TAX v. INDRA SEN* **All. 554 F B**

s. 4 (3) (vii)—“Casual,” in s. 4 (3) (vii), meaning of.

The word ‘casual’ in s. 4 (3) (vii) must be read as meaning the antithesis of that which is governed by something more than mere chance, something out of which, according to the probabilities of business or to the known course of practical experience, a rational expectation of profit arises. And that does not, apply to a mere bet. *COMMISSIONER OF INCOME-TAX v. INDRA SEN* **All. 554 F B**

Income Tax Act—contd.

— s. 4 (3) (VII)—*Exemption from taxation—Onus.*

Taxation under the Act is the rule and exemption the exception. All income from whatever source derived must, therefore, be chargeable to income-tax, and the burden of proving that a particular class of income is not so chargeable must necessarily lie on the person claiming exemption from the liability to pay income-tax. *COMMISSIONER OF INCOME-TAX v. INDRA SEN* All. 554 F B

— s. 4 (3) (VII)—*Receipts from maintenance of racing stable or betting whether casual and recurring.*

The receipt of stakes money by owners of racing stables is a matter of frequent occurrence and such receipts cannot, therefore, be characterized as of a non-recurring nature but casual and recurring. *COMMISSIONER OF INCOME-TAX v. INDRA SEN* All. 554 F B

— 4 (3) (VII)—*Value of English decisions in interpreting words "business," "profession," "vocation" or "occupation."*

Per Iqbal Ahmad, J.—The words "business," "profession" and "vocation" have been interpreted in some English decisions and though those decisions cannot, furnish an infallible guide, they are of assistance in interpreting those words. *COMMISSIONER OF INCOME-TAX v. INDRA SEN* All. 554 F B

— s. 4 (3) (VII), 12—*Business, meaning of.*

The word "business" has been used in the Act to denote the continuous and systematic exercise of an occupation or profession with the object of making income or profit, and where the element of continuity is wanting in a particular activity, that activity cannot be characterized as "business" within the meaning of the Act. "Profession" or "occupation" can amount to business only if it is continuously and systematically exercised. It follows that the words "profession" and "occupation" are words of wider import than the word "business." *COMMISSIONER OF INCOME-TAX v. INDRA SEN* All. 554 F B

— s. 4 (3) (VII), 12—*Maintenance of racing stable, when amounts to business.*

Whether the maintenance of a racing stable does or does not in a particular case amount to "business" must depend on the facts and circumstances of each case. It is impossible to lay it down as a general proposition of universal application that, in all cases where an element of sport or amusement is involved, a particular activity, howsoever systematically and continuously exercised, cannot amount to business. The question in each case must be what was the dominant intention. If the dominant intention was to get income or make profits or gains the activity of the description referred to above must amount to "business." *COMMISSIONER OF INCOME-TAX v. INDRA SEN* All. 554 F B

— ss. 4 (3) (VII), 24, 12, 66—*Held on materials before High Court that assessee was not entitled to claim set-off of losses either on racing establishment or on betting accounts.*

An assessee who was a money-lender also dealt in precious stones and maintained and ran horses in races. He betted in races on his horses. He kept account books in regular course of business and also maintained an account styled as the "racing account." In this latter account, the stakes money received from the race clubs and the amount won on his bets were entered on the credit side and the losses and expenses in the maintenance of the horses on the debit side. The stakes money represented the prize paid to the assessee as the

Income Tax Act—contd.

owner of the horses which won the races. In the accounting year, according to the entries in the account book, the assessee suffered a loss of Rs. 7,458 in betting and Rs. 425 in running the horses at the races but made profit in money-lending business and in the purchase and sale of precious stones:

Held, (per Bajpai and Braund, JJ.)—That upon the material before the Court the assessee was not entitled to claim a set-off of losses either on the racing establishment or on the betting account

(Per Iqbal Ahmad, J., contra.)—There was no material on which it could be held that the maintenance of the racing stable and the series of betting transactions by the assessee did not constitute his business. The assessee was entitled to have the loss of Rs. 425 and Rs. 7,458 deducted from his assessable income for the year in dispute. *COMMISSIONER OF INCOME-TAX v. INDRA SEN* All. 554 F B

— s. 9. SEE Income Tax Act, 1922, s. 55.

— s. 9—S. 9, construction—'Owner of property, meaning of.

On a plain construction of the words of s. 9, Income Tax Act, it necessarily follows that the assessee must be the owner of the property assessed. In construing this section the words 'owner of the property' cannot be construed as meaning owner of the annual value of the property. *COMMISSIONER OF INCOME-TAX, LAHORE v. KRISHAN KISHORE* Lah. 676 S B

— s. 10—*Association for advancing and protecting business interests of members—Running of Produce Exchange Department and charging of fees from members for services rendered—Whether doing business within meaning of s. 10—Saving from payments by members, if profit or gain.*

Where an Association is an Association for the purpose of advancing and protecting the business and trading interests of its members there is a certain mutuality between the Association and its members. The basis of mutuality is not destroyed because one of the objects of the Association is to further not only the particular interests of its members but of trade and commerce outside the particular city where the Association is formed. Hence the activities of the Association in maintaining and running the Produce Exchange Department and charging fees for the various services rendered by it to its members do not amount to doing business within the meaning of s. 10, Income Tax Act. Such a case does not fall outside that class of cases where a number of individuals for the common good combine to provide by common sacrifices a common organization to do for them more efficiently as a body what they could do individually but less efficiently for themselves and the fact that from the payments made by the members themselves there is a surplus or saving upon the year's working, does not constitute that surplus or saving a profit on gain. *COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY, SIND ADEN v. KARACHI INDIAN MERCHANTS ASSOCIATION* Sind 461

— s. 12. SEE Income Tax Act, 1922, s. 4 (3).

— s. 14. SEE Income Tax, 1922, ss. 19, 20.

— s. 14 (2) (a)—*Words "assessed to income-tax" in s. 14 (2) (a), meaning explained.*

A company is not assessed to income-tax within the meaning of cl. (a) to s. 14 (2), where it has submitted a return of its total income as required by s. 22 and the return has been dealt with by the

Income Tax Act—contd.

Income-tax Officer under s. 23, and the result of the assessment is that nothing is found to be payable by way of income-tax. The words "assessed to income-tax" must be given their ordinary and natural meaning and they do not cover the case where a company is assessed to no income-tax. *BAI LALITA RATANOHAND KHIMOHAND v. TATA IRON AND STEEL Co., LTD.* Bom. 389 F B

— ss. 19, 20, 51, 14 (2) (c)—*Income-tax paid by company, whether on behalf of share-holders.*

In the case of a company the tax has to be paid by the company direct and not on behalf of the share-holders, and this is rendered clearer by the provisions as to return of income and assessment of companies contained in ss. 22 and 23 of the Income Tax Act. *BAI LALITA RATANOHAND KHIMOHAND v. TATA IRON AND STEEL Co., LTD.* Bom. 389 F B

— ss. 20, 51—*Certificate under s. 20, when no income-tax is payable, if necessary—S. 51, if applies—Tax by company on profits distributed—Tax, if can be deducted from dividends.*

The provisions of s. 20 are no doubt mandatory but they only apply where the company is liable to tax. A certificate to the share-holders under s. 20 is not necessary where no income-tax is payable by the company. The penalty imposed by s. 51 on a failure to furnish a certificate under s. 20 only arises where the failure is without reasonable cause or excuse, and the fact that the certificate would be untrue as no income-tax was payable by the company would provide reasonable cause for not issuing it.

Section 20 clearly recognizes a right in the company to deduct tax where tax has been or will be paid on the profits distributed. Income-tax has to be discharged out of profits before any distribution can be made, and where tax has been paid, the company must apportion the burden amongst the different classes of share-holders, according to their legal rights. No doubt deduction of tax at the standard rate is a rough and ready method of apportionment, but to pay dividends in full to the preference share-holders would be to give them a tax free share and throw the whole tax onto the ordinary shares.

Where, however, no income-tax is payable by the company and there is no burden to adjust, there is nothing in the Act to justify the company in making any deduction in respect of income-tax from the dividends paid. *BAI LALITA RATANOHAND KHIMOHAND v. TATA IRON AND STEEL Co., LTD.* Bom. 389 F B

— s. 24. SEE Income Tax, 1922, s. 4 (3) (vii) 554 F B

— s. 24 (1)—*Firm of partners dealing in shares holding opening stock of shares valued at certain amount, at beginning of accounting year—Stocks and shares always valued at cost—Firm dissolved at end of accounting year and shares allotted to partners at market value on date of dissolution—Difference between opening stock valuation at cost and valuation at market rate on dissolution of firm held could not be claimed as loss.*

A business firm which is liable to be assessed to income-tax is under an obligation to maintain a system of accounts with regularity and it is not permitted to change the system except upon a proper application being made to the income-tax authorities in that behalf. So also every tax year is a self-contained period and the profits earned or the loss sustained either before that year or after that

Income Tax Act—contd.

year are not at all relevant for the purpose of an assessment relating to a particular year.

The assessee a firm of partners were doing business in shares and held at the beginning of the accounting year an opening stock of shares valued at certain cost. Their stock of shares had always been valued at cost. During the year there had been no transaction in shares. At the end of the accounting year their partnership was dissolved and shares were allotted to the partners at the valuation based on the market value of the shares on the date of the allotment. The assessee in the year of assessment claimed to deduct the difference between the opening stock valuation at cost and the valuation at market rate on the date of allotment of shares to the partners, as loss:

Held, that the assessee was not entitled to do so because, as the stock was at all previous times valued at cost price and was brought into the balance sheet at the beginning of the year at its cost price, then, when it was taken out of the assets of the company, it also should be valued in the same way at the cost price. The system of valuation which the assessee contended for had the effect of bringing into the accounts of the year a loss in respect of this stock which had not occurred during the year. *CHOUTHMAL GOPALOHAND, In re Cal. 722 s. 26-A. SEE Income Tax Act, 1922, s. 66 (3) 610*

— ss. 26 (2), 66 (3), (2) (6)—*Business transferred being agency business, whether excludes application of s. 26—Assessee firm held could be taxed as successor.*

The facts that the business transferred is an agency business cannot, always be decisive to exclude the application of s. 26, Income Tax Act, because many businesses sell as agents the goods of others.

A certain motor company terminated in December 1930 an agency for sale of its cars given by it to another firm A, and gave it to the assessee firm from January 1931. On January 22, 1931, A sold to the assessee all its business as a going concern and the assessee firm took charge of the business and buildings as a going concern as its vendor went out. There was thus continuity and identity:

Held, that the assessee firm could be taxed as a successor of firm A within the meaning of s. 26 (2) of the Income Tax Act. *COMMISSIONER OF INCOME TAX, BOMBAY PRESIDENCY, SIND AND ADEN v. NARAIN DAS & Co. LTD (FIRM)* Sind 893

— ss. 48, 26-A—*Child, whether can be partner in firm and share profits thereof.*

There is no prohibition in law against a child being introduced to share in the profits of the firm, and s. 48 of the Income Tax Act shows that in a firm which has been registered such a minor is equally entitled to the benefits accruing to a firm from registration. *ABDUL GHAFOR v. COMMISSIONER OF INCOME-TAX, CENTRAL PROVINCES AND UNITED PROVINCES, LUOKNOW* Nag. 610

— s. 51. SEE Income Tax Act, 1922, 19, 20 389 F B

— ss. 55, 9—*Impartible estate—Joint Hindu family of assessee and his sons—Assessee succeeding by rule of primogeniture—Income of estate in his hands, if chargeable in status of 'individual'—Incumbent, whether owner for purposes of s. 9.*

The income of the impartible estate, to which the assessee has succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara, is not chargeable in his hand in the status of 'in-

Income Tax Act—contd.

dividual.' The income of the impartible estate cannot be said to be the income solely of the incumbent of the impartible estate there being vested in the junior members of the family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family namely the incumbent of the impartible estate. The incumbent of an impartible estate cannot become for the purposes of s. 9, Income Tax Act, the owner of the property. As the corpus of the property belongs to the joint Hindu family, individual member of that family cannot be held to be the owner simply because by custom in that particular property the major portion of the income is used entirely for his benefit. **COMMISSIONER OF INCOME-TAX, LAHORE v. KRISHAN KISHORE**

Lah. 676 S B

— s. 66—*Accuracy or otherwise of inference from proved facts, is question of law.*

The question of the accuracy or otherwise of an inference from proved facts is always a question of law and if the Commissioner has stated the proved facts and has asked the High Court to decide as to whether on those facts the conclusion arrived at by the Assistant Commissioner was correct in law, the question raised would undoubtedly be a question of law. **COMMISSIONER OF INCOME-TAX v. INDRA SEN**

All. 554 F B

— s. 66—*Case sent back to Commissioner—Duty of Commissioner and procedure to be followed.*

When the case went back to the Commissioner he sent up a re-statement of the case, but without hearing the assessee. The High Court was compelled to send the case back to the Commissioner once again in order that the case might be re-stated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee. The matter then went back to another Commissioner, who instead of re-stating the case, as he was ordered to do, stated that he had no power within s. 66 (4), Income Tax Act to vary an opinion given under s. 66 (2) if no new facts were admitted:

Held, that the Commissioner was in duty bound to carry out the order of the High Court. He should have re-heard the parties, admitted such further evidence as he considered relevant on the point at issue and re-stated the case with his opinion thereon. It was also open to the Commissioner to make a submission that the High Court should decide the case not upon the case which he was re-stating (as ordered) but upon the finding of fact already arrived at by the previous Commissioner. **COMMISSIONER OF INCOME-TAX, BILHAR AND ORISSA v. VISHESWAR SINGH**

Pat. 691

— s. 66—*Question referred by Commissioner—High Court, if can reframe it.*

In view of the limited jurisdiction given to the High Court by cl. (5) of s. 66. It is not permissible for the High Court to re-frame the questions referred by the Commissioner. **COMMISSIONER OF INCOME-TAX v. INDRA SEN**

All. 554 F B

— s. 66—*Statement accompanying reference under s. 66.*

Only questions of law can be referred to the High Court for decision under s. 66, and the reference under that section must be accompanied by "a statement of the case" by the Commissioner. The "statement" must contain a full and exhaustive narration of the facts giving rise to the questions of law, so that the High Court may

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straightway proceed to apply the law to the set of facts stated and be relieved from the necessity of enquiring as to what the real facts are. **COMMISSIONER OF INCOME-TAX v. INDRA SEN**

All. 554 F B

— s. 66 (2), (3). *SEE* Income Tax Act, 1922, s. 66 (b) 893

— s. 66 (3), 26-A, 48—*Application under s. 26-A for registration of firm—Income-tax Authorities, if can go behind deed of partnership, find it to be bogus and refuse registration—Finding that deed is sham based on evidence—High Court, if can weigh evidence to decide whether finding is correct.*

The Income-tax Authorities are entitled to go behind a deed of partnership which the persons produce and to find that the deed is bogus and to refuse to register them as a firm for the purposes of the Income Tax Act. If the Income-tax Authorities find that a deed of partnership is sham and not intended to be acted upon, and there is evidence on which they could arrive at such a finding, the High Court will not weigh the evidence with view to decide, whether the finding is correct or otherwise. **ABDUL GHAFUR v. COMMISSIONER OF INCOME-TAX, CENTRAL PROVINCES AND UNITED PROVINCES, LUCKNOW**

Nag. 610

— s. 66 (4), (2), (3)—*Costs payable by assessee, whether should be paid from or limited to Rs. 100 deposited under s. 66 (2)—Discretion of Court in the matter.*

Under s. 66 (6), Income Tax Act, costs are in Court's discretion. The deposit is returnable under proviso 2 to s. 66 (2) in certain circumstances. There is however no provision in the Act that costs payable by an assessee should be paid from or limited to the Rs. 100 deposited under s. 66 (2). Rupees 100 in s. 66 (2) is referred to as a fee. **COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, SIND AND ADEN v. NARAIN DAS & Co., LTD.**

Sind 893

Injunction—Temporary. *SEE* Civil Procedure Code, 1908, s. 151 813

— *Temporary—Temporary injunction declined by Judge—His successor, if can go behind order and subsequently grant it.*

Where a Judge has declined to grant a temporary injunction, his successor can go behind that order when new circumstances have subsequently arisen and make another order which the exigencies of the case require. **ISHAR DAS v. FIRM BHAON KI DUKAN**

Lah. 804

Insolvency—Second appeal—Competency of, when no question under s. 4, Provincial Insolvency Act is decided.

Quære:—It is doubtful whether second appeals are competent in cases where no question falling under s. 4, Prov. Insol. Act, has been decided. **RAM RATAN v. FAZAL HAQ**

Lah. 839

Interest—Interest added to amount due when new transaction is agreed between parties which includes payment of interest as acknowledged debt—Whether objectionable.

Where a loan has been incurred for interest and this interest is added to the amount agreed to be due when a new transaction is agreed between the parties which includes the payment of interest as an acknowledged debt this is not in principle open to any sound objection. **S. R. M. S. CHETHAMBARAM CHETTIAR v. LOO THON POO**

P C 445

— *Interest not provided in contract—Whether can be allowed.*

Not interest would be allowed where the claim for interest is not within the contract nor is such

Interest—conold.

interest by way of damages nor is it specifically provided for by statute. *MADAN THEATRES, LTD. v. NARAYAN DAS* Oudh 849

Purchaser, if entitled to interest on purchase price.

In a suit on breach of contract by the vendor, the vendee is entitled to a claim for interest upon the amount of purchase price paid by him to the vendor and retained by him even after his repudiation of the contract. *JAGGO BAI v. HARI-AR PRASAD SINGH*

All. 501

Usurious interest—State of Johore—24 per cent. interest held excessive and unreasonable when loan was amply secured.

Where in a State of Johore in certain transactions of loan and charge the interest charged was 24 per cent such interest being capitalized on each transaction and made payable by monthly instalments, all the loans and charges being amply secured and the contract contained a very harsh term giving power to the money-lender to enforce payment of the loan and interest if any instalment became due and unpaid:

Held, that the rate of interest at 24 per cent. was unfair and unreasonable between the parties. *S. R. M. S. CHETHABARAM CHETTIAR v. LOO THON POO*

P C 445

Interest Act (XXXII of 1839), s. 1—Suit for arrears of maintenance payable monthly—Interest if can be awarded.

A monthly maintenance or allowance made payable under a compromise in a suit come within the scope of provision of s. 1, Interest Act and it is competent to the Court to allow interest at the current rate up to the date of suit for arrears on arrears, of the maintenance. *DEPUTY COMMISSIONER KHERI, MANAGER COURT OF WARDS, MAHEWA ESTATE v. BROJENDRA BAHADUR SINGH* Oudh 624

Interpretation of Statutes—Language clear—Must be given effect to irrespective of anomaly.

Per *Krishnaswami Ayyangar, J.*—When the language of the statute is clear the Court cannot refuse to give effect to it on a consideration that it would create an anomaly. It is in the hands of the Legislature to remedy such anomaly. *RAMACHANDRA RAO v. PARASURAMAYYA* Mad. 176 F B

Retrospective effect—Guiding principles.

No doubt the general principle is that Acts of the Legislature are not given retrospective effect unless the language makes it clear that such was the intention, but in applying that principle one must have regard to the general character of the Act in question, and when construing an Act introduced for the purpose of applying an equitable doctrine to certain transactions considered *ex hypothesi* to be lacking in equity one should not assume that the Legislature intended that the Act should not have retrospective effect, but wishes to preserve rights acquired in such transactions. *RUSTOMJI DOSSABHAI BILLIMORIA v. BAI MOTI* Bom. 27

Jurisdiction—Foreign Court—Decree passed ex parte by British Indian Court against resident of State not submitting to its jurisdiction—Validity—If can be enforced in State—Foreign country, what is—Indian States, whether foreign countries in relation to British India.

It is a well-settled rule of international law that Courts cannot by their judgments bind absent foreigners who have not submitted to their jurisdiction, and can only exercise jurisdiction over persons who are within the territorial limits of their jurisdiction, and, therefore, a judgment of a foreign

Jurisdiction—contd.

Court obtained against an absent defendant cannot be enforced where the defendant at the time of the commencement of the suit was neither a subject of, nor resident in the country in which the judgment was obtained.

A decree against an absent foreigner is valid only so far as the same is made operative by local Legislature within the country of the forum pronouncing the same. Beyond the limits of that country the decree would remain a nullity in spite of the authority given to it by the local Legislature.

An Indian State whose Legislature is not subject to the Legislature of British India is a distinct and separate political entity. Such a State is, therefore, a foreign country in relation to British India within the meanings and for the purpose of the Civil P. O. Section 20 of Civil P. O., (of British India) may give jurisdiction to British Indian Courts to pass a decree against residents of such a foreign State but it has no effect against State subjects within the territorial limits of that State and should be considered an absolute nullity. Hence a decree passed by a British Indian Court against the subject of Bhopal State who at the time of commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable against the defendant in the forum of Bhopal State, wherever the cause of action might have arisen. *KESRI SINGH v. HARKANWAR BAI* Bhop. 19

Foreign Court—Submission—Putting appearance to search papers after ex parte decree or executing general power-of-attorney to defend suits in foreign Court does not amount to submission to jurisdiction.

Putting in an appearance to take search of papers after an *ex parte* decree was pronounced, by a foreign Court does not amount to an act of submission to jurisdiction. So also mere execution of a general power-of-attorney in favour of certain person for defending suits in foreign Courts does not amount to submission to jurisdiction of foreign Courts. *KESRI SINGH v. HAR KANWAR BAI* Bhop. 19

Foreign Court—Submission to its jurisdiction—Effect—Ex parte decree—Steps taken to set it aside and suit defended—Whether submission to jurisdiction—Decree passed on merits—Binding effect—Test to determine whether decree is passed on merits.

Where in a suit filed in British Indian Court against the defendant, a resident and subject of an Indian State an *ex parte* decree is passed and the defendant gets the *ex parte* decree set aside and files written statement and defends the suit through properly constituted attorney, these acts amount to voluntary submission to the jurisdiction of the foreign Court. The case no longer remains *ex parte* against him and a decree subsequently passed on merits is fully binding on him.

The true test for determining whether a judgment has or has not been passed on merits is to see whether it has been pronounced as a penalty for any conduct of the defendant, or whether it is based on a consideration of the truth or otherwise of the plaintiff's case. *KESRI SINGH v. HARKANWAR BAI* Bhop. 19

Jurisdiction—Small Causes—Nature of small cause suit—Suit for fixed amount—Defendant's plea giving rise to settlement of accounts—

Jurisdiction—concl'd.

Nature, if changed—Suit against agent for value of tickets received and not accounted for is cognizable by Small Cause Court—Small Cause Courts Act (Bhopal).

The essential nature of a suit for accounts is that therein the plaintiff does pray for a decree for a fixed sum of money, but only wants rendition of account by the defendant followed by a decree for the amount found due. Such suits are excluded from the purview of Small Cause Courts Act. But a suit which is essentially of small cause nature does not change its character merely because the defendant has chosen to raise a plea of account. It is possible that even in claims for a fixed amount the defendant's plea might some time give rise to the necessity of settlement of account, but this alone would not convert a suit for a fixed sum into a suit for account. Even if the Court has to go into the parties' account to a certain extent, the jurisdiction of Small Cause Court is not ousted. A suit against an agent for value of goods received and not accounted for by him would lie in a Court of Small Causes.

The plaintiff had given to the defendant a number of admission tickets in connection with a wrestling match to be sold on commission. The defendant sold these tickets to the public and pocketed all the money realized thereby. Thus the plaintiff neither got any unsold tickets back from the defendant, nor any money on account of such tickets as were disposed of. The price of the tickets was fixed and their number was in dispute. The plaintiff brought a suit in Small Cause Court to recover full face value of the total number of tickets :

Held, that the suit was cognizable by the Court of Small Causes. *ISHAQUE ALI v. ABDUS SAMAD*

Bhop. 480

Land Acquisition Act (I of 1894), s. 3—"Land" includes buildings, trees and standing crops.

For the purposes of the Land Acquisition Act land includes buildings and also trees and standing crops. The definition is wider than that of immovable property under the T. P. Act. *PROVINCE OF SIND v. HAR KRISHANDAS GULABRAI*

Sind 714

ss. 4, 5. SEE Land Acquisition Act, 1894, s. 23

ss. 18, 21—Reference to tribunal on amount of compensation—Declaration that claimant K was entitled to enhanced compensation based on compromise between claimants—Secretary of State held necessary party.

On a reference by Collector as to the amount of compensation, the tribunal made a declaration that the claimant K was entitled to enhanced amount of compensation, on the basis of settlements between the claimants to the property. The terms of these settlements were embodied in two petitions of compromise filed before tribunal. By these settlements the compensation awarded by the Collector was divided between K and the other claimants and K was given the right to get the excess amount of compensation, if any, to be awarded by the tribunal. There were certain admissions about K's or his representative's title to the lands acquired by the other claimants in these petitions of compromise :

Held, that the Secretary of State for India was not only a proper party but was a necessary party as he was the only person interested in opposing K's claim to enhanced compensation. *SECRETARY OF STATE v. SHYAMAPADA BANERJEE*

Cal. 364

ss. 18, 21, 20—Reference only on question

Land Acquisition Act—cont'd.

of amount of compensation—Question of title to land acquired, relevancy.

The jurisdiction of the Court on a reference by the Collector is a special jurisdiction. If the only objection is to the amount of compensation, that alone is the matter referred to, and the Court has no power to determine or consider anything beyond what is referred. The question of title to the land acquired is, therefore, not relevant in a reference on the question of the amount of compensation only. In an inquiry as to the amount of compensation only, the question is how much more the claimant is to get and how much more is the Govt. to pay. The only question is the additional amount of compensation. It does not involve the determination of question of the right to claim or the liability to pay any additional compensation. *SECRETARY OF STATE v. SHYAMAPADA BANERJEE Cal. 364*

ss. 23, 4, 6, 3—Part of property ceasing to exist between notifications under ss. 4 and 6—Value of that part, if can be considered when making award.

No interest in favour of Govt. arises from the notification under s. 4, Land Acquisition Act. The identity of the property acquired is determined only by the notification under s. 6. If in the period between the two notifications a part of the property has ceased to exist, whether by act of the owner or by accident, the value of that part has not to be taken into consideration when making the award. *PROVINCE OF SIND v. HARKRISHINDAS GULABRAI*

Sind 714

s. 49—Held, application of the tenants to acquire their huts also was not premature.

Held, on facts that the application of the tenants for the acquisition of their huts also was not premature. The action taken by way of agreement under s. 24, Cal. Improvement Trust Act, for exemption of acquisition of part of the premises following steps taken for acquisition of the whole amounted to this: that the provisions of Land Acquisition Act (as part of the Cal. Improvement Trust Act) were being put into force for the purpose of acquiring a part only of the premises in question. *MAHESH MISSIR v. PROVINCE OF BENGAL*

Cal. 872

s. 49—Order of tribunal rejecting reference under s. 49 (1)—Appealability.

A decision on or a determination by the tribunal of any matter which has no reference to compensation in some form or other does not come under the definition of an 'award,' and no appeal lies in such cases. An order of the tribunal rejecting reference under s. 49; Land Acquisition Act is not therefore appealable. *MAHESH MISSIR v. PROVINCE OF BENGAL*

Cal. 872

Landlord and tenant—Assignee of lease, if liable by privity of estate to payment of rent to lessor.

In India an assignee of a lease is liable on the covenants by privity of estate to the payment of rent to the lessor. The manner in which the interest of the lessee becomes vested in the assignee is immaterial, provided the method is such as in law vests the whole interest of the lessee in the assignee. The doctrine, therefore, applies even where the title of the assignee is derived under a Court sale.

But the liability to interest arises purely under the contract contained in the lease. It is not a liability which runs with the land or is attached in law to the interest of the lessee, and it is not a

Landlord and tenant—concl'd.

liability which affects an assignee of the lease. *VIRABHADRAYA NAGAYYA SHIVAPPANMATH v. BASANGOWDA MUDIGOWDA PATIL* Bom. 680

Enhancement of rent—Proposal and acceptance. SEE Contract 575

Rent receipts by agent of landlord—Continuance of possession by tenant — Presumption of authority to agent.

Where in addition to the receipts for rent granted by the *mukhtar-am* of the landlord there is the fact that defendants have been long in possession of land without any interference from the landlord, that is a circumstance from which it may not only be inferred that the landlord ratified the settlement by her *mukhtar-am* but it is also a circumstance from which it may be inferred that the *mukhtar-am* had authority to make the settlement. In such circumstances the question of onus regarding the proof of the fact whether the *mukhtar-am* had implied authority of the landlord, is immaterial. *KURR RAI v. BABURAM KURR* Pat. 583

Lease—Construction—Lease held permanent one.

A lease stated that the lands had been settled with the lessee to enable him to build a *gola* house and a plat form for rice mill. The settlement was made for an indefinite (*bemeyadi*) period and it provided that neither the lessee nor his heirs and representatives would put forward any plea or objection with regard to the payment of rent. It was further provided that in the event of default of two consecutive instalments, the lessor or his heirs and representatives, would have the power to realize the arrear rent with interest thereon and dispossess the lessee. The lessee bound himself not to sell the residential right to anyone without a reference to the landlord or his heirs and representatives and without obtaining his or their permission in writing:

Held, that the lease was intended to be a permanent one. *COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA v. VISHESHWAR SINGH* Pat. 691

Legal practitioner. SEE Practice 453

Professional misconduct—Court having reason to believe that practitioner may have been guilty of professional misconduct—If can allow proceedings to be dropped on agreement between complainant and practitioner or on wish of complainant.

Where the Court has reason to believe that a practitioner may have been guilty of professional misconduct it cannot allow proceedings to be dropped as the result of an agreement between the complainant and the practitioner or even if the complainant without any agreement does not wish to proceed with the matter. *In the matter of SRI K. SRINIVASA RAO, FIRST GRADE PLEADER, COIMBATORE* Mad. 144 S B

Legal Practitioners Act (XVIII of 1879), s. 13—Appointment of tribunal to make enquiry—Approval of tribunal, if can be given *ex post facto*.

The Legal Practitioners Act in s. 13 contemplates the High Court directing an inquiry before action is taken. The Court has duties to perform under the Act and the first duty is to nominate a person or persons to hold the inquiry into the alleged misconduct. Unless the tribunal is constituted beforehand the inquiry, cannot be lawful. The suggestion that approval of a tribunal may be given *ex post facto* is repugnant to the spirit of the Act and the wording of s. 13. *In the matter of SRI K. SRINIVASA RAO, FIRST GRADE, PLEADER, COIMBATORE* Mad. 144 S B

Legal Practitioners Act—concl'd.

s. 13—High Court directing District Judge to enquire into charge of professional misconduct—District Judge, if has power under s. 3-A, Madras Civil Courts Act (III of 1873), to direct Additional District Judge to make enquiry without reference to High Court.

There is nothing in the Legal Practitioners Act, which directs the District Judge to hold the inquiry. The act leaves the matter entirely in the hands of the High Court. The High Court and not the Act nominates the tribunal. Therefore, when the High Court directs a District Judge to hold an inquiry into a charge of professional misconduct the District Judge does not hold the inquiry under the Act but under the order of the High Court. Before the District Judge can be allowed to pass on his duty to some one else there must be very clear authority for his action. The Madras Civil Courts Act, s. 3-A does not provide it. Where therefore, the High Court directs the District Judge to hold an enquiry into a charge of professional misconduct, he has no power of delegation and cannot direct the Additional District Judge to hold an enquiry without making a reference to the High Court. *In the matter of SRI K. SRINIVASA RAO, FIRST GRADE PLEADER, COIMBATORE* Mad. 144 S B

s. 13—Tribunal not validly constituted—Acquiescence whether makes it lawful.

If the tribunal which conducted the inquiry under s. 13 was not validly constituted acquiescence in the proceedings would not turn it into a lawful tribunal. If illegal in its inception, illegal it would remain. *In the matter of SRI K. SRINIVASA RAO FIRST GRADE PLEADER, COIMBATORE* Mad. 144 S B
Letters Patent (Cal.), cl. 12 — Leave under, to sue—Application for revocation of—Considerations—Firm register kept according to terms of Partnership Act showing Calcutta as principal place of business—Suit for dissolution of partnership in Calcutta High Court—Leave to sue there, if can be revoked.

In an interlocutory application for revocation of leave to sue granted under cl. 12, Letters Patent matters of difficulty and importance which require a meticulous consideration of facts and law and which are best determined upon the evidence of witnesses who have been subjected to cross-examination should be decided at the trial of the suit and not in the application.

Where a firm register kept in accordance with the terms of the Partnership Act shows that the principal place of business of the firm in Calcutta and a person brings a suit for dissolution of partnership in Calcutta High Court relying upon the entry in the firm register, the High Court has jurisdiction to try the suit and leave to sue in the Calcutta High Court under cl. 12, Letters Patent (Cal.) cannot be revoked on the ground that jurisdiction of that Court is being attracted by adoption of a device. *ALI MOHAMED EBRAHIM SHAKOOR v. ADAM HAJEB PEER MOHAMED ESSACK* Cal. 356

Letters Patent (Nag.), cls. 10, 27—Judge refusing leave to appeal under cl. 10—If can subsequently re-call his own order and declare case fit for appeal.

Rule 10 of the rules made by the Nagpur High Court under the powers conferred by cl. 27 of the Letters Patent read with sub-s. (1) of s. 106 of the Govt. of India Act, precludes any possibility of an applicant approaching a Judge a second time when his application for a declaration under cl. 10, Letters Patent that the case is a fit one for appeal

Letters Patent (Nag).—concl'd.

has been refused. Hence when once a Judge has refused to declare that a case is fit one for appeal under cl. 10, Letters Patent he cannot subsequently revise or review his own order and recall it and declare that the case is fit one for appeal under cl. 10. *MANIKLAL v. BHIKAMOHAN* Nag. 253

License—Nature of—If elapses with death of licensor.

A license does not create an interest in the land as it is merely leave to do a thing lawfully which otherwise would be unlawful and it is thus a matter purely personal between the grantor and the grantee of the license. Such license must be held to have elapsed with the death of the licensor *ALAGIRI CHETTY v. MUTHUSWAMI CHETTY* Mad. 376

Limitation—Law in force before 1877.

It is not correct to say that because the first Lim. Act was not introduced until 1877 there was no law of limitation in force in 1872. There was a law of limitation laid down in s. 14 of Regn. III of 1793 which provided a period of 12 years for the cause of action for any suit. *ASHRAFI LAL v. ZAMIR FATMA BIBI* All. 485

Suit for possession—Entry in settlement records—Suit beyond six years from this cause of action but within six years from decree for rent—Suit held within time.

So long as nobody interferes with a man's possession and enjoyment of his share in a property, the fact that his share is inaccurately recorded in the revenue papers does not affect his title to it. Although the settlement entry gives plaintiffs a cause of action the decree for rent gives them a fresh cause of action and a suit brought within six years of the decree is within time. When plaintiff has got a right, every invasion of that right gives him a fresh cause of action. *KAMTA PRASAD v. CHHATARPAL* Oudh 155

Limitation Act (IX of 1908), ss. 2 (7), 14—Proceedings contrary to express provision of law—Whether prosecution in good faith.

Proceeding contrary to a clearly expressed provision of law cannot be regarded as prosecuting another civil proceeding in good faith in the sense in which the words "good faith" are defined in the Lim. Act. *BRIJMOHANDAS DAMODARDAS v. SADASHIV LAXMAN NAIK* Bom. 85

s. 3—Act, if draws distinction as to whether cause of action arose with regard to document before 1877 or after it.

The Lim. Act, does not make any distinction as to whether the cause of action arose in a suit in regard to a document before or after 1877. The Act says clearly that every suit instituted after the period prescribed therefor shall be dismissed. *ASHRAFI LAL v. ZAMIR FATMA BIBI* All. 485

s. 5—Cross-objection not filed within time—Wrong impression of legal adviser, if ground for extension.

There is no provision in the Lim. Act which would entitle a party who has failed to file a cross-objection within period of limitation to extension of time simply because his legal adviser was under a wrong impression. *AMULYA KRISHNA BANDOPADHYAYA v. RAJULI PIONEER CO OPERATIVE BANK, LTD.* Cal. 416

s. 5—Sufficient cause—Time taken by review application, if can be deducted.

Section 5 of the Lim. Act gives the Court discretion to excuse the delay in filing an appeal. An appellant who desires to be excused the delay must satisfy the Court that there were sufficient circumstances existing in the case to account for the

Limitation Act—cont'd.

delay and, therefore, the appellant must satisfy the Court that there were reasonable grounds for review. Mere presentation of an application for review does not entitle a litigant as of right to deduct the period during which the application for review remains pending from the period of limitation required for filing an appeal specially when the grounds for review were really grounds of appeal. *MAIMUD ALI KHAN v. WAJID ALI KHAN*

Oudh 83

s. 10—Assignee from trustee, without consideration—Defence of limitation, if available.

Where the assignee of a trustee does not give valuable consideration, in a suit to recover trust property from the assignee by the Official Trustee, defence of limitation is not available to him but is excluded by the terms of s. 10, Lim. Act. *GADADHUR MULLICK v. OFFICIAL TRUSTEE OF BENGAL*

PC 108

s. 14—Suit on mortgage—Cause of action, how determined—Striking out relief for sale of property, whether changes cause of action—Plaint returned after amendment to proper Court—Plaint, if, if entitled to benefit of s. 14.

"Cause of action" and "relief" are quite distinct and the question whether two proceedings are based upon the same cause of action or different causes of action cannot be decided upon the terms of the reliefs claimed in either proceeding.

A suit based upon a mortgage deed is essentially a suit to recover a loan and the cause of action for such a suit is the failure of the defendant to discharge the loan. A mortgagee in a suit founded upon a simple mortgage proceeds on the same cause of action whether he claims only to recover the loan advanced by him or presses also for the additional relief to enforce the charge in his favour. Where the plaintiff based on a mortgage deed after deletion of relief as to sale is returned from regular side for presentation to the Small Cause Court the plaintiff is entitled to the benefit of s. 14, Lim. Act. *DAL SINGHAR KOBRI v. CHANDI SINGH* All. 336

s. 14—Want of jurisdiction, if should exist at date of suit, for applicability of s. 14.

The want of jurisdiction or other cause of a like nature referred to in s. 14 need not be in existence at the very institution of a suit. All that the law requires for the applicability of s. 14 is that the Court in which the previous proceeding is prosecuted should be unable to entertain it from defect of jurisdiction or other cause of a like nature. Want of jurisdiction or other cause of a like nature may arise at any stage of a suit or proceeding and if upon that basis the Court in which the suit or proceeding is being prosecuted arrives at the conclusion that it cannot entertain it and makes an order accordingly the condition laid down in s. 14 is sufficiently fulfilled. *DAL SINGHAR KOBRI v. CHANDI SINGH* All. 336

s. 19—Acknowledgment—Payment of monthly allowance alal hisab—Whether saves limitation.

Entries of payments towards *guzara*, followed by words that they are made *alal hisab* i.e., on account, amount to general and unconditional acknowledgment within the meaning of s. 19, Lim. Act and would cover any arrears existing within three years of the date at which that acknowledgment was made. *THE DEPUTY COMMISSIONER, KHERI MANAGER COURT OF WARDS, MAHEWA ESTATE v. BRIJENDRA BHADUR SINGH* Oudh 624

ss. 19, 21, Art. 182—Held that written statement by mother on behalf of minor sons amounted

Limitation Act—contd.

to acknowledgment of decretal debt—Execution petition on personal decree held within time.

Held, on facts that the execution application upon the personal decree was within limitation as the written statement filed by the mother on behalf of her minor sons amounted to an acknowledgment of the decretal debt. **GUMTI DEBI v. JUGAL KISHORE BAISYA** Cal. 831

s. 20—Interpretation—Interest bearing debt—Payment of part amount on open account in handwriting of debtor—Appropriation by creditor—Amount not paid as interest “as such”—Whether should be regarded as part payment of principal—Appropriation by creditor should be before expiry of limitation.

Section 20, Lim. Act must be construed carefully according to its terms, and effect must be given to the consideration that in order to give a fresh period of limitation interest must be paid as such though there is no similar requirement in the case of a part payment of principal. It is not reasonable as a matter of construction of a statute to suggest that the words “as such” can be ignored; or that their meaning has changed; or that they can be given their meaning but only as regards payments made before January 1, 1928.

By the amendment of s. 20 the intention of the debtor is not made the sole test whether a payment was made towards the principal of the debt. Appropriation by the creditor can have effect under the section as it now stands and the character of the payment need not necessarily be determined at the time when the payment is made.

The section cannot be read as governed by any such principle as that it must be read as proceeding upon an acknowledgment by the debtor of his liability familiar though it be in the law of England. There is no sufficient reason for the assumption that the section is an expression of any single principle. In the Lim. Act, s. 19, which deals with acknowledgments, is not to be read as based upon the theory of implied promise; and it is difficult to see why s. 20, which deals with payments, should be regarded as based upon a theory of acknowledgment. The words in s. 20 by which the matter must be judged are “where part of the principal of a debt is paid.” As it is not prescribed by the section that the payment should be intended by the debtor to go towards the principal debt at all, the words “as such” having no place in this part of the section, it is not correct to require that the payment should have been made of part as part.

It cannot be maintained that a payment on general account is either a payment of interest as such or a part payment of principal. The disjunction is incomplete; there are additional possibilities as well. There are indeed four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, (4) no intention of appropriation as between interest and principal. This is a common enough frame of mind when a payment is made generally on account of a debt—an “open payment” as it is called.

In the case of “open” payment the creditor's act of appropriation of the payment to the principal debt is a very different matter. It cannot have been intended by the Legislature that at the end of the prescribed period the right to sue should be barred and yet that the creditor might thereafter

Limitation Act—contd.

remove the bar at his own choice by making an appropriation. Though it need not be shown that the creditor's appropriation has within the time limited been communicated to the debtor, the language of the section cannot be regarded as satisfied unless within the prescribed period the creditor has in exercise of his right done something which treats the payment as made on account of principal. To evidence a definite appropriation to the principal debt made by the creditor within the period prescribed the manner in which the payment has been dealt with by the creditor in his own books of account will ordinarily be sufficient. But if it be true until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended s. 20 part payment of principal has not been established. The result may be regarded as unfortunate since the fresh period begins or does not begin according as the creditor has or has not taken some step in consequence of the debtor's act, whereas the essential matter is really the debtor's act, but unless either a part payment of principal is required to be made as such in order to stop the running of the statute or a payment on account of an interest bearing debt, though made generally on account, is made sufficient for that purpose there is no escape from this conclusion:

Held, on evidence that the debtor paid Rs. 100 in his own handwriting and the creditor appropriated it towards principal straightway. This payment must be held to be part payment of principal. **RAMA SHAH v. LAL CHAND** PC 233

s. 20—Payment of interest—If must be in handwriting of or under signature of party making it—Whether can be inferred that payment was of interest “as such,” from circumstances.

For a payment of interest to come within the purview of s. 20 of the Lim. Act, it is sufficient if circumstances exist which make the conclusion inevitable that the payment must have been made on account of interest. The payment of interest “as such” need not necessarily appear in the handwriting of or under the signature of the party making the payments. No doubt it is necessary that at the time of the payment it must be clearly mentioned that the payment was being made on account of interest but where the payment is proved to be on account of interest not only by the evidence of the witnesses but also from the fact that an account of interest due has been drawn up on the back of each bond and the payment has been shown as being out of that amount the payment falls within the purview of s. 20, Lim. Act. **BACHCHU LAL v. BHAGWATI** Oudh 94

s. 20, sub-s 1, proviso—Proviso applies to sub-s. (1) only.

It was not the intention of the Legislature in enacting proviso to sub-s. 1 of s. 20, Lim. Act to abrogate the long-established and traditional practice by which a mortgagee in possession of land is deemed to be in receipt of interest and to have a fresh start of limitation from the period when his possession ceases and in this view the proviso was intended to apply to the first sub-section and not the second sub-section of s. 20. **MATHURA SINGH v. PALAKDHARI RAI** Pat. 484

s. 20 (2)—Receipt of usufruct during possession as trespasser—Whether gives fresh start of limitation.

The enjoyment of the usufruct of the property by

Limitation Act—contd.

the plaintiff year by year does not give him a fresh start for limitation for a suit to recover the money. *MAKSUDAN LAL SAHU v. NIRANJAN NATH DAS*

Pat. 266

s. 22. SEE Bengal Municipal Act, 1932, ss. 15, 136, 133 (2) proviso

605

Art. 12—Plaintiff's interest not sold or sale found void—Art. 12 does not apply.

Article 12, Lim. Act, would apply only if the sale is held to be binding on the plaintiffs. If the plaintiff's interest is, on the other hand, found not to have been sold or the sale is held to be void against them, this Article cannot be permitted to stand in their way and they will be entitled to the relief claimed by them. Where the debt by the father is found not to have been due or to have been incurred for purposes which were immoral or illegal, a decree obtained in respect of such a transaction would not bind the sons and the sale held in execution could not be held to be binding on them so as to necessitate a prayer for setting it aside particularly when the property was purchased by either the decree-holder himself or even by a stranger having knowledge of the circumstances in which the debt was contracted. Article 12 has no application to such a case. *LAKSHMADU v. RAMUDU*

Mad. 816

Arts. 36, 62, 97. SEE Contract Act, 1872, s. 65

742

Art. 116—Expression, "writing registered" in Art. 116, if includes document registered under Companies Act (VII of 1913).

"Writing registered" in Art. 116 includes a document registered with the Registrar of Joint Stock Companies under the Companies Act. In the General Clauses Act "registered" is defined as meaning registered in British India under the law for the time being in force for the registration of documents. The Companies Act, though no doubt not primarily concerned with the registration of documents, is nevertheless the law in force relating to the registration of certain documents affecting companies. Therefore, the claim for dividends falls under Art. 116. Where the whole contract arises under the Articles of the company registered under the Companies Act. *BAI LALITA RATANCHAND KHEMCHAND v. TATA IRON AND STEEL CO., LTD.*

Bom. 389 F B

Arts. 116, 120—Claim for dividend duly declared and made payable but in part withheld—Article applicable—Cause of action—Running of time.

Cause of action for a dividend duly declared and made payable but in part improperly withheld is an action in debt and is governed by Art. 116, Lim. Act, or else by Art. 120, and, therefore, the claim for dividends falls under Art. 116 since the whole contract arises under the Articles of the company. Time runs under Art. 116 from the date of the breach of contract and not from the date of the knowledge of the breach. The breach occurs in each year when the Income-tax Authorities inform the company that no income-tax is payable by the company for that year. *BAI LALITA RATANCHAND KHEMCHAND v. TATA IRON AND STEEL CO., LTD.*

Bom. 389 F B

Arts. 126, 127, 144—Art. 126, applicability to suit to set aside alienation made by grandfather.

It would be wrong in the construction of the Art. 126, Lim. Act to draw an analogy from the doctrine of representation in Hindu Law or the doctrine of pious obligation of a son or a grandson

Limitation Act—contd.

to discharge the father's or grandfather's debt. Consequently, no general doctrine could be laid down that for all purposes, particularly in the interpretation of the Articles in the Lim. Act, relating to Hindus the term "son" could be regarded as implying a grandson. Article 126 must be subject to the rule of strict construction, and that Article can have no application in terms to a suit to set aside an alienation made by a person's grandfather, as it postulates a suit by a Hindu son governed by the Law of Mitakshara to set aside his father's alienation of ancestral property. *JIVAJI KESHAV BAPAT v. VENKATESH KRISHNA BYADGI*

Bom. 663

Art. 127—Art. 127 whether applies to suits between member of joint Hindu family and stranger alienee from another.

Article 127 would not be applicable to a suit between one member of a joint Hindu family and a stranger alienee who is in possession of the property by virtue of a transfer made by another member of the joint family including a father or manager. *JIVAJI KESHAV BAPAT v. VENKATESH KRISHNA BYADGI*

Bom. 663

Art. 141—On death of widow, person having no title to property obtaining possession—Person subsequently becoming entitled to share in property along with reversioner—Character of possession, if changes—Suit by reversioner for possession more than 12 years from widow's death is barred.

Where on the death of a widow, a person who has no title to the property has been in possession thereof, the character of his possession is not changed by his subsequently becoming entitled to a share in the property along with the reversioner. His accrual of a right to a share in the property does not affect the previous possession and arrest the course of limitation under Art. 141. A suit therefore, by the reversioner for possession, brought more than 12 years after the death of the widow is barred under Art. 141. *ALAGIRI CHETTY v. MUTHUSWAMI CHETTY*

Mad. 376

Art. 144—Suit by Hindu to set aside alienation by grandfather made before his birth, without justifying necessity, 12 years after alienation, if barred.

An alienation by a co-parcener in excess of his powers gives rise to a single cause of action common to all the co-parceners, and the co-parceners, including those born after the alienation, have not a separate cause of action. The cause of action would be identical and the time would run from the date on which the possession of the alienee became adverse to the co-parcenary estate. Consequently a suit by a Hindu to set aside an alienation of the joint family property made before his birth by his grandfather without any justifying cause is barred by limitation if instituted more than 12 years after the date of the alienation. *JIVAJI KESHAV BAPAT v. VENKATESH KRISHNA BYADGI*

Bom. 663

Art. 166—Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 99 (2)—Application to set aside sale under Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Starting point of limitation—Sale held by Rent Court through Qurq Amin, whether makes any difference.

The starting period of limitation under Sch. I, Art. 166, of the Lim. Act, and r. 99 (2) of O. XXI, Civil P. C. for an application to set aside the sale under O. XXI, r. 89 of the Civil P. C., is the date when the sale is approved by the executing Civil Court, and not the date when the Collector or sale officer accepts

Limitation Act—contd.

the bid and reports the sale to the Civil Court. The same is true even where the sale is by a Rent Court and even though by the force of certain rules in the Revenue Manual the officer to carry out the sale on the spot may have to be the Qurq Amin. S. HADI HUSAIN v S. ZAINUL IBAD Oudh 603

Art. 181. SEE Limitation Act, 1908, Art. 183 759

Art. 181—*Stay of execution under O. XXI, r. 29 and execution consigned to record room pending disposal of judgment-debtor's suit—Application to continue execution after stay order has ceased—Whether governed by Art. 181.*

Execution proceedings are not terminated when the execution is stayed under O. XXI, r. 29, Civil P. C., pending disposal of judgment-debtor's suit and the execution application is thereon consigned to record room. When the stay order has ceased to operate it is not incumbent on the decree-holder to make an application to set execution proceedings in motion. Where, however, he makes such an application, it is not governed by Art. 181, Lim. Act, and cannot be barred even if made more than three years after the disposal of judgment-debtor's suit. BHAN DATTA UPADHYA v. TULSA KURR All 313 F B

Art. 182. SEE Civil Procedure Code, 1908, s. 48 176

Art. 182—*Decree for payment of money by instalments—Application to recover some of instalments then due—Whether step-in-aid of execution in respect of instalments not due.*

If there is an application for execution of so much of the decree as is executable, that is a step-in-aid of execution of the decree and prevents time running in respect of the whole decree.

Hence where a decree is for payment of money by instalments and an application is made to recover some of the instalments then due, the application is a step-in-aid of execution even in respect of instalments not due at the time of the application. DASH-RATH SUPADU LADSAKE v GOPAL BHILA GADHARI Bom. 803

Art. 182 (5)—*Application for transfer of decree, if step-in-aid.*

An application for transfer of a decree to a mufassil Court which has passed the same is a step-in-aid of execution within the meaning of Art. 182 (5), Lim. Act. GUMTI DEBI v. JUGAL KISHORE BAISYA Cal. 831

Art. 182 (5)—*Application to revive decree finally satisfied—Whether step-in-aid—Decree, if suspended pending application to set aside satisfaction order or appeals there from.*

When at the time of making an application there is no executable decree, the application cannot be regarded as step-in-aid of execution. There can be no question of the execution of a decree which is not in being at the time of the application. It would not be proper to couple an application for execution along with the application to set aside the order of satisfaction, for, until the decree had been restored to being, there would be nothing to execute, nor even any determination of the amount for which execution could issue. An application to revive a decree which is finally satisfied, cannot be regarded as a step-in-aid of execution of that decree which unless and until it is revived has no judicial existence.

A decree cannot be treated as having been suspended during the pendency of the application to set aside the satisfaction order and appeals therefrom. THARKAM KOJINIYAKATH MOIDIN KUTTI v K. N. SUBRAMANYA IYER Mad. 591

Limitation Act—concl'd.

Art. 182 (5)—Art. 182 (5), *applicability to appeal against review application to set aside order recording satisfaction of decree.*

Clause (2) of Art. 182, Lim. Act, has no application to appeals other than appeals against the decree itself. Its scope has been extended to cover an appeal against a preliminary decree in a mortgage suit when there is an executable final decree which is liable to be modified in the light of that appeal. But there is no authority for extending the scope of Art. 182, cl. (2) to appeals from orders in collateral proceedings which may affect the decree to be executed. There is no statutory provision whereby the person whose decree has been modified as a result of a review application against an order recording satisfaction can have the benefit for purposes of limitation of the period taken up by appeals against that order. THARKAM KOJINIYAKATH MOIDIN KUTTI v K. N. SUBRAMANYA IYER Mad. 591

Arts. 182 (5), 182, ss. 19, 21 — *Plaint in suit in Court passing decree for declaration that property is liable to be attached, in execution, whether application to take step-in-aid.*

A plaint in a suit filed in the Court passing the decree, for declaration that certain property is liable to be attached in execution of the plaintiffs decree against his judgment-debtor, is not an application to take some step-in-aid of execution within the meaning of Art. 182 (5), Lim. Act. GUMTI DEBI v. JUGAL KISHORE BAISYA Cal. 831

Arts. 183, 181—*Application to bring legal representatives of deceased judgment-debtor on record falls within Art. 183—Decree-holder may apply at any time within 12 years of decree or revivor of decree—Right to bring such legal representatives on record, when arises.*

An application to bring legal representatives of deceased judgment-debtor on record is one to enforce a judgment or decree within the meaning of Art. 183, Lim. Act and if made within 12 years it is within time.

The death of a judgment-debtor does not enlarge or decrease the period of limitation prescribed for the execution of a decree. To enforce a judgment passed by High Court the decree-holder must apply for execution at any time within 12 years of the passing of the decree or of the revivor of the decree. If the judgment-debtor be dead the decree-holder must still apply within this period. He need not take any steps to bring the judgment-debtor's heirs on the record at any anterior period; if he does it within this period of 12 years prescribed for the execution of the decree he will be in time.

The right to bring the legal representatives on the record does not arise on the death of the judgment-debtor; it arises only when an application for execution is made. GOBIND NATH SAHA CHAUDHARY v. DURGA NARAIN SAHA Cal. 759

lis pendens—*Purchaser of equity of redemption pending mortgage suit purchasing subsequently rights of mortgagee decree-holder—As between such person and one no party to suit his right of redemption is not affected by lis pendens.*

As between the mortgagee on the one hand and the purchaser of the equity of redemption pending the mortgage suit, on the other, the right of redemption must be held to be subject to the rights of the mortgagee decree-holder. But where such purchaser steps into the shoes of the mortgagee decree-holder, by purchasing the rights of the mortgagee as between him and the puisne mortgagees who were no party to the mortgage suit his

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right to the equity of redemption must be deemed to have stood intact and it is not affected in any way by the doctrine of *lis pendens*. *AMULYA KRISHNA BANDOPADHYAYA v. RARULI PIONEER CO-OPERATIVE BANK, LTD.* Cal. 416

Madras City Police Act (III of 1888), s. 75—
Conviction under, if bar to prosecution under ss. 323 and 352, Penal Code (Act XLV of 1860).

The conviction under s. 75, Mad. City Police Act, is no bar to the trial for an offence under ss. 323 and 352, I. P. C. *THANAMMAL v. ALAMELU AMMAL* Mad. 82

Madras Civil Courts Act (III of 1873), s. 3-A.
SEE Legal Practitioners Act, 1879, s. 13 144 S B

Madras District Municipalities Act (V of 1920), s. 68. SEE Contract Act, 1872, s. 65 780

s. 68—Sanction has to precede every contract exceeding Rs. 1,000—Sanction given after expiry of period for which auction is held—Contract held not valid.

Sub-cl. (1) and sub-cl. (2) of s. 68, Mad. District Municipalities Act cannot be construed to mean that while delegation of the power under sub-cl. (1) might be general in regard to contracts of less than Rs. 1,000 the power of making contracts in regard to transactions exceeding that figure must be specific. Moreover, the necessity to obtain the sanction of the Council for the making of a contract before the same is made implies that the Council must be made aware not only of the matter in regard to which the contract would be entered into but also in regard to its terms and conditions. The sanction has to precede and not follow the making of every contract which exceed Rs. 1,000. Where, therefore, a person has made a bid at a Municipal auction and the contract has been sanctioned by the Municipality after the expiry of the period for which the auction is held, the contract is not valid. *MADURA MUNICIPALITY v. K. ALAGIRISAMI NAIDU* Mad. 780

s. 68—S. 68, if draws distinction between executed and executory contracts.

The word "contracts" used in s. 68, Mad. District Municipalities Act covers both "executed" and "executory" contracts. *MADURA MUNICIPALITY v. K. ALAGIRISAMI NAIDU* Mad. 780

Madras Local Boards Act (XIV of 1920), ss. 208 (2), (3), 210, 227 (a)—Members of Panchayat Board charged with offences under ss. 208 (2) and (3) and 210 for acts done while purporting to act as members of Board—Sanction of Local Government is necessary for prosecution.

Where a member of the Panchayat Board who was appointed Temporary President for the purpose of election is charged for offences punishable under s. 208 (2) and (3) of the Mad. Local Boards Act in respect of acts or omissions alleged to have been done with reference to something intimately related to his position as a member of the Panchayat Board or as some time Temporary President of the Board, the sanction of the Govt. is absolutely necessary as a pre-requisite of taking cognizance of the alleged offence.

So also when some of the members are charged with offences under ss. 208 (2) and (3) and 210 of the Local Boards Act for acts performed by them while purporting to act in the discharge of their duties as members of the Board, they are clearly protected by the provisions of s. 227 (a) of the Act and sanction of the Local Govt. for their prosecution is necessary. *V. K. SUBRAMANIA MUDALI, In re* Mad. 643

Madras Survey and Boundaries Act (IV of 1897), ss. 11, 12—No boundary dispute—One claimant's name entered in register by survey officer as owner of holding—Other claimant, if can institute suit to establish his title as true owner.

There was no provision in the Mad. Survey and Boundaries Act for the decision of any question of title unless it was in respect of land involved in a boundary dispute. Where there was no boundary dispute, but in making the survey the survey officer found that two persons were claiming title to the same holding, he would for the purposes of the register have to decide whose name should be inserted therein as the owner, but this in itself did not mean that the Act empowered the survey officer, or the appellate authority to decide who was in law entitled to the property under survey. There was no provision in the Act which could be read as operating in such circumstances to prevent A when B had been registered as the owner of a holding, from instituting a suit in a Court of competent jurisdiction to establish his title as the true owner. *SIVAPRASAD SOWCAR v. SEKHARAMANTHI NARASIMHAMURTHI* Mad. 321 F B

ss. 11, 12—Order of survey officer under s. 11 or of appellate authority under s. 12, if breaks continuity of adverse possession held by unsuccessful party.

An order of the survey officer under s. 11, or of the appellate authority under s. 12 of the Mad. Survey and Boundaries Act, in itself has not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of the period of his prior possession to make up the period of 12 years required by the Lim. Act, to complete his title. If the unsuccessful party remains in adverse possession of the disputed area for over 12 years his title is good irrespective of any order passed under the Act. *SIVAPRASAD SOWCAR v. SEKHARAMANTHI NARASIMHAMURTHI* Mad. 321 F B

Malicious prosecution. SEE Tort 689

Married women's Property Act (III of 1874), s. 6 (2)—Irrespective of any Official Trustees Act, existence of Official Trustee capable of receiving money under s. 6 (2), is sufficient—He is payee.

The Official Trustees Act of 1913 has not caused a gap in the evolution of the Official Trustee. The Official Trustee under the old Act is not of a different species of being from the Official Trustee under the later Act of 1913. The Official Trustee of to-day, notwithstanding more elaborate plumage, is but the existing living representative of what is not an extinct race. Even if the Act of 1864 had been wholly repealed saving the existence of the Official Trustee, nevertheless s. 6 (2), Married Women's Property Act, remains. Hence irrespective of any particular Official Trustees Act, if there is now an Official Trustee of Bengal capable of receiving the money under cl. 2 of s. 6 that is sufficient. He is the payee. *TRUST FOR ZEBUNNESSA KHATOON, In re* Cal. 881

Master and servant—Illegal removal from service of servant of District Board—Jurisdiction of Civil Court to entertain suit for damages.

The position of an employee in the service of a local authority like the District Board is the same as that of a Govt. servant in this respect and the tenure of his service is 'at the pleasure' of that authority. Therefore, Civil Court has no jurisdiction to entertain a suit for damages on the ground of illegal removal of a servant from service by a District Board. *NARAIN DAS v. DISTRICT BOARD, JHANG* Lah. 540

Merchandise Marks Act (IV of 1889), s. 14—

—*Costs to be awarded under s. 14 and not under s. 546-A, Criminal Procedure Code (Act V of 1898)*
 —*Such costs include Advocate's fees.*

On any prosecution mentioned in s. 13, or for an offence under the relevant sections of the I. P. O., the Court should award costs under s. 14, Merchandise Marks Act and not under s. 546-A, Criminal P. O. These costs include the Advocate's fees. *T. M. MOHAMED CASSIM v. G. S. T. SHAIK THUMBY SAHIB*

Rang. 77

Minor—Election—Minor on attaining majority paying off debt incurred by him during minority—If can subsequently bring suit for refund.

It is perfectly permissible at law for a person after attaining majority to elect to pay the debt incurred by him during his minority.

If therefore a person after attaining majority has paid the debt due on the mortgage executed by him during his minority, he cannot subsequently bring a suit for the refund of that amount for the simple reason that a contract entered into by a minor though void is not unlawful. *ANANT RAI v. BHAGWAN RAI*

All. 4

—*Payment by, towards debt—Validity.*

A minor can validly pay any amount towards his debt and such a payment towards any instalment due under an instalment bond would be a good payment to prove that the said instalment was discharged. *MADAN MOHANLAL v. ZAHIRUDDIN*

Bhop. 809

Mortgage—Construction—Principles.

In each case the Courts must look to the nature of the particular mortgage and the surrounding circumstances to ascertain what the intention of the parties was. One deed cannot be interpreted in the light of the language used in other deeds. *ASHRAFI LAL v. ZAMIR FATIMA BIBI*

All. 485

—*Costs—Preliminary decree for sale against mortgagor and subsequent purchasers of part of mortgaged property—Appeal by purchasers only, dismissed with costs—Purchasers held personally liable for costs of appeal.*

In a mortgage suit a preliminary decree for sale was passed against the mortgagor and subsequent purchasers of part of the mortgaged property. The mortgagor did not appeal, but the subsequent purchasers, did, and that appeal was dismissed with costs:

Held, that the subsequent purchasers were personally liable for the costs of the appeal. It would in this case be an unfair hardship on the mortgagor if the property mortgaged were to be saddled with the costs awarded against the subsequent purchasers and against them, alone. The ordinary rule of the costs in a mortgage suit being amalgamated with the money realisable by sale of the mortgaged property did not apply to the case. *DEVI KISHAN v. CHAMPALALSA*

Nag. 427

—*Hypothecation of property to secure only interest—Money decree for amount of principal.*

Where the executant (defendant) mortgages and hypothecates the lands in favour of the plaintiff not for payment of the principal but to secure payment of the interest on it and the payment of principal is not secured on the land, the plaintiff would be given a money decree for the amount of principal. *MATHURA SINGH v. PALAKDHARI RAI*

Pat. 484

—*Mortgage by conditional sale—Conditions which the parties desire to express in regard to term.*

In a simple or in a usufructuary mortgage, the conditions which the parties desire to express in regard to a term will be different from the conditions which the parties desire to express in a mortgage for

Minor—contd.

conditional sale. In the latter mortgage one of the points which the parties desire to express is the period when foreclosure will arise and another point which they desire to express is within what period redemption is to be allowed. There is no reason to make these two periods the same and the natural agreement would be to allow redemption up to a certain date, and if not made by that date then to allow the right to foreclosure to begin. No such points arise in a simple mortgage; and in a usufructuary mortgage the important point is that the usufructuary mortgagee desires to hold possession for a certain time in order that he shall have the benefit of such a period. *ASHRAFI LAL v. ZAMIR FATIMA BIBI*

All. 485

—*Priority—Subsequent mortgage in favour of another, of some properties covered by earlier mortgage—Yet subsequent mortgage in favour of earliest mortgagee to pay balance due on first mortgage with additional security and lower rate of interest—Suit by first mortgagee within 12 years of due date under third mortgage but beyond that due under first mortgage—Later mortgagee held not entitled to priority and suit not barred by limitation.*

After executing a mortgage in 1912, the mortgagor executed in 1916, another mortgage in favour of another person by hypothecating some of the properties comprised in the mortgage of 1912. Again in 1922, he executed mortgage in favour of the first mortgagee, the amount secured by this mortgage being the balance then due to the first mortgagee under the earlier bond of 1912. In this mortgage, the mortgage of 1912, was specifically referred to and it was stated that the properties of the mortgage of 1922, were subject to the mortgage of 1912. In the mortgage of 1922, additional security was given and there was stipulation to pay lower rate of interest. A suit was brought within 12 years of the due date of payment of the bond of 1922, but more than 12 years of the due date of payment of the bond of 1912:

Held, that by the mortgage of 1922, the mortgagee never gave up his security under the bond of 1912, and the effect of the mortgage of 1922, was merely to substitute the covenant to pay the mortgage amount on the due date stated in this bond in place of the covenant to pay as stated in the bond of 1912. The suit was, therefore, a suit on the bond of 1922, and the right of the mortgagee, so far as the property stood charged in the bond of 1912, had never been given up; charge could still be enforced and was always enforceable so long as the full amount secured was not repaid. Consequently the suit on the bond of 1922, was not barred by limitation, the mortgage bond of 1912, was kept alive, and the claim of priority by the later mortgagee must fail. *SINGHESHWAR SINGH v. MEDNI PRASAD SINGH*

Pat. 339

—*Agreement that mortgagor may redeem within stipulated time, validity.*

Ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of this specified period, but there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of a mortgagor. *ASHRAFI LAL v. ZAMIR FATIMA BIBI*

All. 485

—*Redemption—Limitation—Mortgage before*

Minor—contd.

1882—*Limitation for redemption—Statutory right under Bengal Regulations I of 1798 and XVII of 1806—Redemption suit brought more than 60 years—Applicability of Art. 148, Limitation Act (IX of 1908).*

In case of a mortgage by conditional sale executed before 1882, (before T. P. Act), the mortgagor has a statutory right under Ben. Regns. I of 1798 and XVII of 1806 to redeem within any stipulated period provided in the deed. Therefore, even if there had been only a period of 2 years in the deed, the statutory right existed by which the mortgagors can have redeemed from the date of execution and the suit for redemption brought more than 60 years would therefore be barred by the period of limitation under Art. 148 of the present Lim. Act. *ASHARFI LAL v. ZAMIR FATIMA BIBI* All. 485

—*Redemption—Mortgage of entire property to K—Subsequent mortgage of one-fourth share by co-sharer to plaintiff—K obtaining decree purchasing property in execution and selling it to B—Plaintiff no party to suit—Suit by plaintiff decreed and one-fourth property purchased by him—Plaintiff held entitled to redeem entire property.*

A mortgage of an entire taluk was executed in favour of K. Subsequently the plaintiff company obtained a mortgage of one-fourth share of the taluk from A who was a co-sharer in the mortgaged property. K instituted a suit on mortgage and got a decree. The plaintiff, was not made a party to that suit. K in execution of the mortgage decree put up the entire taluk to sale and purchased it himself and then sold it together with all his subsisting rights under the mortgage decree to B. The plaintiff company, in the meantime, instituted a suit on their mortgage bond against A and having got a decree purchased a fourth share of the mortgaged property and instituted a suit for redemption, against K and B.

Held, that the plaintiff's right of redemption extended to the entire mortgage of K and was not confined to so much of it as related to one-fourth share of the property. In allowing the plaintiff to redeem the mortgage he could not be directed to deposit the amount due under the decree passed in favour of K as he was not a party to the mortgage suit and hence was not bound by the decree. *AMULYA KRISHNA BANDOPADHYAYA v. RABULI PIONEER CO OPERATIVE BANK, LTD.* Cal. 416

—*Sub-mortgagee—No notice of sub-mortgage to original mortgagor—Sub-mortgagee bound by state of accounts between mortgagor and mortgagee—Suit by mortgagee on mortgage—Compromise decree—Sub-mortgagee obtaining decree on his mortgage and purchasing mortgaged property—Suit by heirs of original mortgagor for possession—Sub-mortgagee held could claim only amount given by compromise decree.*

The sub-mortgagee stands in a no higher position than, the mortgagee. He is bound by the state of account between the mortgagor and the mortgagee. He must take the accounts as they in fact stand subsequent to creation of security unless and until he protects himself by giving notice to the mortgagor.

M mortgaged certain property to J and J mortgaged the same property with some other property to P. M, however, had no notice of this sub-mortgage. J brought a suit on his mortgage and a compromise decree was passed which he did not execute. Subsequently P obtained a decree against J and in execution thereof purchased the property.

Minor—concl.

The heirs of M brought a suit for possession of the mortgaged property to which P pleaded that he was not bound by the decree in J's suit and that the security still subsisted:

Held, that the decree in J's suit fixing the state of account between J and M, though a compromise decree was binding upon P. That though the security subsisted for certain purposes after the passing of a decree, it subsisted only in respect of the decretal amount and hence P was not entitled to claim the total amount due on his sub-mortgage. *BHAGWATI PRASAD v. DULLAN SINGH* All. 142

—*Muhammadan Law—Waqf—Proof of—Dedication, if must be proved—Whether can be proved by evidence of user—Private ownership of plot—Inference.*

Waqf implies dedication by a person professing the Mussalman faith of any property for charity, or for religious objects or purposes, or for an object of public utility. Waqf property, is subject to certain rare exceptions, inalienable and a suit for a declaration that property belongs to a waqf can be brought by Muhammadans interested in the waqf. In order to establish a waqf the necessary dedication must always be proved. Lapse of time frequently renders it difficult or impossible to establish dedications by direct evidence, but waqf may be established by evidence of user.

Private ownership of a plot is incompatible with dedication of it under a waqf as a graveyard for Muhammadans in general. *FAKIR DOST MAHOMED v. CHAINRAI* Sind 227

—*Will—Formalities necessary—Letter and telegram giving instructions to solicitors for cancelling certain provision in will held could be admitted to probate.*

No writing is required under Muhammadan Law to make a will valid and no particular form even of verbal declaration is necessary as long as the intention of the testator is sufficiently ascertained. Where, therefore, the testator having decided to make certain alteration in the will and after receiving the draft codicil, instructed his solicitors to amend it by inserting a provision cancelling the provision he had made in the will with regard to the school fees of his grandchildren, by a telegram and a letter, the letter and the telegram containing instructions form part of will and can be admitted to probate. *ABDUL HAMID v. MOHAMMAD YOUSUF* Mad. 414

—*Negotiable Instrument—Hundi. SEE Hundi 225*

—*Hundi—Namjogi—A obtaining hundi drawn by B and payable to C—A sending it to C by post—Hundi intercepted by thief and payee's name removed and another substituted—Amount paid to such person—Liability of drawer.*

Where a Namjogi hundi is obtained from a drawer all that the drawer in such a case guarantees, is that the drawee will honour and pay the hundi when it is presented to him on maturity, and if the drawee fails to do so, then the drawer undertakes to repay the amount thereof, provided the said hundi is returned in an undischarged state to the drawer.

A obtained a Namjogi hundi drawn by B and made payable to C whose name was mentioned in the hundi as payee. On receiving the hundi A sent it by ordinary post to C. The hundi, however, was intercepted by a thief who removed the name of C, the payee, thus making it read payable to third person by making an endorsement making it payable to one G. The hundi was thus delivered to G who presented it to the drawee who paid the

Negotiable Instrument—concl'd.

amount to G. A. instituted a suit against the drawer and the drawee on the basis of *hundi* :

Held, that the drawee not being in a position to return the *hundi* in an undischarged state would certainly be liable in damages for wrongful conversion of the *hundi*, the measure of damages being the amount of the *hundi*.

Held, also that the drawer was in no way responsible for the *hundi* falling into the hands of the thief, or the alteration which resulted in the loss of money to A or in the payment by the drawee of the *hundi*; hence the proximate cause could not be laid at the door of drawer and he was, therefore, not liable. LALLUBHAI BAIKABHAI CHUNAWALLA v. RATANCHAND RAICHAND Bom. 419

Suit on—Endorsement signed by agent on behalf of endorser—Objection that signature of endorser did not appear on instrument, if can be allowed.

When on a fair interpretation of the negotiable instrument the name of the person liable is disclosed, and it is quite clear on the evidence that the agent endorsed it under the implied directions and with the explicit knowledge of his principal an objection taken by the endorser that the signature of the endorser, does not appear on the face of the instrument as it was signed by his agent without mentioning that he is acting on behalf of his principal, cannot be upheld. It is only when there was some doubt regarding the identity of the drawer that the matter can be agitated before the Court. PUNJAB CO-OPERATIVE BANK LTD., v. MUHAMMAD YUSAF Lah. 650

Suit on—Payment guaranteed by endorser of hundi in case of default by drawer — Holder, if must sue drawer before suing endorser.

Where the endorser of a *hundi* guarantees payment in case of default by the drawer, it is not necessary for the holder in due course to sue the drawer first before maintaining a suit against the endorsers. PUNJAB CO-OPERATIVE BANK LTD. v. MUHAMMAD YUSAF Lah. 650

Negotiable Instruments Act (XXVI of 1881), s. 40—S. 40, applicability.

Section 40, Negotiable Instruments Act, comes into operation, only when the holder of a negotiable instrument destroys the endorser's remedy without the consent of the endorsers. PUNJAB CO-OPERATIVE BANK LTD. v. MUHAMMAD YUSAF Lah. 650

s. 76 (b)—Drawee having no residence or place of business at place where hundi is due nor found at that place on due date — Necessity of presentment.

Under s. 76 (b), no presentment is necessary as against any party sought to be charged therewith if he has engaged to pay notwithstanding non-presentment. No presentment is also necessary where the drawee of a *hundi* has no residence or place of business or a known address at a place where the *hundi* is due and on the due date the drawee is not found personally present at such place. PUNJAB CO-OPERATIVE BANK LTD. v. MUHAMMAD YUSAF Lah. 650

s. 76 (b)—Endorsement by notary public held amounted to promise to pay by endorser within meaning of s. 76 (b).

An endorsement on a negotiable instrument by the notary public "endorsers state, if the drawer does not pay we will pay at the request of the manager" imports a promise to pay within the meaning of s. 76 (b). PUNJAB CO-OPERATIVE BANK LTD. v. MUHAMMAD YUSAF Lah. 650

s. 76 (b) — Promise to pay under s. 76

(b), nature of.

Negotiable Instruments Act—concl'd.

A promise to pay need not be expressed so long as it is clearly deducible from the language employed by the parties or their conduct. Under s. 76 (c), if a party after maturity of a bill and with the knowledge that the instrument had not been presented promises to pay the amount due thereon, no presentment is necessary nor is it necessary where the party concerned waives his right to take advantage of any default in presentment for payment. PUNJAB CO-OPERATIVE BANK LTD. v. MUHAMMAD YUSAF Lah. 650

ss. 76 (b) (d), 40—Drawer and drawee same person—Necessity of presentment on due date.

Where the drawer and the drawee are the same person, no presentation on the due date is necessary because the drawer cannot suffer damage for want of presentation. Where therefore a *hundi* in *shahjog* form is drawn on self payable at certain place to a respectable person, no presentment is necessary. PUNJAB CO-OPERATIVE BANK LTD. v. MUHAMMAD YUSAF Lah. 650

Oaths Act (X of 1873), s. 9—"Party," if includes his agent and duly authorised Pleader.

In s. 9, Oaths Act, the expression "any party to any judicial proceeding" must be interpreted as including the Counsel or agent duly authorised to represent him in the case.

If a Pleader is authorised by the *vakalatnama* in his favour to do all proper *pairvi* in the case and to represent his client in a litigation and to present all sorts of applications which may become necessary, even though no express power to compromise the case on his behalf may have been conferred upon the Pleader, still the Pleader being a duly authorised person to represent the client would be fully entitled to bind the client by offering to abide by the special oath of the opposite party. For the purposes of s. 9 all that is necessary is that the Pleader or the agent should be considered a duly authorised agent on behalf of his party to conduct the case.

Obiter.—Apart from the written authority pointed out above, a Counsel appearing in a case from the very nature of his duties and for the purpose of a proper conduct of the case must be deemed to have implied authority to admit or deny a document, to press or withdraw an issue in the case, to examine a witness or call no witnesses and do such other acts which are required for the proper management and conduct of the trial.

Held, that the *vakalatnama* authorised the Pleader to do all that he considered necessary for the conduct of the case on behalf of his clients. MATHURA PRASAD v. SITA RAM Oudh 889

Oudh Rent Act (XXII of 1886), s. 127—Scope and applicability—Person not trespasser before suit but holding as tenant although rent undetermined—Section does not apply.

Section 127 of the Oudh Rent Act cannot be resorted to for the purpose of securing the ejectment of persons whose title to the land is not clear or who while holding with the consent of the landlord are holding without any determination of rent between them and the landlord. Section 127 of the Oudh Rent Act does not cover the case of a person who was not a trespasser before the suit was filed but was holding as a tenant although his rent was undetermined. ABDUL GHANI KHAN v. NASIRUDDIN KHAN Oudh 621

Partition Act (IV of 1893), s. 4—"Dwelling house belonging to an undivided family," meaning of.

The expression "dwelling-house belonging to an undivided family" in s. 4, Partition Act, has been

Partition Act—conold.

borrowed from s. 44, T. P. Act, and bears the same meaning.

The expression "dwelling-house belonging to an undivided family" refers to the family dwelling-house. It does not mean any house or building for human dwelling belonging to an undivided family. Where the house is for most of the time in the occupation of tenants it is not a dwelling-house belonging to an undivided family within the meaning of s. 4, Partition Act. *J. C. CHATTERJI v. MAUNG MYE* Rang. 844

— s. 4—S. 4 read with s. 44, *Transfer of Property Act* (IV of 1882), meaning explained.

The transferee of a share in undivided property is entitled under s. 44, T. P. Act, to his transferor's right to joint possession or other common or part enjoyment of the property in all cases except where the subject-matter of the transfer is a share of a dwelling-house belonging to an undivided family of which he (the transferor) is not a member in which case he is not entitled to joint possession or other common or part enjoyment of the property but is entitled to a partition of the property which however must be denied to him under s. 4, Partition Act in the event of a member of the family being a share-holder, undertakes to buy the share of the transferee. *J. C. CHATTERJI v. MAUNG MYE*

Rang. 844

— s. 4—"Undivided family," meaning.

The expression "undivided family" in s. 4 (1), Partition Act means an undivided family whether Hindu, Muhammadan, Christian or Buddhist, etc. *J. C. CHATTERJI v. MAUNG MYE* Rang. 844

Partnership—Accounts—Suit on promissory note executed by one partner in favour of another, maintainability of, without taking final accounts of partnership.

If one partner gives to his co-partner a bill or note which is in such a form as to bind, not the firm, but the partner who gives it, he may be sued by his co-partner thereon, whatever the state of the accounts between the two may be, and although the bill or note in question has reference to some partnership transaction. *CHHAGANLAL KALYANDAS SHAH v. JAGJIVANDAS GULABDAS* Bom. 41

— *Individual partners, if can be sued along with firm.*

Individual partners may be sued personally along with the firm and a decree can be passed against the firm and against an individual partner. *MESSRS. FATECHAND KRUBOHAND v. FIRM NATIONAL TILES Co.*

Sind 373

— *Money borrowed by one of two partners utilized for joint benefit of both—Liability of other partner or his estate for such debt—Debt contracted by executor of his estate on his death—Liability of estate and executor.*

Where only one of the two partners of a partnership has borrowed money and it is utilized for the joint benefit of both the partners, the creditor cannot have any right to recover the money from the latter partner or from his estate when there is no evidence that he assumed any liability for such loan, before his death. The partnership is dissolved on the death of such a partner and his estate is not liable for the debts contracted subsequently by the executor of his estate. For such debts the executor is personally liable. *P. M. HAMERD ROWTHER v. K. S. AYYAPPA MUDALIAR* Rang. 100

— *Summary suit against firm—Partners served individually—Leave to defend granted to some only*

Partnership—conold.

— *Decree, if can be passed against those to whom leave is refused and against firm also.*

In a summary suit against a firm where several partners have been served individually and leave to defend is granted to some and not to others, a decree can be passed against those partners to whom leave is refused, and also against the firm. *MESSRS. FATECHAND KRUBOHAND v. FIRM NATIONAL TILES Co.*

Sind 373

Payment of Wages Act (IV of 1936), s. 3. SEE

Payment of Wages Act, 1936, ss. 15, 15(3) 498
ss. 15, 15(3), 3, 19—*Revision—Finding whether wages were delayed and mill was working during material period cannot be disturbed.*

A finding of the lower Court on the question whether the wages were delayed and whether the mill was working during the material period or not, cannot be disturbed in revision application, whether the finding is right or wrong. *P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES* Bom. 498

— ss. 15(3), 15—*Claim for delayed wages—Proceedings under s. 15(3), against whom to be taken.*

If a manager of a factory is appointed by the owner the proceedings on an application under s. 15(3), Payment of Wages Act, for a claim of delayed wages should be against the manager alone, but if no manager is appointed they should be against the employer. The liability of the employer would arise only if it is subsequently found that the whole or part of the amount could not be recovered from the manager. The use of the word "or" instead of "and" clearly shows that the proceedings under s. 15 are to be instituted against only one person, whether he is the manager or the employer, but not against both. *P. M. DIXIT v. SENIOR INSPECTOR OF FACTORIES* Bom. 498

— s. 19. SEE **Payment of Wages Act, 1936, ss. 15, 15(3) Bom. 498**

Penal Code (Act XLV of 1860), ss. 23 and 24. SEE Penal Code, 1860, s. 379 825

— ss. 107, 111—"Abetment" includes conspiracy and aiding—A and B conspiring to assault C—B inflicting grievous hurt on C's companion during assault and without any instigation from A—A, liable under s. 111, for causing grievous hurt to C's companion.

The definition of abetment in s. 107, I. P. O., includes not merely instigation, which is the normal form of abetment, but also conspiracy and aiding, and those three forms of abetment are dealt with in the proviso to s. 111.

Where an act is abetted, and the abetment takes the form of instigation of an act, and a different act is done, that different act must be a probable consequence, and committed under the influence of the instigation; and where the abetment takes the form of aiding or a conspiracy, the different act must be a probable consequence and also with the aid or in pursuance of the conspiracy. To make the accused liable under s. 111, the Crown must show, not only that the assault on the complainant was a probable consequence of the conspiracy to assault the complainant but also that it was done in pursuance of that conspiracy.

Where A and B conspire to assault C and during the assault B without instigation from A stabs C's companion who comes to his rescue, and inflicts grievous hurt, A is not liable under s. 111 as the stabbing cannot be said to be in pursuance of the conspiracy to assault C. *SONAPPA SHINA SHETTY v. EMPEROR* Bom. 461

Penal Code—contd.

— s. 120-B. SEE PENAL CODE, 1860, s. 420 33
 — s. 186—*Duty of prosecution.*

The prosecution have to prove their case when they ask that a person should be convicted for the obstruction of a public servant in the discharge of his public functions. They must show that a public servant was discharging public duties imposed upon him by law. *JAMNADAS THAROOMAL v. EMPEROR* Sind 127

— s. 188—*Accused having knowledge of order under s. 144, Criminal Procedure Code (Act V of 1898), disobeying it—Irregularity in promulgation of order—Effect—Knowledge of accused of order which he is charged with disobeying must be proved.*

Even if there has been irregularity in the method of promulgation of the order under s. 144, Criminal P. O., that in itself would not make it *ultra vires*, so as to prevent the conviction of any person who, being proved to have had knowledge of the order, nevertheless disobeyed it. It is not enough in such cases to prove that the order has been duly promulgated. There must also be positive evidence that the accused had knowledge of the order which he is charged with disobeying. *MADAN KISHORE, In the matter of* Pat. 135

— s. 188—*Essentials for conviction under s. 188.*

For a conviction under s. 188, I. P. O., there must clearly be something more than mere disobedience of the order. It must also be shown that obstruction, annoyance or injury, danger to human life etc., have been caused or might have been caused. Where there is a finding that the disobedience of the order was risky to the public peace the conviction of the accused under s. 188 is justified. *MADAN KISHORE, In the matter of* Pat. 135

— s. 205. SEE Criminal Procedure Code, 1898, s. 476 754

— s. 206—*Accused judgment-debtor immediately after giving undertaking to Court not to transfer certain property, transferring it—Case falls under s. 206.*

The word "fraudulently" in the I. P. O., ordinarily connotes firstly, an element of deceit or secrecy and secondly, an intention to cause injury. Where the accused judgment-debtor immediately after giving an undertaking to the Court not to transfer certain property, transfers the same in favour of his son by a sale deed with the knowledge that his son would be in a position to claim the property as his own, the intention to cause injury clearly exists in such a case and the case falls under s. 206, I. P. O., it does not matter whether or not the creditor might by taking troublesome proceedings in the Civil Court to circumvent the transfer. *BROWN PROSECUTOR v. T. SELLAMUTHU* Mad. 122

— s. 211—*Petition to Assistant Superintendent of Police charging certain persons with commission of cognizable offence—Inquiry by Sub-Inspector in charge of thana—Case found maliciously false—Offence under s. 211, if committed—Magistrate taking cognizance of offence under s. 211—Subsequent protest petition by accused rejected—Procedure, if proper.*

Where upon a petition by the accused to the Assistant Superintendent of Police charging certain persons of commission of a cognizable offence, he directs an enquiry and having received a report from the Sub-Inspector in charge of the *thana* that the case was maliciously false makes a complaint against the accused for prosecuting him under

Penal Code—contd.

s. 211, I. P. O., the complaint is proper and an offence is committed even though the offence complained of was enquired into by the Sub-Inspector. A cognizable offence can be enquired into either by the Police Officer in charge of the Police Station or by any officer to whom he was subordinate and within whose jurisdiction the offence was said to have been committed. The Assistant Superintendent of Police having taken action on the petition and directed an enquiry, was in a position to get the offender punished.

Where after the Magistrate has taken cognizance of the offence upon such complaint the accused files a protest petition stating that he is ready to prove the case set up by him with a prayer that the matter may be enquired into by any Magistrate before any order is passed on the Police report and the petition is rejected by the Magistrate on the ground that as he had already taken cognizance of the offence it was too late to modify that order, the procedure followed by the Magistrate is proper one. *SAGUNI MISSIR v. EMPEROR* Pat. 128

— s. 294. SEE Criminal Procedure Code, 1898, s. 106 149

— ss. 302, 304—*Grave and sudden provocation—Accused seeing wife in compromising position with another and immediately killing her—Offence.*

If a person sees his wife in the arms of another and in the anger of the moment kills either his wife or her paramour, he is not guilty of murder. The provocation would be both grave and sudden and would, reduce the crime to culpable homicide not amounting to murder under s. 304, I. P. O. But a man who thinks over what he has seen for some hours might still act under grave provocation, but such could not be described as sudden.

[Conviction under s. 302 was set aside and the accused was convicted under s. 304 and sentenced to five years' rigorous imprisonment.] *EMPEROR v. JATE URAON* Pat. 586

— ss. 323 and 352. SEE Madras City Police Act, 1888, s. 75 82

— ss. 366, 376, 498—*Offence under ss. 366 and 376 not established—Conviction under s. 498, propriety of.*

A person who is prosecuted under ss. 366 and 376, I. P. O., cannot be held to be guilty of having committed an offence under s. 498, I. P. O., if the offences with which he was charged are not established. *HAIDER ALI v. EMPEROR* All. 690

— s. 379—*Land attached under s. 88, Criminal Procedure Code (Act V of 1898)—Person removing crop from it is guilty under s. 379.*

Where land is attached under s. 88, Criminal P. O., and actual possession is taken by posting a constable on the spot, a person removing standing crop from such land is guilty under s. 379, I. P. O. *EMPEROR v. BANDE ALI SHRIKH* Cal. 125

— ss. 379, 23 and 24—*Bona fide claim—Servant believing property to be his master's taking it away—Offence, if theft.*

The Criminal Court should not convict of theft any person who asserts a claim of right unless it is in a position to say that that claim is a mere pretence.

A person cannot be said to act dishonestly, that is with an intention of causing wrongful gain to himself or his master or wrongful loss to another, when he takes movable property which he believes to belong to himself or his master. In short, if the person taking any movable property does it under a

Penal Code—contd.

bona fide claim of right, then he cannot be found guilty of the offence of theft unless the claim is a mere pretence.

A servant may well be in a stronger position than his master, because a servant might, in certain circumstances, honestly believe that his master was the owner of certain property, whereas the master might well know that he was not. A servant should not be held guilty of the offence of theft when what he did was at his master's bidding, unless it should have been shown that he participated in his master's knowledge of the dishonest nature of the acts. *THE ADVOCATE-GENERAL, ORISSA v. BHIKHARI CHARAN MAHANTI* Pat. 825

s. 380. SEE Whipping Act, 1907, s. 3 405

s. 405—*Conviction of partner for breach of trust.*

Section 405, I. P. C., applies to partners and a partner can be convicted of criminal breach of trust. *MANDAVALLI SATYANARAYANAMURTHI v. KOTHA MANIKYALA RAO* Mad. 126

s. 415.—*Cheating—Deception—When amounts to cheating—Giving post-dated cheque by person having no funds in Bank—Dispute held of civil nature.*

Deception is only one element of the offence of cheating and not the only element. There can be no cheating unless by reason of the deception the person deceived is induced to part with any property or to do or omit to do anything that he would not do or omit to do but for the deception.

Hence giving a post-dated cheque by a person who has no funds to his credit in the Bank does not amount to an offence of cheating when there is no evidence to show that the person to whom the cheque was given parted with any property or that he did or omitted to do anything which he would not have done or omitted to do if he had known that the cheque would be dishonoured. The dispute in such a case is of a civil nature. *R. S. RATRA v. GANESH DAS* Lah. 123

s. 420—*Prosecution under s. 420, Penal Code (Act XLV of 1860)—Misrepresentation, proof of—Exact words used by accused should be given.*

In a prosecution under s. 420 if misrepresentation has to be proved, it would be better to get the exact words used by the accused. *CHANDRA NARAIN JHA v. KING* EMPREOR Pat. 862

ss. 420, 120-B—*Grant of false transfer certificate of export quota rights, by clerk of Tea Licensing Committee—Transferor under certificate making transfer of quota far in excess of what was due to his credit—Both clerk and transferor held guilty under ss. 420 and 120-B.*

An owner of a tea estate made an application to the Tea Licensing Committee for transfer of export quota rights in which he mentioned the export quota far in excess of what was fixed to his credit by the Committee. A clerk of the Committee whose duty was to check whether the transferor had in fact the quota sought to be transferred to his credit, wrote on the application that the quota mentioned therein was 'available' for transfer. Due to this false endorsement the transferor was granted the quota transfer certificate which enabled him to transfer export quota rights far in excess of what was to his credit and thereby made a huge wrongful gain:

Held, that the fraud was committed at the instance of the transferor and as the quota transfer certificates were by themselves property and the documents of title both the transferor and the clerk

Penal Code—conold.

were guilty under ss. 420 and 120-B, I. P. C. *In re, J. S. DHAS* Mad. 33

s. 427. SEE Criminal Procedure Code, 1898, s. 192 553

s. 471—*Date of decree in certified copy of decree altered with erroneous belief that decree being time-barred would thus be executable—Execution of such decree sought—Original decree not in fact time-barred—Offence of forgery, if committed—"Fraudulently or dishonestly", meaning of.*

It is necessary for the prosecution, when the charge is under s. 471, I. P. C., to show that the accused knew or had reason to believe the document to be forged and used it fraudulently or dishonestly.

Meaning of the expression "fraudulently or dishonestly" discussed.

Where the execution is sought on the basis of a copy of the decree in which the dates were altered under the impression that the decree was time-barred, a sufficient intent to defraud is involved in the advantage directly aimed at by the petitioner on the basis of the altered dates, and it is immaterial that the alterations were brought about under an erroneous impression that the decree was time-barred. A fraud, it is clear, is attempted upon the Court and in such a case it is not necessary for the prosecution to go further and establish an intent to cause loss or risk of loss. But even if the contrary were to be held, the definition of injury in s. 44 of I. P. C., is very wide, and the threat of a decree that could not be executed by any competent authority is a threat of harm or injury within the meaning of the Code. *BAIJ NATH BHAGAT v. EMPREOR* Pat. 256

s. 498 SEE Penal Code, 1860, s. 386 690

s. 499—*Defamation—Possibility that accused might have some defence, if ground for dismissal.*

A complaint under s. 499, I. P. C., which is made on oath cannot be dismissed on the ground that there is a possibility that the accused might have some defence to the complaint, if true. The Magistrate should direct his attention to ascertain whether there is any reason for disbelieving the complaint. *SHEODENI PATTAK v. BUDHESWAR DUBEY* Pat. 721

s. 500—*Defamation—Complaint against Pleader—Presumption—No defamation unless remark is made wantonly or from malicious or private motive.*

The Court should presume, when a complaint is made against a legal practitioner for defamation that the remark was made on instructions and in good faith, and there can be no defamation unless the circumstances show that the remark was made wantonly, or from a malicious or private motive. *U PIKE v. MA KHIN THIRIN* Rang. 463

Pensions Act (XXIII of 1871), s. 12—*Arrangement between pensioner and his creditor to pay portion of pension to creditor and deposit pension papers with creditor—If falls under s. 12.*

The language of the Pensions Act is very wide and the transaction by which a pensioner arranges with his creditor to pay a certain portion of his pension month by month in liquidation of the sum previously advanced, and to deposit with the creditor his pension pay order and pension papers is clearly one of the class of transactions which s. 12, Pensions Act is enacted to prevent. *In re, IGUSTINS ROADRIK* Cal. 699

Plaint—Amendments. SEE *Civil Procedure Code*, 1908, O. VI, r. 17 266

Amendment—When allowed—Suit on instalment bond with default clause that on default of any one of instalments creditor would recover whole amount—Plaint stating that first two instalments were paid on due dates—Objection by defendant—Plaintiff by amendment seeking to mention real dates of payment and pleading waiver of right to sue for whole amount—Amendment held did not interfere with defendant's right to plead limitation and should be allowed.

No amendment can be allowed which has the effect of depriving the defendant of any right already acquired by him or of altering the cause of action in any suit. Amendment of every other kind is permitted. An amendment which deprives the defendant of his existing right is really against the spirit of the procedure, but such an amendment must always be permitted by which the defendant's plea of limitation against the suit might entirely fall to the ground. A right which the defendant has already acquired is one thing, and a mere right to raise the plea is quite another. Confusion is apt to arise when these two entirely different ideas are mixed up. The plaintiff shall not be allowed to add any new relief by way of an amendment which on account of the efflux of time he could not claim at that time, but the plaintiff's request to plead waiver in his suit is neither a new relief nor it has the effect of depriving the defendant of any right already acquired by him. The nature of the suit is not in the least altered thereby. In fact the plaintiff is trying by this amendment to explain that his suit was within time, and such an amendment is permissible at any stage. If the plaintiff has made a mistake in stating the date of payment of money and then by amendment requests to correct the same, he by doing so is not in any way depriving the defendant of any right whatsoever which he had so far acquired. A mistake of fact of this nature can always be corrected in pleadings by any party without injuring any right of his adversary. It would clearly be against the principle of amendment laid down in O. VI, r. 17 of the Civil P. C., to refuse an amendment in respect of a *bona fide* mistake regarding the mere date of any transaction.

A default clause contained in an instalment bond gave the plaintiffs a right to recover the whole amount in the event of failure of any one instalment. On default of the third instalment plaintiffs sued on the bond and originally stated in the plaint that the first two instalments were paid on due dates but on defendants' objection as to the dates of payment the plaintiffs sought to amend the plaint by mentioning the real dates on which both the instalments were actually received. In respect of the first instalment the due date did not coincide with the actual date of payment, therefore by way of explanation in this connection the plaintiffs pleaded that an acceptance by them of the first overdue instalment amounted to a waiver of their right to sue for the whole amount:

Held, that the plaintiffs had full right to amend the plaint and plead a waiver of their right to sue. That the amendment did not in any way interfere with the defendant's right to plead limitation. *MADAN MOHANLAL v. ZAHIRUDDIN* Bhop. 809

Pleadings—Amendment—Letters Patent Appeal—Suit for specific performance, if can be turned into one for compensation

A Court should not grant an amendment in a suit for specific performance unless such is asked at an early stage. A suit for specific performance therefore should not be allowed to be converted into one for

Pleadings—concl'd.

compensation or damages at the stage of Letters Patent Appeal. *KUBAD MIA v. GUHI MIA* Pat. 198

Amendment—New claim involving extensive amendment of plaint and entirely changing the nature of the case held could not be allowed at the appellate stage

The great-grandson instituted a suit challenging the mortgage executed by his father, grandfather and great-grandfather, on the ground that the debt for the discharge of which it was executed was not antecedent. In the Appellate Court he prayed to be allowed to challenge the original debt itself:

Held, that the claim could not be put forward as it involved extensive amendment of the plaint and would entirely change the nature of the case. *RAM KUMAR SINGH v. PARAM SINGH* All. 215

Amendment—Plaint amended as a result of counter-claim—Amendment of written statement, whether plaintiff's duty.

When the plaintiff has amended the plaint as a result of the counter-claim it is not his duty to amend the title of the written statement itself. The plaintiff can amend his own pleadings and if the defendant wants to amend the title of the counter-claim it is his duty to obtain the order for the purpose. *HIRJI RAMJI v. DAULATRAM RATANJI* Bom. 226

Police Act (V of 1861), s. 15 (4)—Burden of proving that in assessing means of person under s. 15 (4) his income from outside disturbed area was taken into account is on that person.

Under s. 15 (4), Police Act only the means within the disturbed area can be considered. The burden to prove that the Magistrate in making assessment under s. 15 (4) took into consideration a person's means from outside the disturbed area is on such person because the act being an official act will be presumed in the first instance to have been regularly performed in accordance with law. *YADEO GANESH SUBHEDAR v. SECRETARY OF STATE*

Nag. 703

s. 15 (4)—Magistrate's discretion regarding means of person not illegally exercised—Cannot be attacked in Civil Court.

The Magistrate is given absolute discretion in determining the means of a person under s. 15 (4). That being so, unless it is proved that the Magistrate has exercised his judgment illegally which means to say, not in accordance with that section, his decision cannot be attacked in a civil suit. *YADEO GANESH SUBHEDAR v. SECRETARY OF STATE*

Nag. 703

s. 15 (4)—“Means,” how determined.

While considering the means of a person under s. 15 (4), Police Act what the Magistrate is entitled to look to is not only the income derived by the person from the disturbed area but also the means which he had of raising the money required for the assessment. *YADEO GANESH SUBHEDAR v. SECRETARY OF STATE*

Nag. 703

Practice SEE *Privy Council* 1

Counsel—Admission by, on point of law—Whether binding on Court.

Acceptance of a finding by a Counsel, amounting to an admission of a point of law cannot be binding upon a Court; and it is not precluded from deciding the rights of the parties on a true view of the law. *SOCIETE BELGE DE BANQUE S. A. v. RAO GIRDHARI LAL CHAUDHARY* PC 770

Declaration of title, when refused.

A Court will not grant a declaration of right which would be stamped with something in the

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nature of futility. **SAIN DASS CHAWLA v. UJAGAR SINGH** *Lah. 35*

Duty of Counsel to give correct statement of facts—Legal practitioner.

When Counsel take on themselves the responsibility of making statements of fact to the Court, the Court is entitled to assume that those statements are true in every particular, so that it may implicitly rely upon them. This is a rule which admits of no qualification. It is an honourable obligation of the Bar and of great value in the administration of justice. **PIRTHWI CHAND LALL CHOUDEURY v. SUKHAJ RAI** *F C 453*

Evidence—Party calling opponent's clerk as his witness—Practice condemned.

The practice of calling as his own witness by a party the clerk of his opponent condemned. **RAMA SHAH v. LAL CHAND** *P C 233*

Expunging remarks from judgment—Duty of Judge when commenting on conduct of party.

Judges, when commenting on the conduct of parties and others, should be very careful to use sober, restrained language. A passage in the judgment which is not necessary to the conclusion of the Judge, nor necessary to his argument, which militates seriously against party's earning a living in his profession should be expunged. **PHILIP WILLIAM RAVANSHAW v. HARDLESS** *Lah. 272 S B*

New plea—Appeal.

The plaintiff cannot be allowed to abandon the case put forward by him before the lower Courts and set up a new case in the High Court. **MANGTU LAL BAGARIA v. SECRETARY OF STATE** *Pat. 727*

Relief—Variance between pleadings and proof.

Although parties should be kept to their pleadings it is not every variance between pleading and proof that is fatal. But this cannot militate against the fundamental principle that no plaintiff should obtain a decision on facts which he has not pleaded and which were not put in issue at all. **BEIJLAL PRASAD v. LALDAS** *Nag. 764*

Revision—Matter under investigation—Remedy available by way of appeal—Interference by High Court held undesirable.

It is the practice of the Patna Court to refrain from dealing with a matter in revision where a definite remedy is provided to the parties in the form of an appeal. Where the matter is still under investigation and the Subordinate Judge has not finally decided any question and the objections, which the petitioner is trying to urge can still be urged before the Subordinate Judge, in such circumstances, even if the High Court has the power to interfere with the order of the Subordinate Judge, it would be undesirable to do so. **HRIDAYNATH SINGH v. LOHAR SINGH** *Pat. 838*

Precedents—Privy Council appeal from State of Johore—English decisions, binding effect of.

English decisions are not binding either in fact or in law on a question arising in an appeal from a judgment in the State of Johore. Nevertheless, the reasoning of Judges in the English Courts may prove helpful in solving a similar problem arising in that State. **S. R. M. S. CHETHAMBARAM CHETTIAR v. LOO THON POO** *P. C. 445*

Pre-emption—Improvement by vendee—Compensation, when can be granted.

Claim for compensation for improvements by a vendee when a pre-emption suit is filed, is based on s. 51 of the T. P. Act. The question whether or

Pre-emption—cont'd.

not a transferee believed in good faith that he was absolutely entitled to the property cannot be the subject of any hard and fast rules but should be decided on the merits according to the circumstances of each case.

What constitutes good faith is a question of fact to be inferred from the circumstances of each case; failure to make due enquiry does not constitute good faith. The vendee acts in good faith, i. e., under the honest belief that he has secured good title to the property in question, and is the rightful owner thereof, and for this belief there must be some reasonable grounds such as would lead a man of ordinary prudence to entertain it. The belief in good faith includes not only acting honestly but includes due enquiry.

The existence of the right of pre-emption is well-known in the Province of Oudh, and it is a legitimate presumption to hold that the vendee would know of the existence of it. Where the vendee is not co-sharers in the village and even if he does not know all the details of the law of pre-emption he would certainly know that every co-sharer in the village would have the right of pre-emption and the vendee has not shown that he took any step whatsoever to assure himself that co-sharers would not pre-empt and makes improvements in property without waiting for the limitation for pre-emption to expire, he cannot be granted compensation, in a suit for pre-emption against him. **SHUBRATAN v. SHABIR ALI** *Oudh 317*

Oudh—Superior proprietor creating under-proprietary right and selling it to person who is already proprietor and under-proprietor—Co-sharer in the mahal, if can pre-empt.

A superior proprietor created an under-proprietary right which he sold to a person who was already a proprietor and also an under-proprietor. A pre-emption suit was brought by the plaintiff on the ground that he was a co-sharer in the mahal concerned and the defence of the vendees was that under the Oudh Laws Act being under-proprietors they came before a superior-proprietor and he could not, therefore, pre-empt a sale of under-proprietary rights made in their favour:

Held, that the transaction could not be called a sale of a superior proprietary right. The vendor's share in the proprietary *khewat* would in no way be modified by the fact that he had created an under-proprietary right. The only change in the *khewat* would be in the under-proprietary *khewat*. Cases like this could not be distinguished from sales of a prior existing under-proprietary right and consequently the vendees had a preferential right to the would-be pre-emptor and his suit must fail. **KAZIM HUSAIN v. MAHFUZ ALI** *Oudh 843*

Suit for—Exception to validity of items of consideration which have in fact changed hands, if can be taken—Vendee having influence over vendor—Burden of proving reality of consideration.

The right of pre-emption is a right of substitution for the buyer and it is not open to a plaintiff in a pre-emption suit, while claiming to enforce this right of substitution, to take exception to the validity of the items of sale consideration when, as a matter of fact, those items of consideration have changed hands.

Where therefore, the vendor who had executed a mortgage during his minority in favour of the vendees, agrees on attaining majority at the time of the sale to pay off the mortgage debt and the vendees

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agree to set off that amount out of the total sale consideration entered in the sale deed, the transaction is perfectly legal and its legality cannot be impugned either by the vendor or the pre-emptor.

The fact that the vendees had some influence over the vendor is an additional circumstance tending to cast doubt on the genuineness of the amount of consideration as entered in the sale deed. That being so, the burden of proving that the ostensible consideration was the real consideration is on the vendees. *ANANT RAI v. BHAGWAN RAI* All. 4

Presidency Towns Insolvency Act (III of 1909)

—Proviso to s. 7, scope and application.

There is nothing in Proviso to s. 7 limiting its application only when the third party has been actually examined under s. 36. But its application is restricted to the two matters arising under sub-ss. (4) and (5) of s. 36, that is, under sub-s. (4) the question whether the third party is indebted to the insolvent, or under sub-s. (5) the question whether the third party is in possession of property belonging to the insolvent. Unless all parties agree, if such indebtedness or such possession is denied by the third party, the jurisdiction of the Insolvency Court to try the matter is, wholly excluded, and it does not matter whether the denial has been made in the course of examination under s. 36 or at any other time. But sub-s. (5) of s. 36 has in view only the case of property admittedly belonging to the insolvent, and the object of the sub-section is to enable the Official Assignee to discover its whereabouts; it relates to possession only and not to title. Where the ownership of, or title to the property, is in dispute this sub-section has no application, and consequently the jurisdiction of the Insolvency Court under s. 7 is not barred in such cases by the proviso to the section. *T. S. N. CHETTYAR FIRM, In re*

Rang. 45

—(Rang.) s. 7, Proviso—S. 7, scope—If limited only to matters where Official Assignee claims higher title than insolvent.

Section 7, Rang. Insol. Act, is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than that which the insolvent himself would have had.

Where the Official Assignee, standing in no higher position by reason of the special provisions of the Insolvency Law than the bankrupt himself, seeks to recover a debt which is not admitted, it is a matter of discretion for the Judge sitting in insolvency whether in any given case he should deal with such a claim in the Insolvency Court, or refer it to the machinery of the ordinary Court. *T. S. N. CHETTYAR FIRM, In re*

Rang. 45

—ss. 7, 17, 60 (2)—S. 7, scope of—Orders to be passed under.

Although the jurisdiction given by s. 7, Presidency Towns Insolvency Act, is extensive, only those orders can be made under the section which are necessary for the purpose of the insolvency, that is to say, for facilitating the distribution of the assets among the creditors. *IGUSTINS ROHDIBICK, In re* Cal. 699

—ss. 17, 60 (2)—Pension payable by Government, if property of insolvent within s. 17—Debtor arranging with creditor to pay portion of pension in liquidation of debts—Pension papers deposited with creditor—Insolvency of debtor—Insolvency Court, whether can direct creditor to return papers to insolvent.

A pension payable by Govt. is not 'property' of the insolvent within the meaning of s. 17, Presidency

Presidency Towns Insolvency Act—concl'd.

Towns Insolvency Act, which vests in the Official Assignee on the making of the order of adjudication.

A pensioner arranged with his creditor to pay a portion of his pension monthly in liquidation of his debts and deposited the pension pay order and other pension papers with the creditor. On being adjudged insolvent the debtor applied to the Insolvency Court for an order directing the creditor to return pension papers to him:

Held, that the pension was not attachable and the Insolvency Court had therefore no power under s. 60 (2) to make an order for the return of the pension papers to the insolvent. *IGUSTINS ROHDIBICK, In re* Cal. 699

Presumption. SEE Evidence 317

Principal and agent—Interest—Agent, when liable to pay, on sums due from him to principal.

No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract express or implied, or where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of default. The agent must also pay interest in all cases of fraud, and on all bribes and secret profits received by him during his agency. *TOTA RAM v. ZALIM SINGH* All. 277

—Person acting as Manager of company for long time and accepting and endorsing bills of exchange—Whether establishes that he had authority of partners to act as such and bind company.

When a person has been acting as the Manager of a Company for a long period and has been transacting all the business of the Company as such manager, including the acceptance and endorsing of the bills of exchange of the value of several lacs of rupees, this fact alone is sufficient to establish that he had the proper authority of the partners to act as the Manager of the Company and to bind it as such. *PUNJAB CO-OPERATIVE BANK, LTD. v. MUHAMMAD YUSUF* Lah. 650

Principal and surety—Limitation—Time against surety, when runs—Surety guaranteeing payment of money due on mortgage if same is not realized from mortgaged property—Limitation against surety, when runs.

The question as to when time began to run, so far as the surety is concerned, has to be decided on the terms of the contract of guarantee in each case.

Where the undertaking given by the surety to the mortgagee is that if the latter's money is not realized from the property mortgaged by the mortgagors, then the mortgagee would be entitled to realize the money, from the surety. The clear intention of the parties is that the mortgagee is first to proceed against the mortgaged property and is to take every step that could be taken against it to realize his money, and that it is only when he fails to realize the whole amount due to him from the mortgaged property that he is to proceed against the surety. *DALJIT SINGH v. HARKISHAN LAL SAK & BROS.* All. 152

Privy Council—Practice—Appeal from Federal Court of India—Leave to appeal—Point technical and of no use in future—Leave refused.

An appeal from the Federal Court would not lightly be admitted by the Board, and should only be admitted if it arises in a really substantial case.

Where the matter was one concerning the construction of a very exceptional section which would have

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no application in the future, and it was a technical point and the Board had before it the view of the Federal Court with regard to it and, having regard to all the circumstances of the case and the ingenious argument which had been presented to them, their Lordships did not think that it was a case in which they would advise His Majesty to grant leave to appeal. **HORI RAM SING v. THE KING-EMPEROR P C 1 Privy Council Rules—Applicability to Federal Court.**

Per Sulaiman, J.—There are several considerations which show that the provisions in the Privy Council Rules were never intended to be applicable to appeals to the Federal Court.

Rule 9 of the Privy Council Rules of February 9, 1920, has not been made applicable to Federal Court appeals and the High Court has no power to extend the time fixed by O. XLV, r. 7 of the Civil P. O. **LACHMESHWAR PRASAD SHUKUL v. GIRDHARI LAL F C 670**

Promissory note—Insufficiently stamped—Claim for debt, if can be based on separate contemporaneous agreement.

Where a promissory note evidencing debt is invalid, not being sufficiently stamped, the creditor can base his claim on the contemporaneous oral agreement between the parties and such agreement can be proved. **MAHADRO TUKARAO MAHAJAN v. RAMCHANDRA DBOYYA YELAMI DHOKI Nag. 367**

Insufficiently stamped—Such note, whether operates as acknowledgment.

An insufficiently stamped promissory note cannot operate as an acknowledgment or be used for any purpose whatever. **MAHADRO TUKARAO MAHAJAN v. RAMCHANDRA DBOYYA YELAMI DHOKI Nag. 367**

Provident Funds Act (XIX of 1925), s. 5 (1)—Deceased nominating certain person to receive amount to his credit in Provident Fund—Such sum, if forms part of estate of deceased.

Where a deceased has nominated certain person as a person to whom the sum standing to his credit in the Railway Provident Fund should be paid, that sum does not form part of the estate of the deceased and it cannot be disposed of by the deceased in his will. **STANLEY AUSTIN CARDIGAN MARTIN, In the goods of Cal. 886**

Provincial Insolvency Act (V of 1920), ss. 4, 53, 54, 75—Order passed by Subordinate Judge under ss. 53 and 54—Second appeal, if lies.

The words "or of any nature whatsoever" in s. 4, Prov. Insol. Act, are incompatible with the *ejusdem generis* rule of interpretation, and that s. 4 (1) must be taken to give the Court power, subject to the provisions of the Act, to decide all questions which may arise in any case of insolvency coming within the cognizance of the Court or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. Section 4 is not intended to cover orders made under ss. 53 and 54. No second appeal therefore lies from an order made by Subordinate Judge under ss. 53 and 54. **DATTATRAYA CHANDRAYA BACHUWAR v. K. L. BAWAR-CHAKAR Bom. 508**

ss. 5, 18. SEE Civil Procedure Code, 1908, O. IX, r. 13. **794**

s. 19 (2). SEE Provincial Insolvency Act, 1920, s. 79. **794**

s. 28—Property vested in Receiver under s. 28—If legal owner.

Legally the Receiver and not the insolvent is the owner of the property, which vests in the Receiver

Provincial Insolvency Act—cont'd.

under s. 28, Prov. Insol. Act on the order of adjudication being passed. **RAM RATTAN v. FAZAL HAQ Lah. 839**

s. 37 (1)—Insolvency annulled—Court, if can proceed to distribute assets of insolvent among creditors—Proper procedure.

Section 37 (1), Prov. Insol. Act does not allow an Insolvency Court on annulling an insolvency to proceed to distribute the assets of the insolvent among any of the creditors. The distribution of assets is a proceeding in insolvency, and by annulling the insolvency it means that the Court will not proceed with the insolvency. Therefore, the course open to the Court is either to return the property to the insolvent on condition that he furnishes security which will make it available to the creditors or for some other reason the Court may direct the property of the insolvent in the hands of the Receiver to vest in a certain person. The words "to vest in such person" do not mean distribution of assets among the creditors. **RAM NATH v. GOBIND PRASAD Oudh 729**

ss. 38, 39, 40, 42—Jurisdiction of Insolvency Court to impose penalty on insolvent in shape of suspension from practice—Suspension is governed by High Court Rules—Order of Court cannot extend their scope—Application for discharge—Court must consider provisions in s. 42 together with Receiver's report—Agreement between parties—Procedure in s. 38 must be followed.

According to the rules of the Lahore High Court, the license of an insolvent legal practitioner is only suspended till his discharge—whether absolute or conditional. An Insolvency Court has no jurisdiction to impose a penalty on the insolvent in the shape of suspension from practice. The suspension is the result of the rules framed by the High Court and the scope of the rules cannot be extended either by the agreement of the parties or by the order of the Insolvency Court.

When the application for discharge of an insolvent Advocate came up for hearing, he stated that he was prepared to deposit with the Official Receiver Rs. 20 per mensem till his creditors got eight annas in the rupee and that in default of any payment, he should be disallowed to practise as an Advocate. This was agreed to by the Official Receiver and the Counsel representing creditors and on the basis of this agreement the Court passed an order, granting a conditional discharge and for six years, subject to the condition that the insolvent should deposit a sum of Rs. 20 with the Official Receiver every month. It was also ordered that in case of default he would be liable to suspension of practice as provided by the High Court Rules and Orders. The proved debts amounted only to Rs. 181-8-0.

Held, that the Court was dealing not with an application under s. 28, Prov. Insol. Act, but with the insolvent's application for discharge and for that purpose the Court was bound to consider the matters laid down in s. 42, along with the report of the Receiver and then decide what order was appropriate in the circumstances of the case. The order passed was not in accordance with law and was not fair to the parties. The order of the Court purported to be based on the agreement between the parties but the procedure laid down for a "composition" or "scheme of arrangement" in s. 38, was not followed. The proper order to pass would have been to annul the adjudication and if the insolvent had then failed to carry out the terms of the compromise he would have been liable to be re-adjudged insolvent; *vide* ss. 39 and

Provincial Insolvency Act—conold.

40. LADHA RAM v. OFFICIAL RECEIVER, JUDICIAL COMMISSIONER'S COURT, KARACHI *Lah.* 424

ss. 53, 54. SEE Provincial Insolvency Act, 1920, s. 4 508

ss. 60 (2), 28—S. 60 (2), scope of and applicability—*Insolvent, member of agricultural tribe at time of sale by Receiver—S. 16, Punjab Alienation of Land Act, if applies—Temporary alienation of insolvent's property, whether can be made.*

Sub-s. (2) of s. 60, Prov. Insol Act is intended to supplement s. 28, and to save the operation of enactments prohibiting execution of decrees or orders against the immovable property of the insolvent even after the property has vested in the Receiver and must be held to apply to a sale by the Receiver. Section 16, Punjab Alienation of Land Act applies to a sale by the Receiver of the land belonging to an insolvent who is a member of a notified agricultural tribe as the sale is held in enforcement of an order of adjudication. While applying s. 16, Punjab Alienation of Land Act, the status of the insolvent at the time of the sale of the property must be taken into consideration, in the same way as it is in execution of decrees. The insolvent's acquiring the status of a member of an agricultural tribe after the adjudication, does not prevent the operation of sub-s. (2) of s. 60 at the time of sale of the property. Section 16, Punjab Alienation Act, does not prohibit the temporary alienation of such land, and it is therefore open to the Receiver to arrange for the temporary alienation of the land of the insolvents according to law. RAM RATTAN v. FAZAL HAQ *Lah.* 839

s. 68—Sale conducted by Official Receiver—*Insolvent, if can appeal under s. 68 to set it aside.*

On the wording of s. 68 of the Prov. Insol. Act, the insolvent has clearly a right to appeal to the Insolvency Judge against the act of the Receiver to set aside the sale by him of property. KUNDA SINGH v. OFFICIAL RECEIVER *Lah.* 241

s. 75. SEE Provincial Insolvency Act, 1920, s. 4 508

ss. 79, 19 (2)—Rules under s. 79—R. 5—Publication of order fixing date of hearing of petition under s. 19 (2), only in Government Gazette, if enough.

Rule 5 framed under s. 79, Insol. Act, nowhere provides that mere publication of the notice of order fixing date of hearing of petition under s. 19 (2) in the official Gazette will be enough. It distinctly provides that a copy of the notice should also be forwarded by registered letter to each creditor. Where the creditor has received no notice of either the application or the date of the hearing the Court must allow his petition for setting aside, the insolvency order passed *ex parte* and re-hear the matter. Mere publication in the Govt. Gazette of the notice is not enough. In such a case the question of prejudice is irrelevant. RAMPRATAP MARWARI v. LAOHMAN MISTRI *Pat.* 794

Provincial Small Cause Courts Act (IX of 1887), (Bhopal). SEE Jurisdiction Small Causes 480

s. 25. SEE Provincial Small Cause Courts Act, 1887, Sch. II, Art. 3 209

Sch. II, Art. 3, s. 25—Tenderer depositing money with tender for supply of grass to prison department—Conditions of tender not fulfilled—Deposit forfeited by Inspector-General of Prisons—Suit for return of deposit—Jurisdiction of Small Cause Court to entertain—Powers of High Court under s. 25.

Provincial Small Cause Courts Act—conold.

Article 3, Sch. II, Small Cause Courts Act, operates to take out of the purview of Small Cause Courts claims arising out of an act or order purporting to be done by an officer of Govt. in his official capacity, and no distinction arises from the fact that such an order, which is actually made by an officer of Govt. in his official capacity, might have been made by a private person in his private capacity.

The applicant tendered for the supply of grass to the jails. He submitted the tender in the prescribed form with the cash certificate for Rs. 500 to the Inspector-General of Prisons, and the tender was accepted. Under the terms, however, it was a condition of the acceptance of tenders that the tenderer should execute an agreement embodying the conditions of contract, a copy of which was annexed to the tender, and deposit the security mentioned in the said conditions within such time as might be allowed by the Inspector-General of Prisons. In the event of the tenderer's refusing or failing to execute the agreement or to deposit the security within the said time, the Inspector-General was to be at liberty to cancel the acceptance of the tender and to forfeit the earnest money deposited by the tenderers. The tenderer failed to execute the agreement within the time fixed by the Inspector-General, and the Inspector-General cancelled the acceptance of the tender and ordered forfeiture of the security money. In consequence the tenderer instituted a suit against the Secretary of State for India praying for a decree for Rs. 322 by way of damages and for an order to the defendant to return the said postal cash certificate. The suit was instituted in the Court of Small Causes:

Held, that the very essence of the suit was that it was a claim founded on the allegation that the Inspector-General of Prisons was not entitled to cancel the acceptance or at any rate forfeit the security money and that the U. P. Govt. was liable for damages arising out of other consequences of that act. The suit was therefore excepted from the cognizance of a Court of Small Causes under Art. 3, Sch. II, Prov. Small Cause Courts Act.

Held, also that the power of the High Court under s. 25 of the Act being very wide, the applicant should be allowed by it an opportunity of having his suit properly determined by a competent Court. SITAL PRASAD NIGAM v. THE UNITED PROVINCES *Oudh* 209

Punjab Alienation of Land Act (XIII of 1900), s. 16. SEE Provincial Insolvency Act, 1920, ss. 60 (2), 28 839

Punjab Custom (Power to Contest) Act (II of 1920), s. 6—Possession of insolvent's property taken by Official Receiver—Suit by insolvent's son for declaration that property belonged to him under will of his grandfather—S. 6, if applies—Official Receiver, whether can resist suit on ground that will was not valid.

A person who was disinherited by his father was adjudged insolvent and the Official Receiver took possession of the property in dispute as belonging to the insolvent. The plaintiffs preferred an objection in the Insolvency Court on the ground that the property in dispute had been bequeathed to them by insolvent's father who was their grandfather. This objection was dismissed by the Insolvency Court. Thereupon the plaintiffs instituted a declaratory suit to the effect that the property in dispute was owned and possessed by them, that it did not belong to insolvent, and that it was not liable to attachment and sale in the insolvency proceedings against him. The creditors of the insolvent were also made defendants in the case. The

Punjab Custom (Power to Contest) Act—*contd.*

defendants pleaded, *inter alia*, that the will relied upon by the plaintiffs was never executed by the insolvent's father, that the property in dispute was ancestral, and that deceased was not entitled to will it away in favour of the plaintiffs according to custom :

Held, that s. 6, Punjab Custom (Power to Contest) Act had no applicability to the facts of the case as the Official Receiver had not instituted any suit to contest an alienation of ancestral immovable property made by the insolvent's father. The Official Receiver as the representative of the insolvent was fully entitled to resist the suit of the plaintiffs on the ground that the will made by the deceased in their favour was not valid. **RADHA KISHAN v. SAFDAR ALI**

Lah. 551

Punjab Laws Act (IV of 1872), s. 5—Adoption by Hindu convert to Christianity—Custom must be alleged and proved.

So far as the Province of Punjab is concerned, under s. 5, Punjab Laws Act, 1872, the primary rule for decision in matters of succession is custom, which may be found to govern the parties, but it is for those who allege that there is such a custom to establish it. Thus, it is at least necessary for a Hindu convert to Christianity to allege and to prove that there is any custom of adoption among the Christian community in the Punjab, or in any section of that community, before any question as to whether any such adoption confers on the alleged adopted boy the same rights as an adoption in Hindu Law confers on him, can be considered. **RANBIR KARAM SINGH v. JOGINDRA CHANDRA BHATTACHARJI**

All. 170

Punjab Municipal Act (III of 1911), s. 169 (g), Proviso—Disposal of part of public street proposed by Municipality—Damage likely to be caused to vested interests of public—Burden to prove that part proposed to be disposed of is no longer required as public street, lies heavily on Municipality.

The Municipal Committee cannot act arbitrarily and prejudice the rights of the public in disposing of a part of the public street on the mere pretext, without any substance behind it, that it is no longer wanted as a public street. Where by doing so they will cause damage to the vested interests of members of the public, the burden lies heavily upon the Municipality to prove that in fact the portion of land they propose to dispose of is no longer required as a public street. **KASTURI LAL SARTI v. MUNICIPAL COMMITTEE, JAGRAON**

Lah. 686

Railways Act (IX of 1890), ss. 122, 132—Complaint by Railway authorities, if necessary for conviction under s. 122

An accused who is found guilty of an offence under s. 122, Railways Act cannot be acquitted on the ground that the prosecution was not on the complaint of the Railway authorities as required under s. 132 of the Act. **PUBLIC PROSECUTOR v. MOTURU APPALANARASAYYA**

Mad. 118

Rateable distribution. SEE Civil Procedure Code, 1908, s. 73

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Record of Rights—Notice by Deputy Collector referring certain plot as waqf—If instrument of title.

Notices by Deputy Collector referring certain plot as waqf are not instruments of title or otherwise the direct foundation of rights. **FAKIR DOST MAHOMED v. CHAINRAI**

Sind 227

Redemption. SEE Mortgage

416

Registration Act (XVI of 1908), s. 2 (3)—Districts and sub-districts under Act.

Section 2 (3), Reg. Act defines a district and sub-district as one formed under the Reg. Act. Therefore, it is clear that the Registering Authorities have their own districts and sub-districts which need not necessarily conform to those of the Revenue Authorities. **SUGANMAL v. UMRAOBI**

Nag. 295

s. 17—Amendment in 1929—Document executed before amendment and not requiring registration—Whether requires registration after amendment.

The amendment of s. 17, Reg. Act, in 1929 does not require documents executed before that Act came into operation and which did not require registration when it was executed, to be registered. **CHHATRANATH DAS v. KASHINATH DAS**

Pat. 353

s. 17—Document giving up reversionary rights, if must be registered.

The transfer of reversionary rights is not itself tantamount to transfer of property and hence registration of a document giving up reversionary rights is not necessary. **NAND LAL v. LAKHMI**

Lah. 865

s. 17 (1) (e)—Final mortgage decree, assignment of, if compulsorily registrable.

When a final mortgage decree has been passed the document declaring the mortgagee's rights in the mortgaged property is the decree itself and not the mortgage deed. The decree gives the mortgagee something more than the deed. It finally establishes the mortgagee's right to have the property sold and directs that it be sold. A mortgage decree must therefore be regarded as immovable property and its assignment falls under s. 17 (1) (e), Reg. Act, and must be regarded as compulsorily registrable on the footing, that such a decree represents an interest in immovable property. **SHIVA RAO v. SHANMUGHASUNDARASWAMI**

Mad. 243

s. 28—Fraud on registration—Property not intended to pass included in mortgage deed to get document registered in sub-division, where it was situated—Whether fraud—Registration, if valid—Party to document, if can challenge registration—Proof of intention that the property was not intended to pass, if can be given—Evidence Act (I of 1872), s. 92, Proviso (1)—Insufficient description of such property, rendering it unidentifiable, if ousts jurisdiction of Sub-Registrar to register document.

There is no effective registration unless the deed of mortgage relates to land situate in the sub-district in which the deed is registered. It is not sufficient that the land mentioned in the sale or the mortgage deed exists. The document cannot be said to relate to land in a registration district unless it was the intention of the parties that such land, even if it exists, should in a sale deed be transferred or in a mortgage deed form part of the security.

Where the land certainly existed in Sub-Division where the deed was registered but the insertion of it in the mortgage deed gave the mortgagee no security whatsoever and the land being undefined could not effectually form part of the security, and on the evidence it was clear that it was never intended to form part of such security :

Held, that the registration of this mortgage deed must be held to be invalid.

Held, also that the mortgagor could raise this question of want of valid registration though he was a party to the fraud on the registration laws.

Held, further that there was nothing in s. 92 of the Evi. Act, to render evidence of the intention of the parties inadmissible. It was not evidence which varied the terms of the written document as between

Registration Act—contd.

the parties and their representatives. It was evidence which went to show that the document did not relate to land within the jurisdiction of the Sub-Registrar who registered it. Further, it might well be said that evidence of this kind was evidence which tended to render the document invalid and such was admissible under the first proviso to s. 92 of the Evi. Act.

Held, still further that it could not be held that the Registrar had no jurisdiction to register this sale deed by reason of the insufficiency of the description of the land situate. The Legislature intended that such errors or defects should be classed under the general words "defect in procedure" in s. 87 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer, on whom they would naturally place reliance. RAMNANDAN PRASAD NARAYAN SINGH v. CHANDRADIP NARAIN SINGH Pat. 522

ss. 30 (1), 87—*Sub-Registrar at one place having no jurisdiction wrongly accepting and registering document—District Registrar can re-register it himself—His directing registration of document by Sub-Registrar having jurisdiction is irregularity curable by s. 87.*

The discretion conferred by s. 30 (1), Reg. Act is wide and unfettered. It is not controlled, in so far as representation of a document which has been accepted and duly registered in a wrong place by either s. 32 or s. 34 or by any other provision of Part VI, or any other part. These provisions deal with initial presentation and do not refer to representation of a document which has been accepted for registration and duly registered in the wrong place through a mistake of the registering authorities for which the parties were not responsible. These sections no more impose a time-limit or any other restriction upon representation. The discretion should not be lightly exercised. It should not be exercised at all when there is gross negligence, or carelessness or fraud.

Where a Sub-Registrar of a sub-district having no jurisdiction to accept for registration a document, has wrongly accepted and duly registered it, the District Registrar having control over such Sub-Registrar and the Sub-Registrar by whom the document ought to have been registered, can remedy the wrong and register the document. If instead of registering it himself he directs the latter Sub-Registrar to register it, it is mere irregularity curable by s. 87. SUGANMAL v. UMRAOBI Nag. 295

s. 49, as amended in 1929—*Amendment, effect of in considering whether s. 53-A, Transfer of Property Act is retrospective.*

The amendment of s. 49, Reg. Act, was only passed *ex abundante cautela* and was not necessary, and the fact that that amendment was not made retrospective cannot, have any great weight in considering whether s. 53-A, T. P. Act, is made retrospective. RUSTOMJI DOSSABHAI BILLIMORIA v. BAI MOTI Bom. 27

s. 49, proviso—*Proviso to s. 49 as added by Act XXI of 1929, whether retrospective in effect—Document held created right in immovable property.*

The proviso to s. 49 Registration Act, which was added by Act XXI of 1929 does not have retrospective effect and therefore cannot affect an agreement which was executed four years before the amending Act XXI of 1929 came into force and which if unregistered could not be adduced in evidence according to law in existence before 1929.

Held, that the agreement in question undoubtedly

Registration Act—concl'd.

gave the plaintiff a right in the immovable property; it gave him not only possession but security for the money which he had already paid. Hence the document created a right in immovable property. KUBAD MIA v. GUHI MIA Pat. 198

ss. 49, 17 (2) (v)—*Integral part of transaction creating charge—Registration of document, necessity of—Tendering of such unregistered document to prove agreement to execute further document such as sale-deed.*

Where a charge is created by a term which is an integral part of the transaction, then the document must be registered and cannot be tendered in evidence even to prove an agreement to execute a further document such as a sale-deed. Where, however, the promises are distinct and separable, then a document, though it creates a charge, can be put in evidence to establish a promise to execute a further document such as a sale-deed. KUBAD MIA v. GUHI MIA Pat. 198

ss. 60, 2 (3), 30 (1), 87—*Mere re-registration, if validates deed—Court, whether can go behind certificate of registration.*

The mere fact that the deed has been re-registered cannot validate it and the Courts are entitled to go behind the certificate of registration. SUGANMAL v. UMRAOBI Nag. 295
Res judicata—*Applicability to decision of survey officer.*

Per Krishnaswami Ayyangar and Somayya, JJ. (in order of reference).—The rule of *res judicata* cannot be applied to the decision of a survey authority under the Mad. Survey and Boundaries Act. SIVA-PRASAD SOWCAR v. SEKHARAMANTRI NARASIMHAMURTHI Mad. 321 P S

Plaintiff abandoning claim—*There is no decision operating as res judicata.*

When the plaintiffs abandon their claim, there is no trial of the issues arising between the parties and consequently there is no decision which could operate as *res judicata*. To prevent the defendants being harassed unnecessarily a second time on the same cause of action, the law however prescribes that the plaintiffs shall not sue again on the same cause of action, unless the suit is withdrawn under O. XXIII, r. 1, Civil P. O., owing to some technical defect, etc., and the permission of the Court is obtained. NAND LAL v. LAKSHMI Lah. 865

Suit against father and son for declaration that son had saleable interest in three properties—*Suit dismissed against son but against father only in respect of two properties—No appeal preferred—Decision if can be attacked in appeal from decree relating to matters left undecided.*

A suit instituted under O. XXI, r. 63, Civil P. C., by a decree-holder against father and son for declaration that the son had saleable interest in certain properties and that all the properties were liable to attachment, was dismissed as against son in respect of all the properties and against the father in respect of two properties and it was held that the suit could proceed against the father in respect of one property. No appeal was preferred against this decision:

Held, that the decision was clearly a final adjudication between the parties relating to these matters and was, therefore, a "decree" as defined in s. 2, cl. (2), Civil P. O. No appeal having been filed, the decree became final and was not liable to attack on appeal from the decree relating to other matters, which had been left undecided.

Held, also that as the suit was a composite suit,

Res Judicata—concl'd.

relating to different subject-matters in which different reliefs were claimed against the two defendants it was competent to the Court to decide the dispute relating to the various properties separately. *SAIN DASS CHAWLA v. UJAGAR SINGH* *Lah. 35*

Restitution. SEE Civil Procedure Code, 1908, s. 144 30, 354

Revision.

SEE Civil Procedure Code, 1908, s. 115 350

SEE Criminal Procedure Code, 1898, s. 439 103

SEE Practice 838

Sale—Setting aside of—Application by one of two judgment-debtors—Only one item sold—Irregularity not apportionable—Sale to be set aside as whole.

A distinction can be drawn between an irregularity and injury which can be allotted to one part only of the sale, in which case a Court may be justified in setting aside the sale of that part only, and an irregularity affecting the whole property and all the lots, where the sale should be set aside *in toto*. Where only one house is sold and the irregularity cannot be apportioned, the sale must be set aside as a whole and it is immaterial that one of the two judgment-debtors has not objected. *PANNALAL v. FIRM OF HASAN DADA* *Nag. 584*

Setting aside of—Irregularity apparent on face of record—Objection based on it can be considered at any stage.

It is within the power of the Court to consider the objection even if not taken specifically in the application, when the irregularity is demonstrable from the record itself and the Court's dealing with it cannot be questioned at a later stage on the ground of delay. *PANNALAL v. FIRM OF HASAN DADA* *Nag. 584*

Sale certificate—Evidentiary value of.

The sale certificate is the document of title and cannot be lightly ignored by reference back to other documents and it cannot be argued that the property could not have been sold and so must be taken not to have been sold. *KUNJLAS KUNWAR v. KRISHNA DEO SINGH* *All. 185*

Sea Customs Act (VIII of 1878), s. 167 (36).

SEE Government of India Act 1935, s. 226 (1) 542

ss. 188, 191—**Decision of Chief Customs**

Authority modified by Governor-General in Council under s. 191—If can be questioned in Civil Court.

It is a well-known principle that where a statute creates a duty or imposes a liability, and prescribes a specific remedy in case of neglect to perform the duty or discharge the liability, no remedy can be taken but the particular remedy prescribed by the statute. The Legislature intended that the sole remedy open to those who were aggrieved by a decision or order passed by an Officer of Customs under the Sea Customs Act, should be the appeal to the Chief Customs Authority provided by s. 188. The order passed by the Governor-General in Council under s. 191 of the Act can in no case, be questioned in the Civil Courts, except possibly orders which while purporting to be made under it are clearly outside it. An order by the Governor-General in Council enhancing penalty would possibly be such an order. Generally speaking, however, what the section contemplates are revisional orders of an executive character. *THIN YAN v. SECRETARY OF STATE* *Cal. 542*

Second appeal—Interference with discretion of lower Appellate Court.

The High Court does not interfere ordinarily with the discretion of the Court below when that discretion has been exercised judicially on a full consideration of the evidence in the case. Where, however, the Court below has not directed its mind

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to the evidence in the case at all, but has disposed of the suit on a preliminary objection, the High Court would not be deviating from the ordinary rule when it does not accept the decision of the Court below in a case where the discretion has not been exercised judicially. *SATRUHAN PRASAD SINGH v. UDAI PRATAP NARAIN SINGH* *Pat. 207*

New point.

A point of law which depends entirely upon admitted facts can be raised for the first time in second appeal. *R. M. S. V. CHETTYAR v. MA OHN MYAING*

Rang. 254

Question of fact—Whether instances of burial proved are adequate to infer dedication is question of fact.

Whether instances of burial proved in any particular cases are "adequate in character, number and extent" to justify an inference of dedication is a question of pure fact. *FAKIR DOST MAHOMED v. CHAINRAI* *Sind 227*

Sedition—Colony of Gold Coast—Incitement to violence, if necessary ingredient.

The elaborate structure of s. 330, Criminal Code (Colony of Gold Coast) (now s. 326 of the Criminal Code of 1936 Revision) suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of the case free from any glosses or interpolations derived from any expositions however authoritative of the Law of England or of Scotland.

There is nothing in the section to suggest that unless the words complained of were themselves of such a nature as to be likely to incite to violence, and unless there was positive extrinsic evidence of seditious intention the prosecution for sedition would not succeed. Nowhere in the section is there anything to support the view that incitement to violence is a necessary ingredient of the crime of sedition. Violence may well be, and no doubt often is, the result of wild and ill-considered words, but the Code does not require proof from the words themselves of any intention to produce such a result. *ISAAC THEOPHILUS AKKUNNA WALLACE-JOHNSON v. THE KING* *PC 2*

Specific performance. SEE Vendor and vendee

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Specific Relief Act (I of 1877), s. 9—Suit under—Nature and scope.

In a suit under s. 9, Specific Relief Act the plaintiff must aver previous possession and dispossession by the defendants otherwise than in due course of law within six months of the suit being brought, and should aver nothing else, and the only prayer in such a suit can be a prayer for the recovery of possession. The decree must either dismiss the suit or order the plaintiffs to be put into possession by the defendants, such decree being based on previous possession and dispossession merely and not on title. *Daw Po v. U Po HMYN*

Rang. 875

s. 3

s. 42—Suit for declaration—Relief for unqualified right to maintain and cut bunds according to necessities of irrigation—Right subject to permission of Collector—Maintainability of suit.

A suit for declaration in which the relief claimed by the plaintiff is an unqualified right to maintain and cut a part of the existing bunds according to necessities of irrigation and to close and repair them is maintainable and the declara-

Specific Relief Act—concl'd.

tion cannot be said to be based upon a mere contingent right merely because the right claimed is subject to the permission of the Collector as a result of a Notification under s. 6, Ben. Embankment Act of 1882. *SATRUHAN PRASAD SINGH v. UDAI PRATAP NARAIN SINGH* Pat. 207
Stamp Act (Bhopal), Arts. 39 and 12 (b). SNE Hundi 225
Subrogation. *See* Transfer of Property Act, 1882, s. 92, para. 4. 274

Succession Act (XXXIX of 1925)—Applicability—Hindu convert to Christianity—Succession to, how governed.

Succession to the estate of an Indian Christian dying intestate cannot be governed by the rules applying to the Hindus to which community he belonged before his conversion to Christianity. In such a case the succession is governed by the Succession Act. *RANBIR KARAM SINGH v. JOGINDRA CHANDRA BHATTACHARJI* All. 170

s. 138—Whether applies to gift followed by direction amounting to trust.

Section 138, Succession Act, has no application to the case of a gift followed by a direction which amounts to a trust. In such a case the gift is not to the legatee absolutely, but to him upon a trust, which is nonetheless a trust because it is introduced by the word "direct." *SUBHAS CHANDRA BOSE v. GORDHANDAS I PATEL* Bom. 471

s. 299—Order to executor to furnish fresh security—If appealable.

An order calling upon an executor to furnish fresh security is subject to appeal. *SRI RAM v. EMPEROR* Lah. 93

s. 321—Creditor lending money to executor to obtain probate—Money so used—Creditor, if entitled to charge on estate or to indemnity which executor enjoys.

Where a person lends money to the executor for obtaining probate and the money is so used, the creditor is entitled to stand in the shoes of the executor and can be allowed the benefit of the indemnity which the executor enjoys for the purpose of recovering the money from the estate although he is not entitled to a charge. *SUBRAMANIA CHETTIAR v. FÉLIX JOSEPH SARPRASADAM* Mad. 467

s. 388 (1)—Inferior Court invested with powers under sub-s. (1), if becomes District Court.

The inferior Court invested with the powers under s. 388 (1), Succession Act does not become a District Court but merely exercises certain functions of the District Judge under Part X of the Succession Act. The Court remains the Court as it formerly was. *BISESAR v. JAIRAM* Nag 119

ss. 388, (1), (2) proviso, 384 (1)—Court of Subordinate Judge at Bilaspur invested with powers under s. 388 (1), also Additional District Court attached to District Court at Raipur—Succession certificate granted by him—Appeal held lay to the District Court and not to High Court.

A Judge who granted a succession certificate was an Additional District Judge sitting at Bilaspur attached to the District Court at Raipur, as well as a Subordinate Judge of the First Class at Bilaspur. He signed as Subordinate Judge of the First Class at Bilaspur. The Court of the Subordinate Judge First Class at Bilaspur was invested with the powers referred to in s. 388 (1) of the Succession Act by the Local Govt. by a Notification and thus the jurisdiction of the Raipur District Court in the Bilaspur area had been taken away by the Notifica-

Succession Act—concl'd.

tion and conferred upon the Subordinate Judge of the First Class at Bilaspur:

Held, that the Judge could only have exercised the powers under Succession Act, in his capacity as Subordinate Judge First Class and not as an Additional District Judge. The appeal therefore lay to the District Court and not to the High Court. *BISESAR v. JAIRAM* Nag. 119

Tort—Malicious prosecution—Damages, suit for—Defendant making report to Police about rioting—Police after investigation prosecuting plaintiff—Subsequent acquittal—No proof that report was false and based on enmity—Defendant held not liable for damages.

Where in a suit for damages for malicious prosecution it is found that the defendant himself had filed no complaint in Court against the plaintiff, but had merely entered a report with the Police for rioting etc., and the Police, after due investigation and making sure that the report of the defendant was correct, had filed the *chalan* against the plaintiff, who, after judicial inquiry, was acquitted and the plaintiff has not proved that the report of the defendant was false and based on enmity, and to cause injury to the plaintiff no responsibility for damages lies on the defendant. *FAYAZ MOHAMMAD v. SARDAR KHAN* Bhop. 689

Trade-mark—Cigars imported and sold by importer with his own trade-mark—Importer bestowing great care and skill in selecting goods and advertisement etc.—Whether entitled to protection in respect thereof—Action against manufacturer using similar trade-mark.

Where the cigars imported had been sold by the importer who registered the trade-mark in his own name, had leaves selected for the cigars and sold them with his own trade-mark and because of his care and precaution in selecting leaves and because of his advertisement and pushing, cheroots had acquired a great reputation:

Held, that the importer was entitled to protection of the Court and could maintain an action against the manufacturer of those goods using marks closely resembling that used by the importer. *U KYAW DUN v. MAUNG NGEE* Rang. 37

Passing off action—English precedents, value of—Plaintiff acquiring right to certain trade mark in respect of smoking tobacco and cigarettes—Defendant using trade mark not unlike plaintiff in respect of chewing tobacco—Plaintiff, if can maintain action, in the absence of evidence as to deception.

In the matter of infringement of trade marks conditions peculiar to India must be borne in mind in applying any doctrine of English Law, and English decisions which turn or partly turn on questions of fact—as do most cases of common law trade marks and passing-off—can only be applied with care and circumspection. The general principle, founded as it is on justice and equity, is the same in both countries. No man, is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate purchaser.

There can obviously be no monopoly in the use of the trade mark. A manufacturer of cigarettes under an undoubted trade mark such as an animal, or any

Trade-mark—contd.

other device, cannot legally object to the use of the identical mark on say, hats, or soap, for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured or marketed by the cigarette manufacturer. Those would be simple cases, but some much more difficult ones can be suggested. If a manufacturer of a special kind of smoking tobacco under a trademark seeks to restrain the use of it on cigars, or on a very different kind of smoking tobacco, or on cigarettes, or on snuff, or on chewing tobacco, or on tobacco in some form sold for use as a weed killer—all these things being made of tobacco—questions, sometimes of great difficulty, may arise. It is, however, very important to observe that each of these questions will be a question of fact to be decided on the evidence adduced. The vital element in such a case is the probability of deception. This may depend on a number of matters as well as the question of similarity of the marks or of the get-up. Witnesses can be called to prove the circumstances and the places in which the articles are sold, the classes of persons who buy them, and whether they include persons who are illiterate or ignorant or the reverse, the manner in which the public are accustomed to ask for the articles, and any other matters which will assist the Court to decide whether deception is probable. Evidence of actual deception may be available and if available may be very valuable. There is no such person as an expert in human nature, and it is now well settled that a witness cannot be called to say that it is likely that purchasers of the goods will be deceived. This can only be a matter of opinion formed after the dispute has arisen and too often without any judicial consideration of the opposing contentions. On the other hand a person who is accustomed to buy the articles in question may be called to say that he would himself be deceived, and cross-examination will often show what weight should be attached to such a statement:

Held, that the appellants had acquired a proprietary right in respect of their elephant trade mark with reference to their cigarettes and Virginia Bird's Eye tobacco. Right was not confined only to the sale of the same kind of cigarettes and of Virginia Bird's Eye tobacco; for, in the absence of strong evidence to the contrary, such a mark would ordinarily extend to protect goods so similar in kind to the goods actually put upon the market by the trader in connection with the trade mark that it was an almost inevitable inference that such goods would be manufactured or marketed by the trader. In other words the probability of deception in the case of goods of a closely similar kind to those actually marketed by the appellant would be proved in the course of establishing the trade mark. But no such inference could be made in the absence of evidence in the case as regards the respondent's goods, since the chewing tobacco he sold differed widely in appearance and in use from the goods sold by the appellant.

Held, also that much importance could not be attached to the fact that the appellants were unable to call evidence of a actual deception, due to the fact that the procuring of evidence of probability of deception is often a difficult and troublesome task. On the other hand the appellants had to establish their case, and in the complete absence of evidence on the point it must be held that they failed to do so. **THOMAS BEAR & SONS (INDIA) LTD. v. PRAYAG NARAIN** **PC 658**

Trade-mark—concl'd.

— *Passing off action—Test of comparison, value of.*

It is not an answer to the claim of a trader who has established, the right to a trade mark (e. g., a device or a fancy word) to say that, apart from the device or the word, the labels or containers of the rival trade are very different from those of the trade mark owner. It cannot be said that the differences in get-up are immaterial; for they must inevitably form an element in considering the question of probability of deception by the use of the mark.

The test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. **THOMAS BEAR & SONS (INDIA) LTD. v. PRAYAG NARAIN** **PC 658**

Trade-name — *Temporary injunction restraining defendant from using disputed trade name, when can be granted.*

Where the name of one particular individual or firm, has such universal reputation in connection with a particular class of goods that it becomes evident that if a second person enters the trade under a name which is the same or so similar as likely to cause confusion in the mind of the intending purchasers and the harm thus caused is *prima facie* such as no compensation would be enough to counterbalance it, the Court can grant temporary injunction restraining the second person from using the disputed trade name till the decision of the suit. **ISHAR DAS v. FIRM BHAION KIDOKAN**

Lah. 304

Transfer of Property Act (IV of 1882), s. 3—*"Immovable property" includes benefits to arise out of land—Assignment of rents and profits of land can be made only by registered instrument.*

Immovable property is not defined in the T. P. Act, which merely says that it does not include standing timber, growing crops or grass; but it is defined in s. 2, sub-s. 29, General Clauses Act, and this definition applies to transfers of property. According to this definition "immovable property" shall include land, and benefits to arise out of land. Hence the assignment of rents and profits of the land can only be made by a registered instrument. **DAW YON v. U MIN SIN** **Rang. 762**

— ss. 3, 6—*Defendant borrowing money from plaintiff to carry on money suit filed by him against X and executing mortgage in plaintiff's favour assigning decree that would be passed in his suit—Decree passed—Suit by plaintiff for mere declaration that he was entitled to recover his dues out of amount payable under decree—There was held transfer of actionable claim and not of mere right to sue—Suit held not bad under s. 42, Specific Relief Act.*

An assignment of future or non-existing property is quite valid and the transfer becomes operative as soon as the property comes into existence.

Defendant borrowed money from the plaintiff aggregating to Rs 1,500, to carry on a money suit instituted by him against X and he executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in the money suit instituted by him. The stipulation was that the plaintiff would be entitled to realize out of the decretal amount the sum of Rs. 1,500 due to him together with interest at the rate

Transfer of Property Act—contd.

mentioned in the document. Subsequently a decree was passed in favour of defendant in the money suit for a certain sum. On appeal this sum was reduced. The plaintiff brought a suit for a declaration that on the strength of the mortgage bond he was entitled to have his dues realized out of the amount payable under the decree:

Held, that what was transferred was the claim to a debt and as such would come within the definition of 'actionable claim' as given in s. 3, T. P. Act. The mere fact that the claim was reduced by the Court did not make, any difference. What was transferred was not a mere right to sue:

Held, also that the plaintiff was an assignee of the decree for the purpose of realizing the amount due on the mortgage bond and was competent under the terms of the bond itself to institute proceedings for recovery of the amount.

Held, further that all that the plaintiff could want possibly was a declaration that he was an assignee of the decree, and if he got a declaration it would be open to him to apply for execution of the decree under O. XXI, r. 16, Civil P. C. No other consequential reliefs, by way of injunction or otherwise could or should have been prayed for by the plaintiff in the suit and the suit for mere declaration without consequential relief was not bad, under s. 42, Specific Relief Act. **PURNA CHANDRA BHOWMIK v. BARNA KUMARI DEVI** Cal. 806

s. 51—Costs—Plaintiff alleging true consideration to be much less than that found by lower Court—Defendant taking unreasonable defence—Parties ordered to bear their own costs—Order held good.

Where in a pre-emption suit the defendants wrongly alleged that the plaintiff was not entitled to pre-emption at all and claimed a further sum for improvements to which in law they were not entitled and the plaintiff did not claim pre-emption on the consideration recited in the deed which had been found to be the true consideration but alleged that the real consideration was less than half of what the Court found it to be:

Held, that in the circumstances when the lower Appellate Court ordered that parties should bear their own costs by which order the pre-emption decree of the trial Court was varied, it was impossible to say that in its order as to costs Court did not judicially exercise the discretion vested on him. **SHUBRATAN v. SHABIR ALI** Oudh 317

s. 52—Subsequent mortgagee in execution of his decree for sale obtained on his mortgage purchasing property himself and suing for possession transferee pendente lite—Whether entitled to unconditional possession—Liability to reimburse transferee in respect of prior mortgages redeemed by him.

It may be assumed that a transfer in contravention of the provisions of s. 52, T. P. Act, is only voidable and not void, but even then there is no analogy between a suit for possession by a decree-holder against a transferee *pendente lite* and a suit by Hindu reversioner for possession of property alienated by a widow. Even though s. 52 does not operate to annul a transfer *pendente lite* it renders the transfer subservient to the rights of the parties to the action as determined by the judgment or decree passed in the action. In other words, unlike a transfer by a Hindu widow there is a statutory prohibition against transfers *pendente lite* so as to affect the right of either party to the action.

Consequently where a subsequent mortgagee who

Transfer of Property Act—contd.

in execution of a decree for sale obtained on the basis of the subsequent mortgage has the mortgaged property, brings a suit for possession against a usufructuary mortgagee *pendente lite* who redeemed certain prior mortgages, the usufructuary mortgagee-decree-holder is entitled to an order for possession of the property. In this matter in another way, he is, in view of provisions of s. 52, T. P. Act, entitled to possession of usufructuary mortgage executed *pendente lite* transferee cannot, therefore, rely on the fact that he redeemed earlier mortgages with the proceeds of the usufructuary mortgage. **HAR PRASAD RAM**

s. 53. SEE CIVIL PROCEDURE CODE, XXI, r. 63

s. 53—Surrender executed by transferee within meaning of s. 53.

A deed of surrender of the entire estate executed by a widow according to the wishes of her deceased husband, in favour of her daughter, the deed the widow stated that she had transferred her ownership over the properties and over to the daughter's possession as

Held, that the surrender amounted within the meaning of s. 53, T. P. Act. **CHAUGULA v. LAKSHMOHAN TULJARAM KOTIA**

s. 53-A—Applicability to transactions which took place before April 1, 1930, brought after April 1, 1930.

Section 53-A, T. P. Act, applies to transactions which took place before April 1, 1930, and was filed after that date. **RUSTOMJI DODIA v. BAI MOTI**

s. 55 (4)—Purchaser from mortgagor taking to pay mortgagee as stipulated in mortgage—Pre-empted by F and transferred to R—R not aware of F's mortgage—Mortgagor paying amount and bringing suit to recover it—S. 55 (4) held did not apply—Decree held could not be passed against F.

A mortgagor sold a portion of the mortgaged property to M for certain amount a portion of which was to be paid by M to the mortgagee. One day the sale and got a decree on payment of purchase money. He then transferred the property to R. Neither M nor F nor R paid the mortgage. The mortgagor was the sum and therefore sued for recovery. He claimed a decree against R as he was on the property on the basis of the mortgage. He also claimed a decree against F as R had notice of the previous mortgage and was not aware that the mortgage was unpaid till the property was purchased.

Held, that the principle of s. 55 (4) did not apply to R. The mortgagor was entitled to a decree against R and a decree against F for the property in his hands. **JIWAN v. KESARI**

s. 55 (4) (b)—Money left with vendor's creditor—Purchaser's liability to pay—Vendor, if he is not a creditor, is not liable on money left with vendee.

The statutory lien created under s. 55 (4) (b), T. P. Act, must operate to the extent there is any portion of the purchase money unpaid in the hands of the vendee or with notice. If there is a novation or undertaking between the vendee and

Transfer of Property Act—contd.

for the payment to the latter of the money retained in the vendee's hands, then that money may cease to be a part of the unpaid purchase price and may become a debt payable only to the creditor in respect of which there can obviously be no occasion for a lien in favour of the vendor. But when there is no privity between the vendee and the creditor who is to be paid off, the money in the hands of the vendee, whatever be the purpose for which it is retained remains in fact money at the disposition of the vendor, who can presumably countermand the instructions given to the vendee as to the disposal of that fund. It is, therefore, the vendor's money in respect of which he is entitled to the statutory lien. *RAMAKRISHNA v. PANGHAMAL NARASIMHA KAMATH* *Mad. 426*

ss. 58, 63, 63-A, 72—Deed of mortgage with possession providing that mortgagees should effect repairs on failure of mortgagor if property fell into ruins and mortgagees sustained loss in income of rent—Repairs not shown to be made after property fell into ruins—No loss of income proved—Repairs in nature of improvements—Mortgagees held not entitled to credit for sums spent in repairs.

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary. Although a mortgage-deed provides that the principal mortgage money, as well as interest and compound interest thereon has to be paid, yet if the repairs effected came within the T. P. Act or within the document, the cost thereof would under the same principle come under the expression "principal mortgage money" and can be added to the principal mortgage money.

Under a deed of mortgage with possession repairs were to be done by the mortgagor and the only power given to the mortgagees, in the event of the mortgagor not effecting repairs was that in case the property fell into ruins or was destroyed on account of some unexpected calamity or want of repairs and the mortgagees sustained a loss in their income of rent on that account, then the mortgagees could effect repairs from their own pocket after giving the mortgagor notice and they could charge interest on these repairs. It was not claimed that any repairs were done by the mortgagees after the property had fallen into ruins or had been destroyed. There was nothing to prove any loss of income from rent and the property was never in ruins or destroyed. On the contrary the work done, was more in the nature of improvements calculated to bring in increased rent. None of them were proved to have been necessary within the meaning of s. 72 or s. 63-A, T. P. Act:

Held, that the mortgagees were not entitled to credit for the sum spent by them in effecting the repairs. *SURAJ MAL v. CHANDER BHAN* *Lah. 705*

s. 58 (C), Proviso—Effect of—Transaction whether mortgage or sale with condition of re-purchase.

A contemporaneous entry stipulating re-conveyance indicates a mortgage and the effect of the added Proviso to s. 58 (c), T. P. Act, is that *prima facie* the document is a mortgage and that the burden lies on the opposite party to show that it appears rather to be an out-and-out sale.

A document after declaring that the fields had been sold and the title transferred contained the further stipulation that if at any time within three years the purchase price was paid back with com-

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pound interest after deducting the income which the purchaser might derive from these fields, there should be a re-conveyance in favour of the vendor:

Held, that the document amounted to a mortgage and not an out-and-out sale with condition of re-purchase. *SAHEBA v. JAGANNATH* *Nag. 594*

s. 59. SEE TRANSFER OF PROPERTY ACT, 1882, s. 100 **243**

s. 63. SEE TRANSFER OF PROPERTY ACT, 1882, s. 58 **705**

s. 63-A. SEE TRANSFER OF PROPERTY ACT, 1882, s. 58 **705**

s. 67-A—Whether retrospective.

The provisions of s. 67-A, T. P. Act, are not retrospective. *SINGHESHWAR SINGH v. MEDNI PRASAD SINGH* *Pat. 339*

s. 72. SEE TRANSFER OF PROPERTY ACT, 1882, s. 58 **705**

s. 83. SEE TRANSFER OF PROPERTY ACT, 1882, s. 84 **73**

ss. 84, 83—Amendment of s. 84, if retrospective—Subsequent mortgagee depositing amount of earlier mortgage in Court to be paid to rightful owner—Dispute regarding estate of earlier mortgagee—Proceedings under s. 83 terminated—Withdrawal and redeposit of deposit by subsequent mortgagee—Interest held ceased to run after date of first deposit.

An amendment will not in general have any retrospective effect unless it is specifically provided that the amendment is to have a retrospective effect. There is nothing in the amendment of s. 84, T. P. Act, which enacts that that amendment is in any way to be retrospective.

A mortgagor executed a subsequent mortgage of the same property in favour of another. The subsequent mortgagees deposited the amount of the earlier mortgage in Court to be payable to the party entitled to it. After this deposit there was a dispute between rival claimants regarding the title to the estate of the earlier mortgagee. One of the claimants made an application showing his willingness to hand over deposit to the depositor pending the litigation regarding title to the estate of the earlier mortgagee. When the proceedings under s. 83, T. P. Act, came to an end, the depositor (subsequent mortgagee) withdrew the deposit but subsequently redeposited it in the Court in which litigation regarding title to the estate of the earlier mortgagee was instituted:

Held, that interest ceased to run from the date of the first deposit. *MUNNA LAL v. CHATAN PRAKASH* *All. 73*

s. 92, Para. 4—Subrogation—Person allowed by mortgagee to redeem mortgage in part—If can claim right of subrogation.

Paragraph 4 of s. 92, T. P. Act, does not make any exception in favour of a person who has been allowed by the mortgagee to redeem the mortgage in part. Such a person cannot, therefore, claim the right of subrogation. *MANGAL SEN v. KEWAL RAM* *All. 274*

s. 92—S. 92, whether retrospective.

Section 92, T. P. Act has retrospective effect *MANGAL SEN v. KEWAL RAM* *All. 274*

ss. 100, 59—Charge, how created.

The words "so far as may be" in s. 100, T. P. Act, have not the effect of taking s. 59 out of the purview of s. 100. Unless given by statute, a charge on immovable property can only be created by a registered instrument, executed by the person creating the charge and attested by at least two witnesses. The mere fact that the parties regarded the properties

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mentioned in the deed as being subject to a charge would not, by reason of the provisions of ss 59 and 100 operate to create a charge in law. *SHIV RAO v. D. A. SHANMUGHASUNDARASWAMI* Mad. 243

s. 130—Fixed deposit receipt—Endorsement on back—Effect.

The fixed deposit receipt is not a negotiable instrument and an endorsement on the back does not have the same effect as an endorsement of a bill of exchange or promissory note. *In the matter of TRAVANCORE NATIONAL & QUILON BANK, LTD.* Mad. 531
Trust—Charitable trust—Language should be clear—General charitable intention shown but particular charitable purpose indicated failing—General charitable intention will be given effect to.

Every trust must be expressed in sufficiently clear language to enable the Court to ascertain what are its purpose and object. This is so under English Law and also under s. 6, Trusts Act, and the principle applies to charitable trusts. The test must ultimately be whether, if the Court be called upon to administer the trust, the Court would be able to do so.

Where a testator shows a general charitable intention, but the particular charitable purpose indicated for some reasons fails, the Court will give effect to the general charitable intention and will get over the defect in the particular intention by framing a scheme. *SUBHAS CHANDRA BOSE v. GORDHANDAS I PATEL* Bom. 471

Trust to advance political purpose, whether good.

A trust to advance a political purpose is clearly bad on the ground that a trust for the attainment of political objects is invalid, not because it is illegal, but because the Court has no means of judging whether any proposed political change will or will not be for the public welfare or benefit. *SUBHAS CHANDRA BOSE v. GORDHANDAS I PATEL* Bom. 471

U. P. Agriculturists' Relief Act (XXVII of 1934), s. 2, Proviso, ss. 3, 30—Joint Hindu family—Each member, if can apply for relief under s. 30—Father and son executing mortgage—Father alone entered in revenue papers as proprietor—Suit on mortgage—Father if entitled to relief under ss. 30 and 3—Benefit, if can be extended to son.

Explanation 2, sub-s. 2, s. 2 of the U. P. Agri. Relief Act, makes it clear that each member of a joint Hindu family cannot claim the benefits conferred by s. 5 of the Act, or by s. 30 which is one of the sections in Chap. IV. For the purposes of applications under s. 30 the person, recorded as owner or the person paying revenue, etc. is the only person who can apply. Normally such a person in a joint Hindu family would be the karta.

Father and son who were members of a joint Hindu family executed a mortgage. The family possessed ancestral property, the revenue of which did not exceed Rs. 1,000. In the revenue papers the father alone was recorded as proprietor. It was contended by both the father and the son, in a suit against them on the mortgage that they were entitled to instalments and reduction of interest.

Held, that the Proviso applied only to those cases where an agriculturist joins a non-agriculturist in any transaction of loan. The son could not be regarded as non-agriculturist so as to invite the application of the proviso. Consequently the father in joining the son in executing the mortgage could not be said to have forfeited his right to claim relief under ss. 3 and 30.

Held, also that the benefits under ss. 3 and 30

U. P. Agriculturists' Relief Act—cont'd.

could also be extended to the son. *BANGALI MAL v. BANSIDHAR* All. 249

s. 3. SEE U. P. AGRICULTURISTS RELIEF ACT, 1934, s. 2, Proviso 249

s. 4—S. 4, meaning of, explained.

The provision in s. 4 is that the rate granted for future interest should not exceed the rate provided under that section. It is not stated in the section that the rate should attain to the rate at which the Govt. of India will lend money to the Local Govt. The Court has a discretion in this matter. *MUKAT LAL v. RAGHURAJ SINGH* All. 345

s. 5 (2)—Scope—Court refusing to grant instalments on finding that applicant is not agriculturist—S. 5 (2) applies to such case—Appeal under s. 5 (2) failing—No revision lies.

The words "refuses to grant instalments" in s. 5, U. P. Agri. Relief Act are unqualified. They cover cases of refusal on the ground that the applicant is not an agriculturist or does not fulfil the requirements laid down by s. 8 of the Act. The issue whether the applicant is an agriculturist is not an incidental issue or an issue the decision of which alone would determine the jurisdiction of the Court to grant instalments. The Court passing the decree alone has jurisdiction to convert it into a decree for instalments and where in the exercise of that jurisdiction it has refused to grant instalments on the finding that the applicants are not agriculturists, s. 5 (2) has application to such a case and when an appeal has been preferred under s. 5 (2) the decision of the Appellate Court confirming that of the trial Court is final and no revision lies. *SHANTI SAROOP v. MOHAMMAD ABDUL HUQ* Oudh 885

s. 12—Tenant mortgaging his holding—S. 12, if applies—Proper remedy of tenant.

Section 12, U. P. Agri. Relief Act, is meant to apply only to valid mortgages and not to those which are *ab initio* void. In the case of mortgages which are void by reason of being against any enactment, the mortgagee is not entitled to get back his money except when any portion of the consideration forms an independent transaction. The mortgage of an agricultural holding in contravention of the provisions of the Rent Law is void *ab initio*. Hence, a statutory tenant who has made a mortgage of his holding cannot avail himself of the provisions of s. 12 of the Agri. Relief Act but his remedy lies in a suit for ejectment in the Revenue Court. *SANT RAM v. PUTTI LAL* Oudh 434

s. 30. SEE U. P. AGRICULTURISTS RELIEF ACT, 1934, s. 2 Proviso 249

s. 30—Alteration of number of instalments.

The matter of instalments is one of discretion and when the Court below has exercised its discretion, the High Court should not alter the number of instalments if sufficient reason has not been shown. *MUKAT LAL v. RAGHURAJ SINGH* All. 345

s. 30—Future interest, whether can be granted on consolidated amount of principal and interest.

The language of s. 30 is that interest is to be paid on the loan and that this interest is not to be higher than the rate in Sch. III. The whole principle of the Act is that transactions should be re-opened between debtor and creditor even in the case of s. 30 (2) where the transactions have terminated in a decree. It would be quite anomalous to hold that the Court in passing its own decree under the Agri. Relief Act should consolidate the interest and the principal and grant future interest on the whole amount. *MUKAT LAL v. RAGHURAJ SINGH* All. 345

U. P. Agriculturists' Relief Act—concl'd.

ss. 30, 4, 3—Compound interest, if can be changed into simple.

There is no provision in s. 30, U. P. Agri. Relief Act which entitles a Court to change compound interest into simple interest. On the contrary the table in Sch. III shows for loans different rates according as the interest is compound or simple. *MUKAT LAL v. RAGGURAJ SINGH* All. 345

ss. 30 (2)—Expression "if decree has already been passed" refers only to decrees passed before Act.

The words "if a decree has already been passed" in cl. (2) of s. 30 of the U. P. Agri. Relief Act refer only to decrees passed before that Act came into force; *KAZIM HUSAIN v. MANGALA DEVI Oudh 856 F B*
U. P. Court of Wards Act (IV of 1912), s. 8 (d), Proviso (a)—"Gross annual profits"—Land revenue if should be deducted—View of Local Government, if, can be questioned.

In considering the way in which land revenue is regarded in India no comparison with tenures in England is of much (if any) assistance. Its universality, its quantum, and the tendency of the Indian outlook to regard the Govt. as a sharer in all the produce of the land are matters of importance.

In calculating the gross annual profits of the property under s. 8 (d), Proviso (a), U. P. Court of Wards Act, 1912, land revenue must be deducted, but no allowance for any expenses of estate management must be made.

However carefully the liberty of the subject has to be guarded, not only is there sound sense in making the decision of the Local Govt. final but it has also to be remembered that a right construction of the Court of Wards Act can only be attained if its whole scope and object together with an analysis of its wording and the circumstances in which it is enacted are taken into consideration. From an examination of the Act the conclusion is inevitable that owing to the provisions of ss. 11 and 13 of the Act no resort to the Court is left under s. 8 to challenge the view of the Local Govt. as to the meaning of "gross annual profits." *BHAGWAN BAKSH SINGH v. SECRETARY OF STATE* P C 646

U. P. District Boards Act (X of 1922), ss. 114

(a), 128, 131—Suit for recovery of tax on circumstances and property—Judge considering tax unjust in case of Government servants—Suit, if can be dismissed—Such tax, if amounts to second assessment on persons paying income-tax—Fact that Forest Research Institute is administered by Government of India, whether excludes land covered by Institute from territories administered by Local Government.

The mere fact that in the opinion of the Judge the tax is unjust and would operate harshly, so far, at any rate, as Govt. servants residing only for certain periods within the jurisdiction of the District Board in question are concerned does not justify the dismissal of the suit for the recovery of a certain sum alleged to be due from the defendant as "tax on circumstances and property" for a certain number of years. The provisions laid down in ss. 128 and 131 of the U. P. District Boards Act make it perfectly clear that the Judge is not right in adverting to these considerations and in basing his judgment upon them.

The tax on "circumstances and property" which the District Board imposes is not income-tax. The residence within the rural area is by itself sufficient to bring a person within the purview of this tax. The imposition of such tax upon a person who pays

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income-tax, does not therefore amount to second assessment.

The mere fact that the Forest Research Institute is a department administered by the Govt. of India does not exclude the land covered by the Forest Research Institute from the territories for the time being administered by the Local Govt. of the United Provinces. *DISTRICT BOARD, DEHRA DUN v. H. TROTTER* All. 270

U. P. Encumbered Estates Act (XXV of 1934), s. 9 (5) as amended by Act XI of 1939—

Creditor wanting to recover proportion of debt due to him by joint debtor who had not applied under the Act—Procedure.

Under the amended U. P. Encum. Estates Act, the creditor wanting to recover the proportion of the debt due to him by the debtor who had not applied under the provisions of the Encum. Estates Act, must wait until the amount due by the joint debtor who had not made an application under the Encum. Estates Act has been determined by the Special Judge. Thereafter he may apply to the Civil Court for a decree for that amount against the debtor. He cannot institute a separate suit for that. *RAMDAS v. SRI SADITAN PANDIT* All. 547 F B

s. 9 (5)—Liability of debtors joint and several—S. 9 (5), if applies.

Section 9 (5), U. P. Encumbered Estates Act, applies to joint and several debt.

The more general sense should be given to the term "joint debt" and whatever injury may thereby be done to the rights of creditors under the general law the intention of this Act is to limit the rights of creditors even in the case of debtors who are not entitled to the protection of the Act by giving to the Special Judge deciding claims under that Act an exclusive jurisdiction to apportion the liability under joint debts as between those debtors who have applied under the Act and those who have not. Whatever may be the position in regard to the "institution" of suits against non-applicant joint debtors in the ordinary Civil Courts, those suits cannot go forward unless and until the Special Judge has exercised his special jurisdiction to distribute the amount of the debts. Sub-section (5) (b) of s. 9 has been a part of the Act from the very beginning and the wording of that sub-section makes it clear that in the ordinary Civil Courts a creditor can only recover from a non-applicant joint debtor such amount as may be determined by the Special Judge to be due by him. *M. MOHD IHTISHAM ALI v. L. LAOHMAN PRASAD Oudh 835*
U. P. Land Revenue Act (III of 1901), s. 44—

Entries in khewat—Whether conclusive.

Though the entries in the *khewat* should be presumed to be correct, such entries cannot be conclusive evidence under the provisions of s. 44 of the U. P. Land Revenue Act. *KAMTAJ PRASAD v. CHHATAR PAL* Oudh 155

s. 111—First suit filed within three months of Revenue Court's order but withdrawn with Court's permission—Second suit beyond three months of the order—If barred by time.

Where a previous suit under s. 111, U. P. Land Revenue Act filed within three months of the order of the Revenue Court is withdrawn with the permission of the Court, a second suit, even if filed beyond three months from the order of the Revenue Court is not time-barred. *SUMMER CHAND v. MUKH-TARI* All. 285 S B

s. 233 (m)—Sale of minor's property—Minor not applying under s. 173—Sale in contravention of ss. 163 and 164—Suit for declaration

U. P. Land Revenue Act—concl'd.

that sale was void, if maintainable.

The general presumption is against an intention to disturb the established state of the law, or to interfere with the vested rights of subjects, and there is a strong leaning against so construing a statute as thereby to oust or restrict the jurisdiction of the Civil Courts. In the provision that 'no person shall institute a suit' in s. 233 (m), U. P. Land Revenue Act the Legislature had in contemplation the class of persons to whom the Act in its general bearing is applicable; that is, to share-holders liable to pay Govt. Revenue and not to strangers outside this body. It was not intended to protect the Govt. against claims in respect of illegal acts done to the detriment of persons who are under no liability to pay Govt. Revenue. It was merely intended to protect the Govt. against claims of members of the revenue paying class.

A Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record and as against such persons, the decrees or sales under them are void without any proceedings to set them aside. It would be a travesty of justice to hold that a minor whose property is being wrongly sold by the revenue authorities has no remedy left to him if he does not apply to the Commissioner under s. 173 of the Land Revenue Act, specially when the sale was conducted with material irregularity and in complete disregard of the provisions of ss. 163 and 164 of the Land Revenue Act. A suit therefore, for declaration that the property sold belongs to him and that the sale is consequently void and ineffective is not barred by the provisions of s. 233 (m). *SAR NARAIN v. CO-OPERATIVE SOCIETY* Oudh 732

U. P. Municipalities Act (II of 1916), ss. 128 (1) (XIII), 296—Rules under s. 296, for Dehra Dun Municipality, r. 1 (a)—Goods received by consignee and brought into Municipal limits—Whether imported.

The word 'import' literally means 'carried into' or 'brought into.' When goods are received by a consignee and are brought by him into the municipal limits, he imports them within the meaning of the U. P. Municipalities Act and of the Rules framed under the Act. The words "imported or brought into" cannot be so interpreted as to mean that only those goods can be said to have been imported or brought into the municipal limits of a town which are either kept, consumed or sold by the consignee of the goods within those municipal limits. *HARDWARI MAL HARNATH DAS FIRM v. MUNICIPAL BOARD, DEHRA DUN* All. 468

U. P. Prevention of Adulteration Act (VI of 1912), s. 18—Expression "in which ghee is manufactured" applies to manufactory, shop or place.

The words "in which ghee is manufactured" in s. 18 apply to the three previous things mentioned that is "manufactory, shop or place." If this were not so, then it would be an offence to keep any substance to be used for the adulteration of such ghee in any kind of a factory or any kind of a shop. That cannot be what was intended by the Legislature, but the Legislature did intend that the manufactory or the shop were those in which ghee was manufactured. *OHHANGA MAL v. EMPEROR* All. 855

s. 18—Point that ghee is not manufactured at shop cannot be taken for first time in revision. In the case of a prosecution under s. 18, it is for the accused to take the plea that his shop,

U. P. Prevention of Adulteration Act—concl'd.

is not such a manufactory, shop, or place in which ghee is manufactured, under s. 242, Criminal P. O., in the trial Court. If he fails to do this, he cannot raise it for the first time in revision. *OHHANGA MAL v. EMPEROR* All. 855

s. 18—Prosecution under—Previous conviction, if can be shown.

In the case of a prosecution under s. 18, U. P. Prev. of Adulteration Act previous conviction for selling adulterated ghee would be relevant to show intention. *OHHANGA MAL v. EMPEROR* All. 855

Vendor and purchaser—Breach of contract—Held vendors and not vendee liable for breach.

Vendors made an offer to the vendee to execute a deed of transfer of their mortgagee rights. The offer, however, was not *bona fide*. One of the vendors who by separate agreement had covenanted to transfer his share in the mortgagee rights to the vendee, if called upon, did not carry out his part of the agreement:

Held, that the vendee and not the vendors committed the breach of the contract. *JAGGO BAI v. HARIHAR PRASAD SINGH* All. 501

Vendor and vendee—Specific performance—

Alternative claim for refund—Claim by vendee for specific performance or in alternative for refund of purchase money—Withdrawal of former claim—Vendee, if can claim refund.

Where upon a breach of contract by the vendors the vendee claims a decree for specific performance or in the alternative a refund with interest of the amount of the purchase price paid by him but withdraws during the pendency of the suit his claim for specific performance and the vendors do not suffer from the suit, the vendee is not debarred from claiming the refund as the claim seeks only *resitutio in integrum* and is not strictly one of damages. *JAGGO BAI v. HARIHAR PRASAD SINGH* All. 501

Waqf. SEE MUHAMMADAN LAW

Whipping Act (IV of 1909), s. 3—Offence under s. 380, Penal Code (Act XLV of 1860)—Sentence of whipping, if can be substituted for order of detention in Borstal School passed by trial Court.

In a case of an offence under s. 380, I. P. O., a Magistrate has two alternatives before him. He may send an offender to prison or in lieu thereof, he may either cause him to be whipped or send him to Borstal; but the power to order a person to be whipped is only in lieu of another punishment under the Code and once an order of detention in Borstal has been passed there is no power to alter this order to a sentence of whipping. Where a Magistrate has ordered detention in Borstal School of an offender, the Sessions Judge has no power to substitute for it a sentence of whipping as that would be enhancing the sentence. *THE KING v. KYAW AYE* Rang. 405

Will. SEE HINDU LAW

Construction. SEE HINDU LAW—ADOPTION

Construction—Absolute estate—Widow held made absolute owner of property.

A testator by his will made his wife the "exclusive owner" of a certain property. She was to have "all kinds of powers to deal with the property aforesaid. She shall be considered full owner." But towards the end of the will there was a provision that "after the death of my wife, whatever property remains shall be owned by the sons of my brother who shall have no connection or concern therewith. Besides, my wife, shall not be entitled to sell immovable property. The sons of my brother shall also have no such right"

Will—contd.

Held, that the prohibition against selling must be disregarded as repugnant to the absolute gift to the wife and that she was made the absolute owner of the property. **JAGAT SINGH v. SANGAT SINGH P C 440**

Construction—Bequest to further principles of particular parties, whether charitable—Clause in will handing over residue to certain person to be spent by him for political uplift of India—Clause held constituted trust which being not for charitable purpose and being also vague was invalid.

Gifts or bequests for furthering the principles of particular political parties are not charitable bequests.

After paying certain legacies, the testator by his will directed the residue of the assets to be handed over to certain person to be spent by him or by his nominee for the political uplift of India and preferably for publicity work on behalf of India's cause in other countries:

Held, (1) that the words constituted a trust, and that there was no beneficial gift to the donee;

(2) that the trust was not for general or specific charitable purpose;

(3) that the trust being vague could not be enforced. Hence it was invalid. There was consequently an intestacy in respect of property covered by the clause. **SUBHAS CHANDRA BOSE v. GORDHANDAS I PATEL Bom. 471**

Construction—"Good work" whether vague—Held there was no permanent dedication absolutely in favour of idol.

The whole of the will must be considered together to arrive at the meaning of it.

The term "good works" is certainly exceedingly vague and is void for uncertainty. *Nek kam* or *good works* is vague and does not necessarily mean an expenditure on a charitable object.

If the real intention of the testator was to benefit the idol and there was clear dedication than the idol would become the owner of the property. If, on the other hand, the dominating intention was to benefit individuals and not a deity then the whole transaction would be a mere colourable imitation of a dedication or at most there might be a charge in favour of the particular idol.

Held, after construing the terms of the will that the will was altogether so vague that it was not possible to say for certain that the testator intended a permanent dedication to the idol absolutely. No valid trust was created by the will and that at most there was a charge or trust in favour of the idol for *bhag* which need be no more than the ordinary daily food of the family. **GAURI SHANKAR v. MOHAN LAL Oudh 597**

Construction—Principles—English precedents.

To construe one will by reference to expressions of more or less doubtful import to be found in other wills is for the most part an unprofitable exercise. To search and sift the heaps of cases on wills which cumber the English Law Reports, in order to understand and interpret wills of people speaking a different tongue, trained in different habits of thought and brought up under different conditions of life, seems almost absurd. **SUBHAS CHANDRA BOSE v. GORDHANDAS I PATEL Bom. 471**

Construction—Principles—Value of decisions.

In interpreting a will the Court should place itself in the armchair of the testator and construe the will so as to give effect to the intention of the

Will—concl'd.

testator by suitably construing passages in the will which are not obviously plain, so as to give them the meaning which the testator would have given them. Intestacy should be avoided whenever possible. But there are cases when a Court with the best of intentions cannot understand what was the intention of the testator, and further, when the testator has used plain language, it cannot give a meaning contrary to this plain language even if to give such contrary meaning might give effect to what, from other parts of the will, might be believed to be more probably the intention of the testator.

No two wills are the same and so decisions are only a guide to the application of the principle.

GAURI SHANKAR v. MOHAN LAL Oudh 597

Construction—Sons interest held contingent and could not be attached.

A will stated "I give and devise my real and personal property ... to my beloved wife for life and after her death to vest in my sons or their heirs who may then be in existence. It is my wish that my sons hereinbefore mentioned will not be entitled to my estate during the lifetime of my said wife".

Held, that the intention of the testator was that the estate was only to vest (i. e., to vest in interest) after the death of the wife. Hence the interest of the sons was contingent and was not attachable. **GANESH PRASAD AGARWALLA v. MONOHAR LAL MULLICK Cal. 801**

Will traced to possession of deceased and last seen there not forthcoming after his death—Presumption arising therefrom.

If a will traced to the possession of the deceased and last seen there is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to rebut it. The presumption will be more or less strong according to the character of the custody which the testator had over the will. **SANTU v. MAIKU All. 747**

Workmen's Compensation Act (III of 1923), s. 3 (1)—"Out of employment"—Onus is on applicant—Accident held did not arise out of employment and no compensation could be awarded to dependent.

In claiming compensation under Workmen's Compensation Act, the onus lies on the applicant to prove that the accident arose out of the employment, and if the evidence is not sufficient to establish this, the claim fails.

An accident arises "out of" the employment where it results from a risk incidental to the employment, as distinguished from risk common to all mankind, although the risk incidental to the employment may include a risk common to all mankind.

The deceased workman used to be employed, at various times in the work of jungle cutting and similar operations at the mine. On the day of his death, the deceased was employed in the work of clearing jungle along a boundary of the mine for the purpose of survey. While the workmen were going back to their camp in the same mining area, a dead tree on the way fell on the deceased and killed him. The tree was at some distance from the place where the deceased actually had to work. The accident was of the kind which anyone who happened to pass by the tree at the time would have met with:

Held, that the accident did not arise "out of" the employment of the workman and hence no compensation to dependent could be awarded. **U YAN SHIN v. MA E SHIN Rang. 767**

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IMPERIAL ACTS, 1940.

ACT No. 1 of 1940

THE REGISTRATION (EMERGENCY-POWERS) ACT, 1940.

Received the assent of the Governor-General on the 23rd February, 1940, and is published in the Gazette of India, Part IV, dated 2nd March, 1940.

An Act to provide for the registration of certain European British subjects.

Whereas it is expedient to provide for the registration of certain European British subjects;

It is hereby enacted as follows :—

1. Short title, extent, commencement and duration.

(1) This Act may be called the Registration (Emergency Powers) Act, 1940.

(2) It extends to the whole of British India, and applies also to European British subjects in any part of India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

(4) It shall be in force during the continuance of the present war and for a period of six months thereafter.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,—

(a) "European British subject" means any subject of His Majesty of European descent in the male line, born, naturalised or domiciled in the British Islands or in any Dominion as defined in the Statute of Westminster, 1931, or in any Colony except Ceylon;

(b) "prescribed" means prescribed by rules made under this Act.

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3. Obligation to register.

(1) Every male European British subject for the time being in India (not being—

(a) a member of his Majesty's naval, military or air forces, or

(b) a person who is enrolled under the Auxiliary Force Act, 1920, or is in holy orders, or is a regular minister of any religious denomination),

who for the time being has attained the age of sixteen years but has not attained the age of fifty years, shall, within the prescribed period, correctly fill up, or cause so to be filled up, to the best of his knowledge and belief, sign and lodge with the appropriate registration authority specified in the First Schedule, or such other registration authority as may be prescribed, the form set out in the Second Schedule, and if any such European British subject claims not to be ordinarily resident in India, he shall lodge with the said form a statement of such claim.

(2) If any registration authority has reason to believe that any person is a European British subject to whom the provisions of sub-section (1) are applicable, he may, by order in writing, require such person to furnish such particulars as may be specified in the order within such time as may be so specified, and such person, whether or not he is a European British subject to whom the provisions of the said sub-section are applicable shall within the specified time furnish correctly to the best of his knowledge and belief the said particulars to the said registration authority in such form or manner as such order may require, and shall sign the same; and if any such person claims that he is not a European British subject to whom the provisions of sub-section (1) are applicable, he shall furnish a statement of such claim with the particulars as aforesaid,

(3) If any person refuses, or, without lawful excuse (the burden of proving which shall lie upon such person), neglects fully to comply with the requirements of sub-section (1) or of any order made under sub-section (2), he shall be punishable with fine which may extend to five hundred rupees.

(4) Every registration authority under this Act shall be deemed to be a public servant within the meaning of the Indian Penal Code.

4. Determination of disputes as to applicability of this Act.

If any question arises with reference to this Act or any rule made thereunder whether a person is a European British subject to whom the provisions of sub-section (1) of section 3 are applicable, a person appointed in writing in this behalf by the prescribed authority may apply to the District Magistrate or to any officer specially empowered in this behalf by the Central Government in the area in which the person to whom the dispute relates is for the time being present, and such Magistrate or other officer, after hearing such person or giving him a reasonable opportunity for being heard, shall summarily determine the question, and the decision of such Magistrate or other officer shall be final.

5. Power of Central Government to make rules.

(1) The Central Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) prescribe registration authorities, in addition to those specified in the First Schedule;
- (b) prescribe the time within which the form set out in the Second Schedule shall be lodged with the registration authority;
- (c) prescribe authorities who may make the appointment referred to in section 4;
- (d) provide for the issue of certificates of registration;
- (e) provide for the preparation, compilation and correction of a register, and require the attendance of persons for any of such purposes;
- (f) require the notification of changes of address of registered persons.

(3) Rules made under this section may provide that any contravention thereof or of any order or notice issued thereunder shall be punishable with fine which may extend to five hundred rupees.

6. Act not to apply to certain persons.

Nothing in this Act shall apply to any person confined for the time being in a prison or lunatic asylum.

7. Repeal of Ordinance II of 1939.

The Registration Ordinance, 1939, is hereby repealed; but any rules made, anything done and any action taken under the said Ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act, and any offence committed against or any proceedings commenced under the said Ordinance, may be punished, or may be continued and completed as if such offence were committed against or such proceedings were commenced under this Act.

THE FIRST SCHEDULE

(See section 3)

Registration Authorities

In the case of any servant of the Crown.	The Head of the Office or Department in which he serves.
In the case of any person in the employ of any public or local authority.	The chief executive officer of such authority.
In the case of any person in the employ of any railway.	The Head of the Railway Administration.
In any other case.	The District Magistrate of the district in which the person is for the time being resident, or in the case of a person resident in a Presidency town, the Commissioner of Police.

THE SECOND SCHEDULE

(See section 3)

Form of Particulars

1. Name in full.
2. Address.
3. Date of birth.
4. Whether single, married or widower.
5. Number of dependants, specifying their relationship, if any, to him.

6. Profession or occupation.
7. Name and nature of business, or name, address and nature of employer's business, or if employed in or under any Department of Government, the name of the Department.
8. Whether he has served, or undergone training of any description, in any naval, military or air force. If so, give particulars of such service or training including date and duration thereof.
9. Whether he possesses, or has possessed, a flying licence.

ACT No. II of 1940.

THE FOREIGNERS ACT, 1940.

Received the assent of the Governor-General on the 23rd February, 1940, and is published in the Gazette of India, Part IV, dated 2nd March, 1940.

An Act to provide for the imposition of restrictions on foreigners.

Whereas it is expedient to provide for the imposition of restrictions on the entry of foreigners into British India, their presence therein and their departure therefrom;

It is hereby enacted as follows:—

1. Short title, extent and duration.

(1) This Act may be called the Foreigners Act, 1940.

(2) It extends to the whole of British India.

(3) It shall be in force during the continuance of the present war and for a period of six months thereafter.

2. Definitions.

In this Act,—

(a) "foreigner" has the meaning assigned to it in the Foreigners Act, 1864, except that it does not include—

(i) any ruler or subject of any Indian State; or

(ii) any native of the tribal areas;

(b) "prescribed" means prescribed by orders made under this Act;

(c) "specified" means specified by direction of a prescribed authority.

3. Power to make orders

(1) The Central Government may, by order make provision, either generally with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into British India or their

departure therefrom or their presence or continued presence therein.

(2) In particular, and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(a) shall not enter British India, or shall enter British India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed;

(b) shall not depart from British India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed;

(c) shall not remain in British India, or in any prescribed area therein;

(d) shall remove himself to, and remain in, such area in British India as may be prescribed;

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified;

(v) prohibiting him from association with persons of a prescribed or specified description;

(vi) prohibiting him from engaging in activities of a prescribed or specified description;

(vii) prohibiting him from using or possessing prescribed or specified articles; or

(viii) otherwise regulating his conduct in any such particular as may be prescribed or specified;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to

the enforcement of, any or all prescribed or specified restrictions or conditions; or

- (g) shall be arrested and detained or confined;

and may make provision for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

4. *Internees.*

(1) Any foreigner (hereinafter referred to as an internee) in respect of whom there is in force any order made under clause (g) of sub-section (2) of section 3, directing that he be detained or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time determine.

(2) No person shall—

- (a) knowingly assist an internee to escape from custody or knowingly harbour an escaped internee; or
- (b) give an escaped internee any assistance with intent thereby to prevent, hinder or interfere with the apprehension of the internee.

(3) The Central Government may, by order, provide for regulating access to, and the conduct of persons in, places in British India where internees are detained and for prohibiting or regulating the despatch or conveyance from outside such places to or for internees therein of such articles as may be prescribed.

(4) No proceedings shall be taken by virtue of sub-section (2) or sub-section (3) against any person in respect of any act done by him when he is himself an internee.

5. *Change of name.*

(1) No foreigner who was in British India on the date on which this Act came into force shall, while in British India after that date, assume or use or purport to assume or use for any purpose any name other than that by which he was ordinarily known immediately before the said date.

(2) Where, after the date on which this Act came into force, any foreigner carries on or purports to carry on (whether alone or in association with any other person)

any trade or business under any name or style other than that under which that trade or business was being carried on immediately before the said date, he shall, for the purposes of sub-section (1), be deemed to be using a name other than that by which he was ordinarily known immediately before the said date.

(3) In relation to any foreigner who, not having been in British India on the date on which this Act came into force, thereafter enters British India, sub-sections (1) and (2) shall have effect as if for any reference in those sub-sections to the date on which this Act came into force there were substituted a reference to the date on which he first enters British India thereafter.

(4) For the purposes of this section—

- (a) the expression "name" includes a surname, and
- (b) a name shall be deemed to be changed if the spelling thereof is altered.

(5) Nothing in this section shall apply to the assumption or use—

- (a) of any name in pursuance of a Royal licence; or
- (b) by any married woman, of her husband's name.

6. *Obligations of masters of vessels etc*

Any District Magistrate and any Commissioner of Police or, where there is no Commissioner of Police, any Superintendent of Police, may, for any purpose connected with the enforcement of this Act or any order made thereunder, enter, with such assistance as he may think fit, any vessel or aircraft at any port or place in British India and may—

- (a) direct the master of the vessel or the pilot of the aircraft, as the case may be,—
 - (i) before any passenger disembarks, or before the vessel or aircraft leaves such port or place, as the case may be, to furnish a list in writing of the passengers who are on board or who have been carried on board at any time since the vessel or aircraft commenced its journey, or who have signified their intention of departing from British India on board such vessel or aircraft, setting out the ports or places at which they embarked, the

ports or places of their disembarkation or intended disembarkation, and such other particulars as may be prescribed, and

- (ii) to answer to the best of his ability any question relating to the passengers who are on board or who have disembarked in any part of British India; and

- (b) if any foreigner seeking to enter British India on board such vessel or aircraft does not give satisfactory reasons for entering British India, either—

- (i) refuse to allow such foreigner to disembark from such vessel or aircraft, or
- (ii) place him under such restraint as may be prescribed or specified.

7. *Burden of proof.*

If any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person.

8. *Power to exempt from application of Act.*

The Central Government may, by order, declare that any or all of the provisions of this Act or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner or any class or description of foreigner.

9. *Power to give effect to orders, directions, etc.*

(1) Any authority empowered by or under or in pursuance of the provisions of this Act to give any direction or to exercise any other power, may, in addition to any other action expressly provided for in this Act, take, or cause to be taken, such steps and use, or cause to be used, such force as may, in its opinion, be reasonably necessary for securing compliance with such direction or for preventing or rectifying any breach thereof, or for the effective

exercise of such power, as the case may be.

(2) Any police officer may take such steps and use such force as may, in his opinion, be reasonably necessary for securing compliance with any order made or direction given under or in pursuance of the provisions of this Act or for preventing or rectifying any breach of such order or direction.

(3) The power conferred by this section shall be deemed to confer upon any person acting in exercise thereof a right of access to any land or other property whatsoever.

10. *Power to delegate authority.*

Any authority upon which any power to make or give any direction, consent or permission or to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf, and thereupon the said subordinate authority shall, subject to such conditions as may be contained in the authorisation, be deemed to be the authority upon which such power is conferred by or under this Act.

11. *Attempts, etc., to contravene the provisions of this Act, etc.*

(1) Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, the provisions of this Act or of any order made or direction given thereunder, or fails to comply with any direction given in pursuance of any such order, shall be deemed to have contravened the provisions of this Act.

(2) Any person who, knowing or having reasonable cause to believe that any other person has contravened the provisions of this Act or of any order made or direction given thereunder, gives that other person any assistance with intent thereby to prevent, hinder or otherwise interfere with his arrest, trial or punishment for the said contravention, shall be deemed to have abetted that contravention.

(3) The master of any vessel or the pilot of any aircraft, as the case may be, by means of which any foreigner enters or leaves British India in contravention of any order made under, or direction given in pursuance of, section 3 shall, unless he proves that he exercised all due diligence

to prevent the said contravention, be deemed to have contravened this Act.

12. Penalties.

If any person contravenes the provisions of this Act or of any order made thereunder or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if such person has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

13. Protection to persons acting under this Act.

No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

14. Application of other laws not barred.

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Foreigners Act, 1864, the Registration of Foreigners Act, 1939, and of any other enactment for the time being in force.

15. Repeal and saving.

(1) The Foreigners Ordinance, 1939, is hereby repealed.

(2) Notwithstanding such repeal, all orders made, directions given, things done and action taken under the said Ordinance, shall be deemed to have been made, given, done or taken under the provisions of this Act as if this Act had come into force on the 26th day of August, 1939, references to the said Ordinance in any rule made under any enactment shall be construed as reference to this Act, and offences committed against or proceedings commenced under the said Ordinance may be punished or may be continued and completed as if such offences were committed against or such proceedings were commenced under this Act.

ACT No. III of 1940.

THE ROYAL INDIAN NAVY (EXTENSION OF SERVICE) ACT, 1940.

Received the assent of the Governor-General on the 23rd February, 1940, and is published in the Gazette of India, Part IV, dated 2nd March, 1940.

An Act to provide for the retention in service of certain person enrolled for service in the Royal Indian Navy.

Whereas it is expedient to provide for the retention in service of certain persons enrolled for service in the Royal Indian Navy;

It is hereby enacted as follows:—

1. Short title.

This Act may be called the Royal Indian Navy (Extension of Service) Act, 1940.

2. Extension of service where term of service has expired.

(1) Until such date as may be notified by the Central Government as the date of termination of the present hostilities any person enrolled for service in the Royal Indian Navy who, by reason of the expiry of the term for which he engaged to serve when so enrolled, is no longer liable for service shall, notwithstanding such expiry, continue to be enrolled for service and to be liable for service in the Royal Indian Navy until he is discharged by order of the Officer Commanding the Royal Indian Navy:

Provided that the period for which the service of any such person is extended under this section shall not exceed five years from the day on which his service would otherwise have terminated.

(2) The provisions of this section shall apply also to any person enrolled for service in the Royal Indian Navy if the expiry of the term for which he engaged to serve occurred between the 2nd day of September, 1939, and the commencement of this Act.

ACT No. IV of 1940.

THE OFFENCES ON SHIPS AND AIRCRAFT ACT, 1940

Received the assent of the Governor-General on the 23rd February, 1940, and is published in the Gazette of India, Part IV, dated 2nd March, 1940.

An Act to extend the operation of the criminal law to offences committed on ship

or aircraft registered in British India wherever they may be.

Whereas it is expedient to extend the operation of the criminal law to offences committed on ships or aircraft registered in British India wherever they may be, and for that purpose further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898;

It is hereby enacted as follows:—

1. *Short title.*

This Act may be called the Offences on Ships and Aircraft Act, 1940.

2. *Amendment of section 4 of Act XLV of 1860.*

In section 4 of the Indian Penal Code,

after clause (3) the following clause shall be inserted, namely:—

"(4) any person on any ship or aircraft registered in British India wherever it may be."

3. *Amendment of section 188 of Act V of 1898.*

In section 188 of the Code of Criminal Procedure, 1898, after the words "Prince or Chief in India", where they occur for the second time, the following words shall be inserted, namely:—

"or

when any person commits an offence on any ship or aircraft registered in British India wherever it may be."

Extracts from Contemporaries.

Section 27, Evidence Act whether repealed by s. 162, Criminal P. C. ?

Some time back their Lordships of the Privy Council in 180 Ind. Cas. 1 held that the words "by any person" in s. 162 Criminal P. C. included an accused person, thereby overruling the view held by the majority of Indian High Courts. Their Lordships further observed that the words of s. 162 are plainly wide enough to exclude any confession made to a Police Officer in course of investigation whether a discovery is made or not. "They may therefore," observed their Lordships, "*pro tanto* repeal the provisions of the section which would otherwise apply. If they do not presumably it would be on the ground that s. 27 of the Evi. Act is a "Special Law" within the meaning of s. 1 (2) of the Criminal P. C. and that s. 162, Criminal P. C. is not a specific provision to the contrary." The question, whether the provisions of s. 27, Evi. Act have been *pro tanto* repealed by s. 162, Criminal P. C. came up before a Full Bench of the Lahore High Court, consisting of seven Judges. The majority (five Judges including the learned Chief Justice) held that s. 162 does repeal *pro tanto* s. 27 of the Evi. Act. Dalip Singh and Bhide, JJ. wrote dissenting judgments. The other Judges concurred with the learned Chief Justice. After

quoting the provisions of s. 162 and s. 1 (2), Criminal P. C. and s. 27 of the Evi. Act, the learned Chief Justice traced the history of the sections. His Lordship was of the opinion that it was not necessary to consider whether s. 27, Evi. Act is "a special law" within the meaning of s. 1 (2), Criminal P. C. though he admitted that the point was not free from difficulty. In this respect, Tek Chand, J., who concurred in the answer with the learned Chief Justice held that though the whole of the Evi. Act is not "a special law", s. 27 contains the "law on a particular subject" and is therefore a special law. The learned Chief Justice, however, held that s. 162 is a specific provision to the contrary" within the meaning of s. 1 (2) of the Criminal P. C. "There could hardly be anything more definite or explicit than the terms of s. 162..... In addition" observed his Lordship, "when there are two exceptions included in the section affecting the Evi. Act and no mention of s. 27 is made, the matter is put beyond doubt." Thus in the opinion of the learned Chief Justice (and the majority) s. 27 is *pro tanto* repealed by s. 162, Criminal P. C. the latter being "a specific provision to the contrary," within the meaning of s. 1 (2), Criminal P. C. and therefore affecting s. 27, Evi. Act whether, it be special law or not. Evidence of information, whether

it amounts to confession or not which relates to the fact discovered in consequence of such information must not now be considered admissible in evidence. It is for the legislature to consider the effect of this decision of the Full Bench and to amend s. 162, if that is thought to be advisable. But we venture to suggest that it would not take any hasty step in the matter.

Penal Reform League.

Sir Maurice Gwyer, the Chief Justice of the Federal Court of India, who inaugurated the Penal Reform Conference recently held in Bombay gave a very lucid discourse on modern conception of crime and the criminal. A proposal to start a Penal Reform League was stressed during the conference. The proposal has come none too soon. In this matter India lags far behind the advanced countries, where penology has advanced considerably. It is a matter of regret that the public in our country, had not taken any keen interest in the field. The proposed League could not have had a more enthusiastic and competent sponsor than Mr. K. M. Munshi the Home Minister in the late Congress cabinet of the Bombay Govt. Mr. Munshi has with him the practical knowledge of the prison life and also the practical experience of tackling the problem from the administrative side.

While emphasising the need for an increase in the general standard of education to eradicate the criminal from the society, Sir Maurice said that the criminal was no longer to be looked down without pity or remorse, that we have come to recognize that the criminal is a man like any one of us and that "we may have to bear part of the responsibility for having made him what he is". The real problem which the conference had to consider, he opined, was how to reconcile the state claims with those of the individual.

In his presidential address, while speaking on the various aspects of Criminal

Law Reform, Mr. Munshi said that "justice in criminal cases must move in the direction of individualisation". To effect the suitable reforms, he proposed an expert body like the Penal Law Reform League. We whole-heartedly welcome the proposal but at the same time we wish to emphasise as was done by Sir Maurice in his address, the need to carry public opinion in any penal reform.

Leave to Appeal From F. C. of India.

On refusal of the Federal Court to grant leave to the petitioner to appeal against the decision of the Court, (1st Ind. Cas. 317) to the Privy Council, under s. 208-B, Govt. of India Act, the petitioner applied to His Majesty in Council for special leave to appeal *in forma pauperis*. This has the distinction of being the first application for such leave from the Federal Court of India. The question for consideration was the true construction of s. 270, sub-s. (1) of the Govt. of India Act, 1935. This section, their Lordships of the Judicial Committee observed is in the nature of an exceptional section, which was intended to afford some measure of protection to certain public servants in relation to acts done or purported to be done in execution of their duty being acts done before the date in question which is April 14, 1937. In this matter, their Lordships thought that once a matter was before the Federal Court an appeal from that Court should not be highly admitted unless it arises in a really substantial case. In this case since the matter concerned was purely technical and one with regard to the construction of a very exceptional section, which would have no application in the future, their Lordships refused to grant leave to appeal. The principle inunited by their Lordships in this case, if we may respectfully say so, is wholesome and put a check on frivolous applications of the sort.

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ACT No. V of 1940.

THE TRADE MARKS ACT, 1940.

Received the assent of the Governor-General on the 11th March, 1940, and is published in the Gazette of India, Part IV, dated 16th March, 1940.

An Act to provide for the registration and more effective protection of Trade Marks.

Whereas it is expedient to provide for the registration and more effective protection of trade marks :

It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. *Short title, extent and commencement.*

(1) This Act may be called the Trade Marks Act, 1940.

(2) It extends to the whole of British India.

(3) This section and section 85, shall come into force at once ; the remaining provisions of the Act shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

2. *Definitions.*

(1) In this Act, unless there is anything repugnant in the subject or context —

(a) "associated trade marks" means trade marks deemed to be, or required to be registered as, associated trade marks under this Act ;

(b) "certification trade mark" means a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material mode of manufacture, quality, accuracy or other characteristic, from goods not so certified and registrable as such under the provisions of Chapter VIII in respect of those goods in the name, as proprietor of the certification trade mark, of that person ;

(c) "District Court" has the meaning assigned to it in the Code of Civil Procedure, 1908 ;

(d) "High Court" means a High Court as defined in sub-section (1) of section 219 of the Government of India Act, 1935 ;

(e) "limitations" (with its grammatical variations) means any limitations of the exclusive right to the use of a trade mark given by the registration of a person as proprietor thereof, including limitations of that right as to mode of use, as to use in relation to goods to be sold or otherwise traded in within British India, or as to use in relation to goods to be exported to any market outside British India ;

(f) "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof ;

(g) "permitted use" means the use of a trade mark by a registered user thereof in relation to goods with which he is connected in the course of trade and in respect of which for the time being the trade mark remains registered and he is registered as a registered user, being use such as to comply with any conditions or restrictions to which his registration is subject ;

(h) "prescribed" means prescribed by rules made, in relation to proceedings before a High Court, by such High Court and in other cases, by the Central Government ;

(i) "registered" (with its grammatical variations) means registered under this Act ;

(j) "registered trade mark" means a trade mark which is actually on the register ;

- (k) "registered user" means a person who is for the time being registered as such under section 41 ;
- (l) "trade mark" means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person ;
- (m) "transmission" means transmission by operation of law, devolution on the personal representative of a deceased person and any other mode of transfers, not being assignment ;
- (n) "tribunal" means the Registrar or, as the case may be, the Court before which the proceeding concerned is pending.

(2) References in this Act to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark, and references herein to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in any other relation whatsoever to, such goods.

3. *Application of other laws not barred.*
The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

CHAPTER II.

THE REGISTER AND CONDITIONS FOR REGISTRATION.

4. *The register of trade marks.*

(1) For the purposes of this Act there shall be established at the Patent Office a Trade Mark Registry, and a record called the Register of Trade Marks (in this Act referred to as the register) shall be kept thereat wherein shall be entered all registered trade marks with the names, addresses and descriptions of their proprietors, notifications of assignments and transmissions, the names, addresses and description of registered users, disclaimers, conditions, limitations ; and such other matters relating to registered trade marks as may be prescribed, but there shall not be entered in the register any notice of any

trust express, implied or constructive, nor shall any such notice be receivable by the Registrar.

(2) Subject to the superintendence and direction of the Central Government, the register shall be kept under the control and management of the Controller of Patents and Designs, who shall for the purposes of this Act be called the Registrar of Trade Marks and is in this Act referred to as the Registrar.

(3) The register shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

5. *Registration to be in respect of particular goods.*

(1) A trade mark may be registered only in respect of particular goods or classes of goods.

(2) Any question arising as to the class within which any goods fall shall be determined by the Registrar whose decision in the matter shall be final.

6. *Distinctiveness requisite for registration.*

(1) A trade mark shall not be registered unless it contains or consists of at least one of the following essential particulars, namely :—

- (a) the name of a company, individual or firm, represented in a special or particular manner ;
- (b) the signature of the applicant for registration or some predecessor in his business ;
- (c) one or more invented words ;
- (d) one or more words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or surname or the name of a sect, caste or tribe in India ;
- (e) any other distinctive mark, provided that a name, signature, or any word, other than such as fall within the descriptions in the above clauses, shall not be registrable except upon evidence of its distinctiveness.

(2) For the purposes of this section, the expression "distinctive," means adapted in relation to the goods in respect of which a trade mark is proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists either generally or, where the trade mark

is proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which—

- (a) the trade mark is inherently so adapted to distinguish, and
- (b) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact so adapted to distinguish:

Provided that in the case of a trade mark which has been continuously used (either by the applicant for registration or by some predecessor in his business, and either in its original form or with additions or alterations not substantially affecting its identity) in relation to the same goods as those in relation to which registration is applied for, during a period from a date prior to the 25th day of February, 1937, to the date of application for registration, the Registrar shall not refuse registration by reason only of the fact that the trade mark is not adapted to distinguish as aforesaid, and may accept evidence of acquired distinctiveness as entitling the trade mark to registration.

7. *Limitation as to colour.*

(1) A trade mark may be limited wholly or in part to one or more specified colours, and any such limitation shall be taken into consideration by any tribunal having to decide on the distinctive character of the trade mark.

(2) So far as a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours.

8. *Prohibition of registration of certain matter.*

No trade mark nor part of a trade mark shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would—

- (a) by reason of its being likely to deceive or to cause confusion or otherwise, be disentitled to protection in a Court of justice; or
- (b) be likely to hurt the religious susceptibilities of any class of His Majesty's subjects; or
- (c) be contrary to any law for the time being in force or to morality.

9. *Use of names of chemical elements barred.*

No word which is the commonly used and accepted name of any single chemical element or single chemical compound (as

distinguished from a mixture) shall be registered as a trade mark in respect of a chemical substance or preparation, and any such registration shall, notwithstanding anything in section 24, be deemed for the purposes of section 46 to be an entry made in the register without sufficient cause or an entry wrongly remaining on the register, as the circumstances may require:

Provided that this section shall not apply to a word which is used to denote only a brand or make of the element or compound as made by the proprietor or a registered user of the trade mark, as distinguished from the element or compound as made by others, and in association with a suitable name or description open to the public use.

10. *Prohibition of registration of identical or similar trade mark.*

(1) Save as provided in sub-section (2), no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or which so nearly resembles such trade mark as to be likely to deceive or cause confusion.

(2) In case of honest concurrent use or of other special circumstances which, in the opinion of the Registrar, make it proper so to do he may permit the registration by more than one proprietor of trade marks which are identical or nearly resemble each other in respect of the same goods or description of goods, subject to such conditions and limitations, if any, as the Registrar may think fit to impose.

(3) Where separate applications are made by different persons to be registered as proprietors respectively of trade marks which are identical or nearly resemble each other, in respect of the same goods or description of goods, the Registrar may refuse to register any of them until their rights have been determined by a competent Court.

11. *Registration of parts of trade marks and of trade marks as a series.*

(1) Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and the part as separate trade marks.

(2) Each such separate trade mark shall satisfy all the conditions applying to, and have all the incidents of, an independent trade mark.

(3) Where a person claiming to be the

proprietor of several trade marks in respect of the same goods or description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of—

- (a) statements of the goods in relation to which they are respectively used or proposed to be used; or
- (b) statements of number, price, quality, or names of places; or
- (c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark; or
- (d) colour;

seeks to register those trade marks, they may be registered as a series in one registration.

12. *Associated trade marks.*

(1) Where a trade mark which is registered, or is the subject of an application for registration, in respect of any goods is identical with another trade mark which is registered, or is the subject of an application for registration, in the name of the same proprietor in respect of the same goods or description of goods, or so nearly resembles it as to be likely to deceive or cause confusion if used by a person other than the proprietor, the Registrar may at any time require that the trade marks shall be entered on the register as associated trade marks.

(2) Where a trade mark and any part thereof are, in accordance with the provisions of sub-section (1) of section 11, registered as separate trade marks in the name of the same proprietor, they shall be deemed to be, and shall be registered as, associated trade marks.

(3) All trade marks registered in accordance with the provisions of sub-section (3) of section 11 as a series in one registration shall be deemed to be, and shall be registered as, associated trade marks.

(4) On application made in the prescribed manner by the registered proprietor of two or more trade marks registered as associated trade marks, the Registrar may dissolve the association as respects any of them if he is satisfied that there would be no likelihood of deception or confusion being caused if that trade mark were used by any other person in relation to any of the goods in respect of which it is registered, and may amend the register accordingly.

13. *Registration subject to disclaimer.*

If a trade mark contains—

- (a) any part not separately registered as a trade mark in the name of the

proprietor, or for the separate registration of which no application has been made, or

- (b) any matter common to the trade, or otherwise of a non-distinctive character,

the tribunal, in deciding whether the trade mark shall be entered or shall remain on the register, may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration:

Provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.

CHAPTER III.

PROCEDURE FOR, AND DURATION OF, REGISTRATION.

14. *Application for registration.*

(1) Any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner, and subject to the provisions of this Act, the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit.

(2) In the case of a refusal or conditional acceptance the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving thereat.

(3) The tribunal may at any time, whether before or after acceptance, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such terms as it may think fit.

15. *Opposition to registration.*

(1) When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted, together with the condi-

tions and limitations, if any, subject to which it has been accepted, to be advertised in the prescribed manner:

Provided that the Registrar may cause an application to be advertised before acceptance if it relates to a trade mark to which clause (e) of sub-section (1) of section 6 applies, or in any other case where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted, but shall not be bound so to do.

(2) Any person may, within the prescribed time from the date of the advertisement of an application, give notice in writing in the prescribed manner to the Registrar of opposition to the registration.

(3) The Registrar shall serve in the prescribed manner a copy of the notice on the applicant, and within the prescribed time the applicant shall send to the Registrar, in the prescribed manner, a counter-statement of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(4) If the applicant sends such counter-statement, the Registrar shall serve in the prescribed manner a copy thereof on the persons giving notice of opposition, and shall, after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions or limitations, if any, registration is to be permitted.

(5) If a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such notice, or an appellant against any order of the Registrar under section 14 or this section, neither resides nor carries on business in British India, the tribunal may require him to give security for costs of the proceedings before it, and in default of such security being duly given may treat the opposition or application or appeal, as the case may be, as abandoned.

16. Registration.

(1) When an application for registration of a trade mark has been accepted and either has not been opposed and the time for notice of opposition has expired, or having been opposed, has been decided in favour of the applicant, the Registrar shall, unless the application has been accepted in error, or unless the Central Government otherwise directs, register the said trade mark, and the trade mark, when register-

ed, shall be registered as of the date of the making of the said application, and that date shall, subject to any directions made under section 83 applicable to such trade mark, be deemed for the purposes of this Act to be the date of registration.

(2) On the registration of a trade mark the Registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof sealed with the seal of the Patent Office.

(3) Where registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

17. Jointly owned trade marks.

(1) Save as provided in sub-section (2), nothing in this Act shall authorise the registration of two or more persons who use a trade mark independently, or propose so to use it, as joint proprietors thereof.

(2) Where the relations between two or more persons interested in a trade mark are such that no one of them is entitled as between himself and the other or others of them to use it except—

(a) on behalf of both or all of them, or

(b) in relation to an article with which both or all of them are connected in the course of trade,

those persons may be registered as joint proprietors of the trade mark, and this Act shall have effect in relation to any rights to the use of the trade mark vested in those persons as if those rights had been vested in a single person.

18. Duration and renewal of registration.

(1) The registration of a trade mark shall be for a period of seven years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The Registrar shall, on application made by the registered proprietor of a trade mark in the prescribed manner and within the prescribed period, renew the registration of the trade mark for a period of fifteen years from the date of expiration of the original registration or of the last renewal of registration, as the case may be (which date is in this section referred to as "the expiration of the last registration").

(3) At the prescribed time before the expiration of the last registration of a trade

mark, the Registrar shall send notice in the prescribed manner to the registered proprietor of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and if at the expiration of the time prescribed in that behalf those conditions have not been duly complied with the Registrar may remove the trade mark from the register, subject to such conditions (if any) as to its restoration to the register as may be prescribed.

19. Effect of removal from register for failure to pay fee for renewal.

Where a trade mark has been removed from the register for failure to pay the fee for renewal, it shall nevertheless, for the purpose of any application for the registration of another trade mark during one year next after the date of the removal, be deemed to be a trade mark already on the register, unless the tribunal is satisfied either—

- (a) that there has been no *bona fide* trade use of the trade mark which has been removed during the two years immediately preceding its removal; or
- (b) that no deception or confusion would be likely to arise from the use of the trade mark which is the subject of the application for registration by reason of any previous use of the trade mark which has been removed.

CHAPTER IV.

EFFECT OF REGISTRATION.

20. No action for infringement of unregistered trade mark.

(1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark unless such trade mark has been continuously in use since before the 25th day of February, 1937, by such person or by a predecessor in title of his and unless an application for its registration, made within five years from the commencement of this Act, has been refused; and the Registrar shall, on application in the prescribed manner, grant a certificate that such application has been refused.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

21. Right conferred by registration.

Subject to the provisions of sections 22, 25 and 26, the registration of a person in the register as proprietor of a trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

- (a) as being use as a trade mark; or
- (b) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

22. No infringement in certain circumstances.

(1) The right to the use of a trade mark given under section 21 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market, or in any other circumstances, to which, having regard to any such limitations, the registration does not extend.

(2) The said right to the use of a trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

- (a) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark; or
- (b) in relation to goods adapted to form part of, or to be accessory to, other goods in relation to which the trade mark has been used without in-

fringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact a connection in the course of trade between any person and the goods.

(3) The use of a registered trade mark, being one of two or more registered trade marks which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration as aforesaid, shall not be deemed to be an infringement of the right so given to the use of any other of those trade marks.

23. Registration to be prima facie evidence of validity.

In all legal proceedings relating to a registered trade mark, the fact that a person is registered as proprietor thereof shall be *prima facie* evidence of the validity of the original registration of the trade mark and of all subsequent assignments and transmissions thereof.

24. Registration to be conclusive as to validity after seven years.

In all legal proceedings relating to a registered trade mark, the original registration of the trade mark shall after the expiration of seven years from the date of such original registration be taken to be valid in all respects unless such registration was obtained by fraud, or unless the trade mark offends against the provisions of s. 8.

25. Saving for vested rights.

Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior—

(a) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his, or

(b) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his,

whichever is the earlier, or to object (on

such use being proved) to registration of that identical or nearly resembling trade mark in respect of those goods under sub-section (2) of section 10.

26. Saving for use of name, address, or description of goods.

No registration of a trade mark shall interfere with any *bona fide* use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods, not being a description that would be likely to be taken as importing any such reference as is mentioned in clause (b) of section 21 or in clause (b) of section 57.

27. Words used as name or description of an article or substance.

(1) The registration of a trade mark shall not be deemed to have become invalid by reason only of any use after the date of the registration of any words which the trade mark contains or of which it consists as the name or description of an article or substance:

Provided that, if it is proved either—

(a) that there is a well-known and established use of the said words as the name or description of the article or substance by a person or persons carrying on a trade therein, not being use in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark or (in the case of a certification trade mark) goods certified by the proprietor; or

(b) that the article or substance has been manufactured under a patent in force at or granted after the commencement of this section, that a period of two years or more after the cesser of the patent has elapsed, and that the said words are the only practicable name or description of the article or substance,—

the provisions of sub-section (2) shall apply.

(2) Where the facts mentioned in clause (a) or clause (b) of the proviso to sub-section (1) are proved with respect to any words then—

(a) for the purposes of any proceedings under section 46—

(i) if the trade mark consists solely of such words, the registration

of the trade mark, so far as regards registration in respect of the article or substance in question or of any goods of the same description, shall be deemed to be an entry wrongly remaining on the register;

- (ii) if the trade mark contains such words and other matter, the tribunal, in deciding whether the trade mark shall remain on the register, so far as regards registration in respect of the article or substance in question and of any goods of the same description, may, in case of a decision in favour of its remaining on the register, require as a condition thereof that the proprietor shall disclaim any right to the exclusive use in relation to that article or substance and any goods of the same description, of such words, provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made;

(b) for the purposes of any other legal proceedings relating to the trade mark,—

- (i) if the trade mark consists solely of such words, all rights of the proprietor under this Act or any other law to the exclusive use of the trade mark in relation to the article or substance in question or to any goods of the same description, or

- (ii) if the trade mark contains such words and other matter, all such rights of the proprietor to the exclusive use of such words, in such relation as aforesaid,

shall be deemed to have ceased on the date at which the use mentioned in clause (a) of the proviso to sub-section (1) first be-

came well-known and established, or at the expiration of the period of two years mentioned in clause (b) of the said proviso.

CHAPTER V.

ASSIGNMENT AND TRANSMISSION.

28. Power of registered proprietor to assign and give receipts.

The person for the time being entered in the register as proprietor of a trade mark shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power to assign the trade mark, and to give effectual receipts for any consideration for such assignment.

29. Assignability of registered trade marks.

Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assignable and transmissible whether in connection with the goodwill of a business or not, and in respect either of all of the goods in respect of which it is registered or of some only of those goods.

30. Assignability of unregistered trade marks.

An unregistered trade mark shall be assignable and transmissible, whether in connection with the goodwill of a business or not:

Provided that except in connection with the goodwill of a business, assignment or transmission shall be permissible only if—

- (a) at the time of assignment or transmission of the unregistered trade mark it is used in the same business as a registered trade mark and
- (b) the registered trade mark is assigned or transmitted at the same time and to the same person as the unregistered trade mark, and
- (c) the unregistered trade mark relates to goods in respect of which the registered trade mark is assigned or transmitted.

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31. Restrictions on assignment or transmission where multiple exclusive rights would be created.

(1) Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in exercise of those rights would be likely to deceive or cause confusion:

Provided that an assignment or transmission shall not be deemed to be invalid under this sub-section if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, having regard to limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within British India (otherwise than for export therefrom), or in relation to goods to be exported to the same market outside British India.

(2) The proprietor of a registered trade mark who proposes to assign it may submit to the Registrar in the prescribed manner a statement of case setting out the circumstances and the Registrar may issue to him a certificate stating whether, having regard to the similarity of the goods and of the trade marks referred to in the case, the proposed assignment would or would not be invalid under sub-section (1), and a certificate so issued shall, subject to appeal and unless it is shown that the certificate was obtained by fraud or misre-

presentation, be conclusive as to the validity or invalidity under sub-section (1) of the assignment in so far as such validity or invalidity depends upon the facts set out in the case, but, as regards a certificate in favour of validity, only if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the certificate is issued.

32. Restrictions on assignment or transmission when exclusive rights would be created in different parts of British India.

Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, an exclusive right in one of the persons concerned to the use of the trade mark limited to use in relation to goods to be sold, or otherwise traded in, in any place in British India and an exclusive right in another of these persons to the use of a trade mark nearly resembling the first-mentioned trade mark or of an identical trade mark in relation to the same goods or description of goods limited to use in relation to goods to be sold, or otherwise traded in, in any other place in British India:

Provided that in any such case, on application in the prescribed manner by the proprietor of a trade mark who proposes to assign it, or by a person who claims that a registered trade mark has been transmitted to him or to a predecessor in title of his since the commencement of this Act, the Registrar, if he is satisfied that in all the circumstances the use of the trade mark in exercise of the said rights would not be contrary to the public interest, may approve the assignment or transmission, and an assignment or transmission so approved

shall not, unless it is shown that the approval was obtained by fraud or misrepresentation, be deemed to be invalid under this section or s. 31 if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the approval is given or, in the case of a transmission, was made before that date.

33. Conditions for assignment otherwise than in connection with the goodwill of a business.

Where an assignment in respect of any goods of a trade mark which is at the time of the assignment used in a business in those goods, is made after the commencement of this Act otherwise than in connection with the goodwill of that business the assignment shall not take effect unless the assignee, not later than the expiration of six months from the date on which the assignment is made or within such extended period, if any, as the Registrar may allow, applies to the Registrar for directions with respect to the advertisement of the assignment, and advertises it in such form and manner and within such period as the Registrar may direct.

34. Conditions for assignment and transmission of certification trade marks and associated trade marks.

(1) A certification trade mark shall not be assignable or transmissible otherwise than with the consent of the Central Government, for which application shall be made in writing in the prescribed manner through the Registrar.

(2) Associated trade marks shall be assignable and transmissible only as a whole and not separately.

35. Registration of assignments and transmissions.

(1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register.

(2) Except for the purposes of an appeal against a decision of the Registrar under sub-section (1) or of an application under section 46, a document or instrument in respect of which no entry has been made

in the register in accordance with sub-section (1) shall not be admitted in evidence before any tribunal in proof of the title to a trade mark unless the tribunal otherwise directs.

CHAPTER VI.

USE OF TRADE MARKS AND REGISTERED USERS.

36. Proposed use of trade mark by company to be formed.

(1) No application for the registration of a trade mark in respect of any goods shall be refused, nor shall permission for such registration be withheld, on the ground only that it appears that the applicant does not use or propose to use the trade mark, if the Registrar is satisfied that a company is about to be formed and registered under the Indian Companies Act, 1913, and that the applicant intends to assign the trade mark to that company with a view to the use thereof in relation to those goods by the company.

(2) The tribunal may, in a case to which sub-section (1) applies, require the applicant to give security for the costs of any proceedings relative to any opposition or appeal, and in default of such security being duly given may treat the application as abandoned.

(3) Where in a case to which sub-section (1) applies, a trade mark in respect of any goods is registered in the name of an applicant who relies on intention to assign to a company, then, unless within such period as may be prescribed, or within such further period not exceeding six months as the Registrar may, on application being made to him in the prescribed manner, allow, the company has been registered as the proprietor of the trade mark in respect of those goods, the registration shall cease to have effect in respect thereof at the expiration of that period, and the Registrar shall amend the register accordingly.

37. Removal from register and imposition of limitations on ground of non-use.

(1) Subject to the provisions of section 38, a registered trade mark may be taken off the register in respect of any of the goods in respect of which it is registered on application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, on the ground either—

(a) that the trade mark was registered without any *bona fide* intention on the part of the applicant for

registration that it should be used in relation to those goods by him or, in a case to which the provisions of section 36 apply, by the company concerned, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application; or

- (b) that up to a date one month before the date of the application, a continuous period of five years or longer elapsed during which the trade mark was registered and during which there was no *bona fide* use thereof in relation to those goods by any proprietor thereof for the time being:

Provided that, except where the applicant has been permitted under sub-section (2) of section 10 to register an identical or nearly resembling trade mark in respect of the goods in question or where the tribunal is of opinion that he might properly be permitted so to register such a trade mark, the tribunal may refuse an application made under clause (a) or clause (b) in relation to any goods, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, *bona fide* use of the trade mark by any proprietor thereof for the time being in relation to goods of the same description, being goods in respect of which the trade mark is registered.

(2) Where in relation to any goods in respect of which a trade mark is registered—

- (a) the circumstances referred to in clause (b) of sub-section (1) are shown to exist so far as regards non-use of the trade mark in relation to goods to be sold, or otherwise traded in a particular place in British India (otherwise than for export from British India), or in relation to goods to be exported to a particular market outside British India, and

- (b) a person has been permitted under sub-section (2) of section 10 to register an identical or nearly resembling trade mark in respect of those goods under a registration extending to use in relation to goods to be so sold, or otherwise traded in, or in relation to goods to be so exported, or the tribunal

is of opinion that he might properly be permitted so to register such a trade mark,

on application by that person in the prescribed manner to a High Court or to the Registrar, the tribunal may impose on the registration of the first mentioned trade mark such limitations as it thinks proper for securing that that registration shall cease to extend to such use.

(3) An applicant shall not be entitled to rely for the purpose of clause (b) of sub-section (1) or of sub-section (2) on any non-use of a trade mark which is shown to have been due to special circumstances in the trade and not to any intention to abandon or not to use the trade mark in relation to the goods to which the application relates.

38. *Defensive registration of well-known trade marks.*

(1) Where a trade mark consisting of any invented word has become so well-known as respects any goods in relation to which it is registered and has been used, that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first-mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods and notwithstanding anything in section 37, the trade mark may on application in the prescribed manner by such proprietor be registered in his name in respect of those other goods as a defensive trade mark and, while so registered, shall not be liable to be taken off the register in respect of those goods under the said section.

(2) The registered proprietor of a trade mark may apply for the registration thereof in respect of any goods as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods otherwise than as a defensive trade mark, or may apply for the registration thereof in respect of any goods otherwise than as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods as a defensive trade mark, in lieu in each case of the existing registration.

(3) A trade mark registered as a defensive trade mark and that trade mark as otherwise registered in the name of the same proprietor shall, notwithstanding that the

respective registrations are in respect of different goods, be deemed to be, and shall be registered as, associated trade marks.

(4) On application in the prescribed manner by any person aggrieved to a High Court, or to the Registrar, the registration of a trade mark as a defensive trade mark may be cancelled on the ground that the requirements of sub-section (1) are no longer satisfied in respect of any goods in relation to which the trade mark is registered in the name of the same proprietor otherwise than as a defensive trade mark, or may be cancelled as respects any goods in relation to which it is registered as a defensive trade mark on the ground that there is no longer any likelihood that the use of the trade mark in relation to those goods would be taken as giving the indication mentioned in sub-section (1).

(5) The Registrar may at any time cancel the registration as a defensive trade mark of a trade mark of which there is no longer any registration in the name of the same proprietor otherwise than as a defensive trade mark.

(6) Except as otherwise expressly provided in this section, the provisions of this Act shall apply in respect of the registration of the trade marks as defensive trade marks and of trade marks so registered as they apply in other cases.

39. *Registered users.*

(1) A person other than the proprietor of a trade mark may be registered as a registered user thereof in respect of all or any of the goods in respect of which it is registered (otherwise than as a defensive trade mark) and either with or without conditions or restrictions.

(2) The permitted use of a trade mark shall be deemed to be used by the proprietor thereof, and shall be deemed not to be used by a person other than the proprietor, for any purpose for which such use is material under this Act or any other law.

40. *Power of registered user to take proceedings against infringement.*

(1) Subject to any agreement subsisting between the parties, a registered user of a trade mark shall be entitled to call upon the proprietor thereof to take proceedings to prevent infringement thereof, and if the proprietor refuses or neglects to do so within three months after being so called upon, the registered user may institute proceedings for infringement in his own name as if he were the proprietor, making the proprietor a defendant.

(2) Notwithstanding anything contained in any other law, a proprietor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

41. *Application for registration as registered user.*

(1) Where it is proposed that a person should be registered as a registered user of a trade mark, the proprietor and the proposed registered user shall make application in writing to the Registrar in the prescribed manner accompanied by an affidavit made by the proprietor, or by some person authorised to the satisfaction of the Registrar to act on his behalf,—

- (a) giving particulars of the relationship, existing or proposed, between the proprietor and the proposed registered user, including particulars showing the degree of control by the proprietor over the permitted use which their relationship will confer and whether it is a term of their relationship that the proposed registered user shall be the sole registered user or that there shall be any other restriction as to persons for whose registration as registered users application may be made;
- (b) stating the goods in respect of which registration is proposed;
- (c) stating any conditions or restrictions proposed with respect to the characteristics of the goods, to the mode or place of permitted use, or to any other matter;
- (d) stating whether the permitted use is to be for a period or without limit of period, and, if for a period, the duration thereof;

and by such further documents, information or evidence as may be required by the Registrar or as may be prescribed.

(2) When the requirements of sub-section (1) have been complied with, if the Registrar is satisfied that in all the circumstances the use of the trade mark in respect of the proposed goods or any of them by the proposed registered user subject to any conditions or restrictions which the Registrar may think proper, would not be contrary to the public interest, the Registrar may register, subject as aforesaid, the proposed registered user as a registered user in respect of the goods as to which he is so satisfied.

(3) The Registrar shall refuse an application under this section if it appears to

him that the grant thereof would tend to facilitate trafficking in a trade mark.

(4) The Registrar shall, if so requested by an applicant, take steps for securing that information given for the purposes of an application under this section (other than matter entered in the register) is not disclosed to rivals in trade.

(5) The Registrar shall issue notice in the prescribed manner—

- (a) of the registration of a person as a registered user, to any other registered user of the trade mark ;
- (b) of an application under section 42, to the registered proprietor, and each registered user, (not being the applicant) of the trade mark.

42. Power to Registrar to vary or cancel registration as registered user.

Without prejudice to the provisions of section 46, the registration of a person as a registered user—

- (a) may be varied by the Registrar as regards the goods in respect of which, or any conditions or restrictions subject to which, it has effect, on the application in writing in the prescribed manner of the registered proprietor of the trade mark ;
- (b) may be cancelled by the Registrar on the application in writing in the prescribed manner of the registered proprietor or of the registered user or of any other registered user of the trade mark ;
- (c) may be cancelled by the Registrar on the application in writing in the prescribed manner of any person on any of the following grounds, namely :—
 - (i) that the registered user has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause or to be likely to cause, deception or confusion ;
 - (ii) that the proprietor or the registered user misrepresented, or failed to disclose, some fact material to the application for the registration, or that the circumstances have materially changed since the date of the registration ;
 - (iii) that the registration ought not to have been effected having regard to rights vested in the applicant by virtue of a contract in the

performance of which he is interested ;

- (d) may be cancelled by the Registrar in respect of any goods in relation to which the trade mark is no longer registered.

43. Registered user not to have right of assignment or transmission.

Nothing in this Act shall confer on a registered user of a trade mark any assignable or transmissible right to the use thereof.

44. Use of one of associated or substantially identical trade marks equivalent to use of another.

(1) Where under the provisions of this Act use of a registered trade mark is required to be proved for any purpose, the tribunal may, if and so far as it shall think right, accept use of a registered associated trade mark, or of the trade mark with additions or alterations not substantially affecting its identity, as an equivalent for the use required to be proved.

(2) The use of the whole of a registered trade mark shall for the purposes of this Act be deemed to be also a use of any trade mark being a part thereof and registered in accordance with sub-section (1) of section 11 in the name of the same proprietor.

45. Use of trade mark for export trade, and use when form of trade connection changes.

(1) The application in British India of a trade mark to goods to be exported from British India, and any other act done in British India in relation to goods to be so exported which, if done in relation to goods to be sold or otherwise traded in within British India would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods for any purpose for which such use is material under this Act or any other law.

(2) The use of a registered trade mark in relation to goods between which and the person using the mark any form of connection in the course of trade subsists shall not be deemed to be likely to cause deception or confusion on the ground only that the mark has been or is used in relation to goods between which and the person using the mark or any predecessor in his business different form of connection in the course of trade subsisted or subsists.

CHAPTER VII.

RECTIFICATION AND CORRECTION OF THE REGISTER.

46. Power to cancel or vary registration and to rectify the register.

(1) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention of, or failure to observe a condition entered on the register in relation thereto.

(2) Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the tribunal may make such order for making, expunging or varying the entry as it may think fit.

(3) The tribunal may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of the register.

(4) A High Court or the Registrar, of its or his own motion, may, after giving notice in the prescribed manner to the parties concerned and after giving them an opportunity of being heard, make any order referred to in sub-section (1) or sub-section (2).

(5) Any order of the Court rectifying the register shall direct that notice of the rectification shall be served upon the Registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly.

47. Correction of register.

(1) The Registrar may, on application made in the prescribed manner by the registered proprietor,—

- (a) correct any error in the name, address or description of the registered proprietor of a trade mark;
- (b) enter any change in the name, address or description of the person who is registered as proprietor of a trade mark;
- (c) cancel the entry of a trade mark on the register;
- (d) strike out any goods or classes of goods from those in respect of which a trade mark is registered;
- (e) enter a disclaimer or memorandum

relating to a trade mark which does not in any way extend the rights given by the existing registration of the trade mark.

(2) The Registrar may, on application made in the prescribed manner by a registered user of a trade mark, correct any error, or enter any change, in the name, address or description of the registered user.

48. Alteration of registered trade mark.

(1) The registered proprietor of a trade mark may apply in the prescribed manner to the Registrar for leave to add to or alter the trade mark in any manner not substantially affecting the identity thereof, and the Registrar may refuse leave or may grant it on such terms and subject to such limitations as he may think fit.

(2) The Registrar may cause an application under this section to be advertised in the prescribed manner in any case where it appears to him that it is expedient so to do, and where he does so, if within the prescribed time from the date of the advertisement any person gives notice to the Registrar in the prescribed manner of opposition to the application, the Registrar shall, after hearing the parties if so required, decide the matter.

(3) Where leave is granted under this section, the trade mark as altered shall be advertised in the prescribed manner, unless the application has already been advertised under sub-section (2).

49. Adaptation of entries in register to amended or substituted classification of goods.

(1) The Registrar shall not, in exercise of any power conferred on him under clause (a) of sub-section (2) of section 84, make any amendment of the register which would have the effect of adding any goods or classes of goods to those in respect of which a trade mark is registered (whether in one or more classes) immediately before the amendment is to be made, or of antedating the registration of a trade mark in respect of any goods;

Provided that this sub-section shall not apply when the Registrar is satisfied that compliance therewith would involve undue complexity and that the addition or antedating, as the case may be, would not affect any substantial quantity of goods and would not substantially prejudice the rights of any person.

(2) A proposal so to amend the register shall be notified to the registered proprietor of the trade mark affected and

advertised in the prescribed manner, and may be opposed before the Registrar by any person aggrieved on the ground that the proposed amendment contravenes the provisions of sub-section (1).

CHAPTER VIII.

CERTIFICATION TRADE MARKS.

50. *Provisions of this Act applicable to certification trade marks.*

Subject to the provisions of this Chapter, the other provisions of this Act except sections 6, 21, 22, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42 and 43 and sub-section (2) of s. 45 shall apply to certification trade marks as they apply to trade marks.

51. *Certification trade mark not to be registered in name of person trading in goods certified thereby.*

A mark shall not be registrable as a certification trade mark in the name of a person who carries on a trade in goods of the kind certified.

52. *Determination whether a mark is a certification trade mark.*

In determining whether a mark is adapted to distinguish in accordance with the provisions of clause (b) of sub-section (1) of section 2, the tribunal may have regard to the extent to which—

- (a) the mark is inherently so adapted to distinguish in relation to the goods in question; and
- (b) by reason of the use of the mark or of any other circumstances, the mark is in fact so adapted to distinguish in relation to the goods in question.

53. *Application for registration.*

(1) An application for the registration of a mark as a certification trade mark shall be made to the Registrar in writing in the prescribed manner by the person proposed to be registered as the proprietor thereof, and accompanied by a draft of the regulations to be deposited under section 56.

(2) The provisions of section 14 shall have effect in relation to an application under this section as they have effect in relation to an application under the said section, except that for references therein to acceptance of an application there shall be substituted references to authorisation to proceed with the application.

(3) In dealing under the said provisions with an application under this section, the tribunal shall have regard to the like considerations, so far as relevant, as if the

application were an application under section 14 and to any other considerations (not being matters within the competence of the Central Government under section 54) relevant to applications under this section, including the desirability of securing that a certification trade mark shall comprise some indication that it is a certification trade mark.

54. *Consideration of application for registration by Central Government.*

When authorisation to proceed with an application under s. 53 has been given, the Registrar shall forward the application to the Central Government who shall consider the application with regard to the following matters, namely:—

- (a) whether the applicant is competent to certify the goods in respect of which the mark is to be registered;
- (b) whether the draft of the regulations to be deposited under section 56 is satisfactory;
- (c) whether in all the circumstances the registration applied for would be to the public advantage;

and may either—

- (i) direct that the application shall not be accepted; or
- (ii) direct the Registrar to accept the application and approve the said draft of the regulations either without modification and unconditionally or subject to any conditions or limitations, or to any amendments or modification of the application or of the regulations, which it thinks requisite having regard to any of the said matters;

but, except in the case of a direction for acceptance and approval without modification and unconditionally, the Central Government shall not decide the matter without giving to the applicant an opportunity of being heard:

Provided that the Central Government may, at the request of the applicant made with the concurrence of the Registrar, consider the application with regard to any of the said matters before authorisation to proceed with the application has been given, so however that the Central Government shall be at liberty to reconsider any matter on which it has given a decision under this proviso if any amendment or modification is thereafter made in the application or in the draft of the regulations.

55. *Opposite on to registration.*

(1) When an application has been ac-

cepted, the Registrar shall, as soon as may be thereafter, cause the application as accepted to be advertised in the prescribed manner, and the provisions of section 15 shall have effect in relation to the registration of the mark as if the application had been an application under section 14:

Provided that, in deciding under the said provisions the tribunal shall have regard only to the considerations referred to in sub-section (3) of section 53, and a decision under the said provisions in favour of the applicant shall be conditional on the determination in his favour by the Central Government under sub-section (2) of this section of any opposition relating to any of the matters referred to in section 54.

(2) When notice of opposition is given relating to any of the matters referred to in section 54, the Central Government shall, after hearing the parties, if so required, and considering any evidence, decide whether, and subject to what conditions or limitations, or amendments or modifications, if any, of the application or of the regulations to be deposited under section 56, registration is, having regard to those matters, to be permitted.

56. Deposit of regulations governing the use of a certification trade mark.

(1) There shall be deposited at the Patent Office in respect of every mark registered as a certification trade mark regulations approved by the Central Government for governing the use thereof, which shall include provisions as to the cases in which the proprietor is to certify goods and to authorise the use of the certification trade mark, and may contain any other provisions which the Central Government may by general or special order require or permit to be inserted therein (including provisions conferring a right of appeal to the Registrar against any refusal of the proprietor to certify goods or to authorise the use of the certification trade mark in accordance with the regulations); and regulations so deposited shall be open to inspection in like manner as the register.

(2) The regulations so deposited may on the application of the registered proprietor be altered by the Registrar with the consent of the Central Government.

(3) The Central Government may cause such application to be advertised in any case where it appears to it expedient so to do, and where it does so, if within the time specified in the advertisement any person gives notice of opposition to the application, the Central Government shall not decide the matter without giving the parties an opportunity of being heard.

57. Right conferred by registration.

Subject to the provisions of sections 25, 26 and 58, the registration of a person as proprietor of a certification trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the certification trade mark in relation to those goods, and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the mark or a person authorised by him in that behalf under the regulations deposited under section 56, using it in accordance therewith, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

- (a) as being use as a certification trade mark; or
- (b) to import a reference to some person having the right either as proprietor, or by his authorisation under the said regulations, to use the mark, or to goods certified by the proprietor.

58. No infringement in certain circumstances.

(1) The right to the use of a certification trade mark given under s. 57 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in in any place, in relation to goods to be exported to any market, or in any other circumstances, to which having regard to any such limitations, the registration does not extend.

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(2) The said right to the use of a certification trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(a) in relation to goods certified by the proprietor of the mark if, as to those goods or a bulk of which they form part, the proprietor or another in accordance with his authorisation under the relevant regulations has applied the mark and has not subsequently removed or obliterated it, or the proprietor has at any time expressly or impliedly consented to the use of the mark, or

(b) in relation to goods adapted to form part of, or to be accessory to, other goods in relation to which the mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact that the goods are certified by the proprietor :

Provided that clause (a) shall not apply to the case of use consisting of the application of any such mark as aforesaid to any goods, notwithstanding that they are such goods as are mentioned in that clause if such application is contrary to the said regulations.

(3) Where a certification trade mark is one of two or more registered certification trade marks which are identical or nearly resemble each other, the use of any of those marks in exercise of the right to the use of that mark given by registration, shall not be deemed to be an infringement of the right so given to the use of any other of those marks.

59. Cancellation or varying of registration.

(1) The Central Government may, on the application in the prescribed manner of any person aggrieved or on the recommendation of the Registrar, and after giving the proprietor an opportunity of opposing the application or recommendation, make such order as it thinks fit for expunging or varying any entry in the register relating to a certification trade mark, or for varying the deposited regulations, on any of the following grounds, namely :

(a) that the proprietor is no longer competent, in the case of any of the goods in respect of which the mark is registered, to certify those goods;

(b) that the proprietor has failed to observe any provision of the deposited regulations to be observed on his part ;

(c) that it is no longer to the public advantage that the mark should be registered ;

(d) that it is requisite for the public advantage that if the mark remains registered, the regulations should be varied ;

and neither a High Court nor the Registrar shall have any jurisdiction to make an order under section 46 on any of those grounds.

(2) The Registrar shall rectify the register and the deposited regulations in such manner as may be requisite for giving effect to an order made under sub-section (1).

60. Costs not to be awarded in certain cases.

The Registrar shall have no power to award costs to or against any party on an appeal to him against a refusal of the proprietor of a certification trade mark to certify goods or to authorise the use of the mark.

61. *Decisions of Central Government to be final.*

Save as otherwise expressly provided in this Chapter, every decision of the Central Government under this Chapter shall be final.

CHAPTER IX.

SPECIAL PROVISIONS FOR TEXTILE GOODS.

62. *Textile goods.*

The Central Government shall prescribe classes of goods (in this Chapter referred to as textile goods) to the trade marks used in relation to which the provisions of this Chapter shall apply; and subject to the said provisions, the other provisions of this Act shall apply to such trade marks as they apply to trade marks used in relation to other classes of goods.

63. *Branch of Trade Marks Registry at Bombay and Textile Marks Record.*

(1) There shall be established at Bombay, for the purpose of facilitating the registration of trade marks in respect of textile goods, a branch of the Trade Marks Registry. The officer in charge of the branch shall be called the Deputy Registrar.

(2) There shall be kept at the said branch for the purposes of this Act a record called the Textile Marks Record wherein shall be entered copies of all entries in the register relating to trade marks registered in respect of textile goods and the said record shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

(3) Trade marks in respect of textile goods of which registration has been refused shall be entered in a list called the Refused Textile Marks List, a copy of which shall be kept at the said branch, and the list and the said copy shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

64. *Restrictions on registration of piece goods.*

In respect of textile goods being piece goods—

- (a) no mark consisting of a line heading alone shall be registrable as a trade mark;
- (b) a line heading shall not be deemed to be adapted to distinguish;
- (c) the registration of a trade mark shall not give any exclusive right to the use of a line heading;

(d) the registration of letters or numerals, or any combination thereof, shall be subject to such conditions and restrictions as may be prescribed.

65. *Registration.*

(1) Applications for the registration of a trade mark in respect of textile goods may be made either to the Registrar or the Deputy Registrar at the option of the applicant.

(2) In respect of all trade marks, applications for registration of which are duly made to the Deputy Registrar under this chapter, the Deputy Registrar shall exercise all the powers of the Registrar under this Act but shall be subject to the general superintendence of the Registrar.

66. *Advisory Committees.*

(1) The Central Government may in the prescribed manner constitute one or more Advisory Committees of persons versed in the usages of the textile trade for the purpose of this section.

(2) The Registrar or the Deputy Registrar shall consult any such Committee with respect to any circumstances peculiar to the textile trade arising on an application to register a trade mark in respect of textile goods.

(3) The place of meeting and the conduct of business of such Committees shall be determined by rules made under this Act.

CHAPTER X.

OFFENCES AND RESTRAINT OF USE OF ROYAL ARMS AND STATE EMBLEMS.

67. *Penalty for falsification of entries in register.*

If any person makes, or causes to be made, a false entry in the register, or a writing falsely purporting to be a copy of an entry in the register, or produces or tenders, or causes to be produced or tendered, in evidence any such writing knowing the entry or writing to be false, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

68. *Penalty for falsely representing a trade mark as registered.*

(1) From such date, not being earlier than one year from the commencement of this Act as the Central Government may, by notification in the official Gazette, appoint in this behalf, no person shall make any representation—

- (a) with respect to a mark not being a

registered trade mark, to the effect that it is a registered trade mark; or

(b) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is separately registered as a trade mark; or

(c) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not in fact registered; or

(d) to the effect that the registration of a trade mark give an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered on the register, the registration does not in fact give that right.

(2) If any person contravenes any of the provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(3) For the purposes of this section, the use in British India in relation to a trade mark of the word "registered", or of any other expression referring whether expressly or impliedly to registration, shall be deemed to import a reference to registration in the register, except—

(a) where that word or other expression is used in direct association with other words delineated in characters at least as large as those in which that word or other expression is delineated and indicating that the reference is to registration as a trade mark under the law of a country outside British India, being a country under the law of which the registration referred to is in fact in force; or

(b) where that other expression is of itself such as to indicate that the reference is to such registration as is mentioned in clause (a); or

(c) where that word is used in relation to a mark registered as a trade mark under the law of a country outside British India and in relation solely to goods to be exported to that country.

69. *Restraint of use of Royal Arms and State emblems.*

If a person, without due authority, uses in connection with any trade, business cal-

ling or profession—

(a) the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or

(b) any device, emblem or title in such manner as to be calculated to lead to the belief that he is employed by, or supplies goods to, or is connected with, His Majesty's Government or the Central Government or any Provincial Government or any department of any such Government,

he may, at the suit of any person who is authorised to use such Arms or such device, emblem or title or of the Registrar, be restrained by injunction from continuing so to use the same.

CHAPTER XI.

MISCELLANEOUS.

70. *Procedure before the Registrar.*

In all proceedings under this Act before the Registrar—

(a) the Registrar shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses;

(b) evidence shall be given by affidavit, provided that the Registrar may, if he thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit;

(c) the Registrar shall not exercise any power vested in him by this Act or the rules made thereunder adversely to any party duly appearing before him without (if required in writing within the prescribed time so to do) giving such party an opportunity of being heard;

(d) the Registrar may, save as otherwise expressly provided in this Act, and subject to any rules made in this behalf under section 84, make such orders as to costs as he considers reasonable, and any such order shall be executable as a decree of a Civil Court.

71. *Procedure before Central Government.*

In all proceedings under this Act before the Central Government, evidence shall be given by affidavit, provided that the Central Government may, if it thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit, and shall for that purpose have all the powers of a Civil Court referred to in clause (a) of section 70.

72. *Procedure in certain cases of option to apply to a High Court or the Registrar.*

Where under this Act an applicant has the option of making an application either to a High Court or to the Registrar,—

- (a) if any suit or other proceedings concerning the trade mark in question is pending before a High Court or a District Court, the application shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated;
- (b) if in any other case the application is made to the Registrar, the Registrar may, if he thinks fit, refer the application at any stage of the proceedings to a High Court.

73. *Suits for infringement to be instituted before District Court.*

No suit for the infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

74. *Appearance of Registrar in proceedings involving rectification of register.*

(1) In any suit or other legal proceeding in which the relief sought includes alternation or rectification of the register, the Registrar shall have the right to appear and be heard, and shall appear if so directed by the tribunal.

(2) Unless the tribunal otherwise directs, the Registrar may, in lieu of appearing, submit a statement in writing signed by him, giving such particulars as he thinks proper of the proceedings before him relating to the matter in issue, or of the grounds of any decision given by him affecting it, or of the practice of the Patent Office in like cases, or of other matters relevant to the issues and within his knowledge as Registrar, and such statement shall be evidence in the suit or other proceeding.

(3) The costs of the Registrar shall be in the discretion of the tribunal, but the

Registrar shall not be ordered to pay the costs of any of the parties.

75. *Evidence of entries in register and things done by Registrar.*

(1) A printed or written copy of any entry in the register, purporting to be certified by the Registrar and sealed with the seal of the Patent Office, shall be admitted in evidence in all Courts in British India and in all proceedings without further proof of production of the original.

(2) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that he is authorised by this Act or the rules to make or do shall be *prima facie* evidence of the entry having been made, and of the contents thereof, or of the matter or thing having been done or not done.

76. *Appeals.*

(1) Save as otherwise expressly provided in this Act, an appeal shall lie, within the period prescribed by the Central Government, from any decision of the Registrar or Deputy Registrar under this Act or the rules made thereunder to the High Court having jurisdiction:

Provided that if any suit or other proceeding concerning the trade mark in question is pending before a High Court or a District Court, the appeal shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated.

(2) In an appeal by an applicant for registration against a decision of the Registrar under section 13 or section 14 or section 15, it shall not be open, save with the express permission of the Court to the Registrar or any party opposing the appeal to advance grounds other than those recorded in the said decision or advanced by the party in the proceedings before the Registrar, as the case may be; and where any such additional grounds are advanced, the applicant for registration may, on giving notice in the prescribed manner, withdraw his application without being liable to pay the costs of the Registrar or the parties opposing his application.

(3) Subject to the provisions of this Act and of rules made thereunder, the provisions of the Code of Civil Procedure, 1908, shall apply to appeals before a High Court under this Act.

77. *Power to High Courts to make rules.*

A High Court may make rules consistent with this Act as to the conduct and pro-

cedure of all proceedings under this Act before it.

78. Certificate of validity.

If in any legal proceeding in which the validity of the registration of a trade mark comes into question, a decision is given in favour of the proprietor of the trade mark, the tribunal may grant a certificate to that effect, and if such a certificate is granted, then in any subsequent legal proceeding in which the said validity comes into question, the said proprietor on obtaining a final order or judgment in his favour shall, unless the said final order or judgment for sufficient reason directs otherwise, be entitled to his full costs, charges and expenses as between legal practitioner and client.

79. Trade usage, etc., to be taken into consideration.

In any suit or other proceeding relating to a trade mark, the tribunal shall admit evidence of the usages of the trade concerned and of any relevant trade mark or get up legitimately used by other persons.

80. Agents.

Where by or under this Act any act, other than the making of an affidavit, is required to be done by any person, the act may, subject to prescribed conditions or in special cases with the consent of the Central Government, be done, in lieu of by that person himself, by a duly authorised agent, being either a legal practitioner or a person registered in the prescribed manner as a trade marks agent.

81. Fees.

There shall be paid in respect of applications and registration and other matters under this Act such fees as may be prescribed by the Central Government.

82. Crown to be bound.

The provisions of this Act shall be binding on the Crown.

83. Power to make reciprocal arrangements with other Governments.

If at any time after the expiry of six months from the commencement of this section it is made to appear to the Central Government that any Government outside British India has made satisfactory provision for the protection within its territories of trade marks in respect of which an application for registration has been made in British India, the Central Government may, by notification in the official Gazette, make provision with regard to trade marks in respect of which an application for registration has been made within the territories of that Government to

enable any person who has applied within such territories for registration of a trade mark or his legal representative or assignee to obtain registration of the trade mark in British India under this Act on his making an application for registration in British India within such period as may be fixed in this behalf by the notification as if an application for registration under this Act had been made in respect of that trade mark at the date at which the application for registration was made within the territories of that Government.

84. Power of Central Government to make rules.

(1) The Central Government may, subject to the condition of previous publication by notification in the official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

- (a) prescribe the classification of goods for the purpose of the registration of trade marks, and empower the Registrar to amend the register so far as may be necessary for the purpose of adapting the entries therein to any amended or substituted classification which may be prescribed ;
- (b) require the making of duplicates of trade marks and other documents connected therewith ;
- (c) provide for securing and regulating the publication, sale or distribution of copies of trade marks and other documents connected therewith ;
- (d) prescribe additional matters to be entered in the register ;
- (e) prescribe the conditions and restrictions subject to which the register, the Textile Marks Record and the Refused Textile Marks List may be inspected ;
- (f) prescribe the form of certificates of registration ;
- (g) prescribe the conditions under which a trade mark removed from the register may be restored under subsection (3) of section 18 ;
- (h) prescribe the further documents, information or evidence to accompany an application under subsection (1) of section 41 ;
- (i) prescribe classes of goods as textile goods for the purposes of Chapter IX ;
- (j) provide for the constitution of Advisory

Committees referred to in section 66, and prescribe the places of meeting, and conduct of business at meetings, of such Committees ;

- (k) regulate the awarding of costs by the Registrar under section 70 ;
- (l) prescribe the conditions subject to which an agent referred to in section 80 may act ;
- (m) prescribe the fees to be paid under this Act ;
- (n) provide for the establishment of branches of the Trade Marks Registry when expedient for facilitating the working of this Act, and authorise the preparation of copies of the register to be kept at such branch offices ;
- (o) prescribe the manner in which, in proceedings under this Act before the Central Government or the Registrar, applications shall be made, notices given and matters advertised ;
- (p) prescribe times or periods required by this Act to be prescribed ;
- (q) provide, generally, for regulating the business of the Trade Marks Registry and of branches established under clause (n) or under section 63, and for regulating all things by this Act placed under the direction or control of the Central Government or the Registrar.

85. Power to Central Government to make provision for applications for registration before the coming into force of the remaining provisions of Act.

The Central Government may, by notification in the official Gazette provide such procedure as it considers expedient to enable intending applicants to deposit trade marks at the Patent Office before the coming into force of the remaining provisions of this Act ;

Provided that the deposit of a trade mark under this section shall not affect any right, existing or accruing, in the trade mark.

ACT No. VI of 1940

THE INDIAN COINAGE (AMENDMENT) ACT, 1940

Received the assent of the Governor-General on the 11th March, 1940, and is published in the Gazette of India, Part IV, dated 16th March, 1940.

An Act further to amend the Indian Coinage Act, 1906.

Whereas it is expedient further to amend the Indian Coinage Act, 1906, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title.

This Act may be called the Indian Coinage (Amendment) Act, 1940.

2. Amendment of section 5 of Act III of 1906.

For section 5 of the Indian Coinage Act, 1906 (hereinafter referred to as the said Act), the following section shall be substituted, namely :

"5. Standard weight and fineness.

- (1) The standard weight of the Government rupee shall be one hundred and eighty grains troy.
- (2) The other silver coins shall be of proportionate weight.
- (3) The standard fineness of the Government rupee shall be as follows, namely, eleven-twelfths, or one hundred and sixty-five grains of fine silver, and one-twelfth, or fifteen grains of alloy ; of the half-rupee, eleven-twelfths, or eighty-two and a half grains of fine silver, and one twelfth, or seven and a half grains of alloy ; and of the quarter-rupee, one-half, or twenty-two and a half grains of fine silver, and one-half, or twenty-two and a half grains of alloy.
- (4) In the making of silver coins, a remedy shall be allowed of an amount not exceeding the following, namely :—

Remedy in weight.

Remedy in fineness.

Rupee	}	Five-thousandths	Two thousandths.
Half-rupee			
Quarter-rupee		Nine-thousandths	Five-thousandths.

and in applying the said remedies to quarter-rupees the remedies shall be applied to the average of one hundred coins and not to individual coins."

3. Amendment of section 15, Act III of 1906.

To section 15 of the said Act the following sub-section shall be added, namely:—

"(3) All quarter-rupee silver coins which may have been issued under this Act prior to the commencement of the Indian Coinage (Amendment) Act, 1940, shall continue to be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of four for a rupee."

ACT NO. VII of 1940

THE RESERVE BANK OF INDIA (CLOSING OF ANNUAL ACCOUNTS) ACT, 1940.

Received the assent of the Governor-General on the 11th March, 1940, and is published in the Gazette of India, Part IV, dated 16th March, 1940.

An Act to facilitate the changing of the date on which the annual accounts of the Reserve Bank of India are closed.

Whereas it is expedient that certain provisions should be made to facilitate the changing of the date on which the annual accounts of the Reserve Bank of India are closed;

It is hereby enacted as follows:—

1. Short title and extent.

(1) This Act may be called the Reserve Bank of India (Closing of Annual Accounts) Act, 1940.

(2) It extends to the whole of British India.

2. Definition.

In this Act "the Bank" means the Reserve Bank of India constituted by the Reserve Bank of India Act, 1934.

3. Power to close accounts at expiry of period of six months.

Notwithstanding anything to the contrary contained in the Reserve Bank of India Act, 1934, or the regulations made under s. 58 thereof the Bank may, for the purpose of facilitating the changing of the date on which the annual accounts of the Bank are closed, close its accounts as at the close of business on the 30th day of June, 1940, and convene a general meet-

ing (which shall be annual general meeting within the meaning of the said Act) at a place where there is an office of the Bank within six weeks from the date on which the accounts are closed:

Provided that this general meeting shall not be held at the same place as that at which the immediately preceding annual general meeting was held.

4. Application of Act II of 1934 when accounts are closed under section 3.

References in sub-section (2) of section 14, section 52 and sub-sections (2) and (3) of section 53 of the Reserve Bank of India Act, 1934, to annual accounts, annual balance-sheet, the auditors' report upon the annual balance-sheet and accounts, and the report of the Central Board on the working of the Bank throughout the year, shall be deemed to include references to the accounts, balance-sheet, auditors' report and the report of the Central Board in respect of a period of six months ending on the 30th day of June, 1940.

5. Interpretation of section 47, Act II of 1934.

For the purposes of section 47 of the Reserve Bank of India Act, 1934, the net profits of the Bank for the period of six months ending on the 30th day of June, 1940, shall be deemed to be "net annual profits" but the cumulative dividend referred to in that section as payable out of such profits shall be payable at the rate of one and three quarter per cent.

6. Power to make regulations.

The Central Board of Directors of the Bank may, with the previous sanction of the Central Government, make regulations to provide for any matter for which provision is necessary or convenient in connection with the changing of the date on which the annual accounts of the Bank are closed, and in particular and without prejudice to the generality of the foregoing power for the manner in which the amount, if any, of the additional dividend referred to in section 47 of the Reserve Bank of India Act, 1934, shall be calculated in respect of the period of six months ending on the 30th day of June, 1940.

ACT No. VIII of 1940**THE INDIAN EMIGRATION
(AMENDMENT) ACT, 1940**

Received the assent of the Governor-General on the 11th March, 1940, and is published in the Gazette of India, Part IV, dated 16th March 1940.

An Act further to amend the Indian Emigration Act, 1922.

Whereas it is expedient further to amend the Indian Emigration Act, 1922, for the purposes hereinafter appearing ;

It is hereby enacted as follows :

1. Short title.

This Act may be called the Indian Emigration (Amendment) Act, 1940.

2. Amendment of section 29, Act VII of 1922.

In section 29 of the Indian Emigration Act, 1922 (hereinafter referred to as the said Act), for the words "may be exercised by those officers for the prevention of offences against this Act" the following shall be substituted, namely :

"may be exercised, for the prevention of offences against this Act, by any such officer, or by a Protector of Emigrants, or a person appointed under section 5".

3. Amendment of section 30-A, Act VII of 1922.

To section 30-A of the said Act the following sub-section shall be added, namely :—

"(5) If any person commits an offence under this section, any police officer may arrest him without warrant."

ACT No. IX of 1940.**THE RESERVE BANK OF INDIA (AMENDMENT)
ACT, 1940.**

Received the assent of the Governor-General on the 11th March, 1940, and is published in the Gazette of India, Part IV dated 16th March, 1940.

An Act further to amend the Reserve Bank of India Act, 1934.

Whereas it is expedient further to amend the Reserve Bank of India Act, 1934, for the purpose of enabling the Reserve Bank of India to act as agent of, and make loans and advances to, the Board of Commissioners of Currency of Ceylon ;

It is hereby enacted as follows :—

1. Short title.

This Act may be called the Reserve Bank of India (Amendment) Act, 1940.

2. Amendment of section 17 of Act II of 1934.

In section 17 of the Reserve Bank of India Act, 1934,—

(a) in clause (4), as adapted and modified by the Third Schedule to the India and Burma (Burma Monetary Arrangements) Order, 1937, for the words "and Burma co-operative banks" the words "Burma co-operative banks and the principal currency authority of Ceylon" shall be substituted ;

(b) in clause (13), the words "a bank which is" shall be omitted, and for the words "such banks" the words "banks which are such principal currency authorities" shall be substituted.

ACT No. X of 1940.**THE ARBITRATION ACT, 1940.**

Received the assent of the Governor-General on the 11th March, 1940, and is published in the Gazette of India, Part IV, dated 16th March, 1940.

An Act to consolidate and amend the law relating to Arbitration.

Whereas it is expedient to consolidate and amend the law relating to arbitration in British India ;

It is hereby enacted as follows :—

CHAPTER I.**INTRODUCTORY.****1. Short title, extent and commencement.**

(1) This Act may be called the Arbitration Act, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of July, 1940.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,—

(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not ;

(b) "award" means an arbitration award ;

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- (c) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;
- (d) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;
- (e) "reference" means a reference to arbitration.

CHAPTER II.

ARBITRATION WITHOUT INTERVENTION OF A COURT.

3. *Provisions implied in arbitration agreement.*

An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

4. *Agreement that arbitrators be appointed by third party.*

The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

5. *Authority of appointed arbitrator or umpire irrevocable except by leave of Court.*

The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

6. *Arbitration agreement not to be discharged by death of party thereto.*

(1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

7. *Provisions in case of insolvency.*

(1) Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be determined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the in-

solvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

8 Power of Court to appoint arbitrator or umpire.

(1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

9. Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.

Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,—

(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or

dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent;

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

10. Provisions as to appointment of three or more arbitrators.

(1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

11. Power to Court to remove arbitrators or umpire in certain circumstances.

(1) The Court may, on the application of any party to a reference, remove an arbitra-

tor or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

12. Power of Court where arbitrator is removed or his authority revoked.

(1) Where the Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—

(a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

13. Powers of arbitrator.

The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to—

(a) administer oath to the parties and witnesses appearing ;

(b) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court ;

(c) make the award conditional or in the alternative ;

(d) correct in an award any clerical mis-

take or error arising from any accidental slip or omission ;

(e) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

14. Award to be signed and filed.

(1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award, cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (b) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

15. Power of Court to modify award.

The Court may by order modify or correct an award—

(a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

16. Power to remit award.

(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot

be separated without affecting the determination of the matters referred; or

(b) where the award is so indefinite as to be incapable of execution; or

(c) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court;

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

17. *Judgment in terms of award.*

Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

18. *Power of Court to pass interim orders.*

(1) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

19. *Power to supersede arbitration when award becomes void or is set aside.*

Where an award has become void under sub-section (3) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall

cease to have effect with respect to the difference referred.

CHAPTER III.

ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING.

20. *Application to file in Court arbitration agreement.*

(1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies they or any of them instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

CHAPTER IV

ARBITRATION IN SUITS.

21. *Parties to suit may apply for order of reference.*

Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time be-

fore judgment is pronounced apply in writing to the Court for an order of reference.

22. Appointment of arbitrator.

The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

23. Order of reference.

(1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

24. Reference to arbitration by some of the parties.

Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

25. Provisions applicable to arbitrations under this Chapter.

The provisions of the other Chapters shall, so far as they can be made applicable, apply, to arbitrations under this Chapter.

Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12 instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

CHAPTER V.

GENERAL.

26. Application of Chapter.

Save as otherwise provided in this Act,

the provisions of this Chapter shall apply to all arbitrations.

27. Power of arbitrators to make an interim award.

(1) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

28. Power to Court only to enlarge time for making award.

(1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except, with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

29. Interest on awards.

Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

30. Grounds for setting aside award.

An award shall not be set aside except on one or more of the following grounds, namely:

- (a) that an arbitrator or umpire has misconducted himself or the proceedings;
- (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35;
- (c) that an award has been improperly procured or is otherwise invalid.

31. Jurisdiction.

(1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award

under the agreement has been, or may be filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

32. Bar to suits contesting arbitration agreement or award.

Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

33. Arbitration agreement of award to be contested by application.

Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

34. Power to stay legal proceedings where there is an arbitration agreement.

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the

arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

35. Effect of legal proceedings on arbitration.

(1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

36. Power of Court where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

37. Limitations.

(1) All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced

when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion

that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred.

(To be continued.)

Extracts from Contemporaries.

Statement Leading to Discovery.

As a result of the Full Bench ruling of the Lahore High Court (*cf.* our note in April issue on p. 25 Journal section) holding that any statement by the accused before a Police Officer, even if leading to a discovery is inadmissible, the Punjab Government introduced a Bill in the Legislature to amend the Criminal Procedure Code, in order to nullify the effects of the ruling aforesaid and maintain the *status quo*. However one may sympathise with the Government's point of view, one cannot but feel that the action of the Government is hasty and not well thought out. We are fully aware of the difficulties that the ruling will entail upon the Police investigation. Their work is already handicapped by rigours of law relating to confessions and their admissibility. But it must be admitted that in spite of these handicaps and safeguards against involuntary confessions, we so often read of strictures that are passed by Courts, against the method of investigation. The law was taking its own course. The Courts always interpreted the law in favour of the accused. The investigating authorities themselves are to be blamed for this. The present ruling of the Lahore High Court is a culminating point in that process of purging the Police methods of the "third degree" method so often employed by them. There are instances where Police have tried to hoist any dis-

covery made by them independently of the statement of the accused, upon the accused. In such cases, it is very difficult, though not impossible for the accused to rebut the presumption arising out of such discovery. Now the Court had come to his rescue. But unfortunately, the executive, with all its good intention, is undoing the wholesome effect of the ruling. We think, the better course for it to adopt would have been, as suggested by our local contemporary "*The Tribune*" to refer the matter to a committee of High Court Judges. But now since the Bill has been referred to the Subjects Committee, we respectfully suggest that it should take advice of the High Court itself. It would not be difficult for the High Court to suggest safeguards while admitting the statement to the Police, leading to discovery, like those already on the statute book, insuring that the confessions are made voluntarily.

Enlargement of the Jurisdiction of the Federal Court.

We welcome the move of the Govt. of India to enlarge and extend the powers and the jurisdiction of the Federal Court to civil matters. As the matters now stand the present jurisdiction of the Federal Court is confined to matters involving the interpretation of the Constitution Act. Ever since 1920 there has been a very strong movement in the Country for the establishment of a Supreme Court. But we find

that some of the public men and our contemporaries have criticised the move. But for our own part we strongly feel the necessity and desirability for such a Court. Supreme Court is as a matter of fact an essential part of the Constitution. We may here refer to that excellent article contributed by Sir Dr. H. S. Gour, to the All India Reporter in 1928. Therein the learned jurist has conclusively shown the urgent need for such a Court. The main objections to the extension of the powers are that it shall be difficult to find men free from political and religious bias to serve on the Bench. To this our answer is that the majority of the members of the Judicial Committee of the Privy Council are and were the retired Judges of the Indian High Courts. India might lag behind in other matters but in matters intellectual it can stand any test. India has produced men, who could have adorned any Bench as a Judge. The other argument is that the establishment of the Supreme Court shall take away that visible link between the Crown and the subject. We do not think that any weight would be attached to this argument based as it is on sentimental grounds. Moreover, we are not in favour of abolishing the right of appeal to the Privy Council from the decisions of the Federal Court, but concurrent jurisdiction of the Federal Court at the option of the parties should be avoided. Unlike the Privy Council, the new Supreme Court shall be responsive to the growth of legal ideas and the social advances of the Indian Society. The prohibitive costs, delay and other inconveniences, in the matter of appeals before the Privy Council, are hindrances, and by the establishment of the Supreme Court, an ordinary litigant shall be able to get judgment of the Highest Tribunal of the Country. Now that India is promised a Dominion Status of the statute of West Minister variety, such a Court is indispensable from various points of view.

Chief Court for Sind

Something is better than nothing. Nearly 15 years ago, the Civil Justice Committee recommended the establishment of a Chief Court for Sind. The people however, wanted a full fledged High Court. Their desire was natural. The establishment of a High Court was all the more necessary, after the separation of the Pro-

vince from the Presidency of Bombay. The recommendation of the Committee had remained, for various reasons on paper only. At last, after much agitation and many deputations, Sind got on April 15, a Chief Court. It was indeed a Red Letter Day in the history of the Province. The inauguration ceremony was performed with all the appropriate formalities. Though the establishment of the Chief Court does not remove the want of the people, its constitution which follows closely the Letters Patent of the Bombay High Court will go a great way to meet the popular demand. We have no doubt that the new Court will carry on the traditions of justice and equity, for which the British justice is so famous.

Mukhtears and their position in the Legal Profession.

Fourth session of all Bengal and Assam Mukhtears' Conference was held recently at Alipore under the Presidency of Mr. Amarendra Nath Ghosh. Pointed reference was made by both the learned President and the Chairman of the Reception Committee in their addresses, to the anomalous position in which the Mukhtears stand. They are now included in the class of Pleaders. In Civil and Revenue Law they must get 60 per cent. marks to get through the examination. Thus from the academical point of view their status is in no way inferior to that of the Pleaders. But still, we find that whereas a Mukhtear is allowed to represent an accused before the Sessions, he is debarred from doing so before the Presidency Magistrate. We do not know why this anomaly should now be continued unless of course there are other reasons known alone to the authorities, to make this distinction.

Similarly, even after passing the examination in Civil and Revenue Laws with such a high percentage as 60 per cent, they are not entitled to appear in cases involving the administration of such laws. In cases involving criminal misappropriation even to the extent of lacs, he is entitled to prosecute or defend in Criminal Courts but in Civil Courts he is not entitled to appear even in simple *ex parte* suits involving a few rupees. There seems to us to be no justification for this handicap imposed upon them. The sooner this anomaly is ended the better it is for all concerned.

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38. *Disputes as to arbitrator's remuneration or costs.*

(1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

CHAPTER VI.

APPEALS.

39. *Appealable orders.*

(1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:—

An order—

- (i) superseding an arbitration;
- (ii) on an award stated in the form of a special case;

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- (iii) modifying or correcting an award;
- (iv) filing or refusing to file an arbitration agreement;
- (v) staying or refusing to stay legal proceedings where there is an arbitration agreement;
- (vi) setting aside or refusing to set aside an award;

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council.

CHAPTER VII.

MISCELLANEOUS.

40. *Small Cause Court not to have jurisdiction over arbitrations save arbitrations in suits before it.*

A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save on application made under section 21.

41. *Procedure and powers of Court.*

Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the

purpose of, and in relation to, any proceedings before the Court:

Provided that nothing in cl. (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

42. Service of notice by party or arbitrator.

Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—

- (a) by delivering it to the person on whom it is to be served, or
- (b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in British India and registered under Chapter VI of the Indian Post Office Act, 1898.

43. Power of Court to issue processes for appearance before arbitrator.

(1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression "processes" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

44. Power to High Court to make rules.

The High Court may make rules consistent with this Act as to:—

- (a) the filing of awards and all proceedings consequent thereon or incidental thereto;
- (b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;
- (c) the staying of any suit or proceeding in contravention of an arbitration agreement;
- (d) the forms to be used for the purposes of this Act;

(e) generally, all proceedings in Court under this Act.

45. Crown to be bound.

The provisions of this Act shall be binding on the Crown.

46. Application of Act to statutory arbitrations.

The provisions of this Act, except subsection (1) of section 6 and sections 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

47. Act to apply to all arbitrations.

Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

48. Saving for pending references.

The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply.

49. Repeals and amendments.

(1) The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

(2) The enactments specified in the Fourth Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

THE FIRST SCHEDULE.

(See section 3.)

IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS.

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.
2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one

month from the latest date of their respective appointments.

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

7. The award shall be final and binding on the parties and persons claiming under them respectively.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

THE SECOND SCHEDULE

(See section 41.)

POWERS OF COURT.

1. The preservation, interim custody or sale of any goods which are the subject matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

THE THIRD SCHEDULE

[See section 49 (1).]

ENACTMENTS REPEALED.

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1999	IX	The Indian Arbitration Act, 1999.	The whole.
1908	V	The Code of Civil Procedure 1908.	Section 89, clauses (a) to (f) (both inclusive) of sub-section (1) of section 104 and the Second Schedule.

THE FOURTH SCHEDULE.

[See section 49 (2).]

ENACTMENTS AMENDED.

Year.	No.	Short title.	Amendments.
1	2	3	4
1863	XX	The Religious Endowments Act, 1863.	(a) In section 16— (i) for the words and figure "Chapter VI of the Code of Civil Procedure" the words and figures "Chapter IV of the Arbitration Act, 1940" shall be substituted; (ii) for the words and figures "section 312 of the said Code" the words and figure "section 21 of the said Act" shall be substituted. (b) In section 17, for the words and figure "section 312 of the said Code of Civil Procedure" the words and figures "section 21 of the Arbitration Act, 1940" shall be substituted.
1877	I	The Specific Relief Act, 1877.	In section 21— (i) for the words and figure "Code of Civil Procedure and the Indian Arbitration Act, 1899" the words and figure "Arbitration Act, 1940" shall be substituted; (ii) after the words "but if any person who has made such a contract" the words "other than an arbitration agreement to which the provisions of the said Act apply" shall be inserted.
1908	IX	The Indian Limitation Act, 1908.	In the First Schedule— (i) for Article 158 of the following shall be substituted, namely:— "158. Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration." Thirty days. The date of service of the notice of filing of the award. (ii) in Articles 159 and 179, for the words "same Code" in the first column the words and figure "Code of Civil Procedure, 1908" shall be substituted; (iii) for Article 178 the following shall be substituted, namely:— "178. Under the Arbitration Act, 1940, for the filing in Court of an award. Ninety days. The date of service of the notice of the making of the award."
1910	IX	The Indian Electricity Act, 1910.	In section 52, for the figure "1899" the figure "1940" shall be substituted.
1913	VII	The Indian Companies Act, 1913.	In section 152— (i) for the figure "1899" in both places [where it occurs,] the figure "1940" shall be substituted; (ii) in sub-section (3) the words "other than those restricting the application of the Act in respect of the subject-matter of the arbitration" shall be omitted.

Act No XI of 1940.**THE COAL MINES SAFETY (STOWING)
AMENDMENT ACT, 1940**

Received the assent of the Governor-General on the 26th March 1940, and is published in the Gazette of India, Part IV, dated March 30, 1940.

An Act to amend the Coal Mines Safety Stowing Act, 1939

Whereas it is expedient to amend the Coal Mines Safety (Stowing) Act, 1939, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title.

This Act may be called the Coal Mines Safety (Stowing) Amendment Act, 1940.

2. Amendment of preamble to Act XIX of 1939.

In the preamble to the Coal Mines Safety (Stowing) Act, 1939 (hereinafter referred to as the said Act), after the word "stowing" the words "and other operations" shall be inserted, and for the word "operation", where it occurs for the second time, the word "operations" shall be substituted.

3. Amendment of section 6, Act XIX of 1939.

In section 6 of the said Act,—

(a) the brackets and words "(not being territory which has been declared under s. 5 of the Indian Tariff Act, 1934, to be foreign territory for the purposes of that section)" shall be omitted ;

(b) after the words "a duty of customs" the brackets and words "(which shall be in addition to any duty of customs for the time being leviable under any other Act," shall be inserted.

4. Amendment of section 7, Act XIX of 1939

In section 7 of the said Act, for the words, figures and brackets "determined in like manner to that provided in sub-section (1) of section 144 of the Government of India, Act, 1935" the words "determined in such manner as may be prescribed" shall be substituted.

5. Amendment of section 8, Act XIX of 1939.

In sub-section (1) of section 8 of the said Act,—

(a) the word "and" at the end of clause (i) shall be omitted ;

(b) after clause (ii) the following clauses shall be added, namely :—

"(iii) the execution of operations other

than stowing in furtherance of the objects of this Act ; and

(iv) the prosecution of research work connected with safety in mines".

6. Amendment of section 9, Act XIX of 1939.

In sub-section (2) of section 9 of the said Act, after the word "stowing", where it occurs for the second time, the words "or any other operation towards which assistance may be granted under this Act" shall be inserted.

7. Amendment of section 12, Act XIX of 1939.

In sub-section (2) of section 12 of the said Act, after clause (b) the following clause shall be inserted, namely :—

(bb) the determination of the net proceeds of the duty of excise for the purposes of section 7".

Act No. XII of 1940.**THE INCOME-TAX LAW Amendment Act, 1940**

Received the assent of the Governor-General on the 26th March 1940, and is published in the Gazette of India, Part IV, dated March 30, 1940.

An Act to amend the law relating to Income-tax.

Whereas it is expedient to amend the law relating to income-tax for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title and extent.

(1) This Act may be called the Income-tax Law Amendment Act, 1940.

(2) It extends to the whole of British India.

2. Amendment of Act VII of 1939.

In section 11 of the Indian Income-tax (Amendment) Act, 1939, for clause (a) of sub-clause (iii) of clause (b) the following clause shall be substituted, namely :—

(a) after the word "equivalent" the words "where the assets are ships other than ships ordinarily plying on inland waters," shall be inserted, and after the word "prescribed" the following words shall be added, namely :—

"and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed".

3. Amendment of section 35 Act XI of 1922.

In section 35 of the Indian Income-tax

Act, 1922 (hereinafter referred to as the said Act),—

(a) in sub-section (1),—

(i) after the words "assessment order" the words "or refund order" shall be inserted, and for the words "or assessment" the word "assessment or refund" shall be substituted;

(ii) in the first proviso, after the word "assessment" the words "or reducing a refund" shall be inserted;

(b) in sub-section (3), after the words "enhancing the assessment" the words "or reducing a refund" shall be inserted.

4. Amendment of section 54, Act XI of 1922.

In sub-section (3) of section 54 of the said Act,—

(a) after clause (g) the following clause shall be inserted, namely:—

"(gg) of any such particulars, relevant to any inquiry into a charge of misconduct in connection with income-tax proceedings against a lawyer or registered accountant, to the authority referred to in sub-section (3) of section 61, when exercising the functions referred to in that sub-section,";

(b) in sub-clause (m), before the words "so much of such particulars" the word "of" shall be inserted.

5. Amendment of section 58S, Act XI of 1922.

In section 58S of the said Act, the words "and super-tax", in both places where they occur, shall be omitted.

6. Amendment of section 64, Act XI of 1922.

To section 64 of the said Act the following sub-section shall be added, namely:—

"(5) The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee—

(a) on whom an assessment or re-assessment for the purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under sub-section (2) of section 5 is exercising the functions of a Commissioner of Income-tax, or

(b) where by any distribution or allocation of work made by the Com-

missioner of Income-tax under sub-section (5) of section 5, a particular Income-tax Officer has been charged with the function of assessing that assessee, or

(c) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub-section (6) of section 5.

but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April, 1939, shall be made by the Income-tax Officer for the time being charged with the function of making such assessment by the Central Board of Revenue or by the Commissioner of Income-tax to whom he is subordinate, as the case may be."

7. Insertion of new section 67 B in Act XI of 1922.

After section 67 A of the said Act the following section shall be inserted, namely:—

"67 B. Act to have effect, pending legislative provision for charge of income-tax.

If on the 1st day of April in any year provision has not yet been made by an Act of the Indian Legislature for the charging of income-tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provision proposed in the Bill then before the Legislature, whichever is more favourable to the assessee, were actually in force."

8. Amendment of Schedule, Act XI of 1922.

In the Schedule to the said Act, in paragraph (b) of the second rule, after the word "surplus", where it first occurs, the words "arrived at by adjusting the surplus or deficit" shall be inserted, and the words "after adjusting such surplus" shall be omitted.

9. Validity of certain assessments and proceedings made under Act XI of 1922.

No assessment made in accordance with sub-section (5) of section 64 of the said Act before the 30th day of December, 1939, and no proceedings taken in the course of, or for the purposes of, so making any assessment before that date shall be or continue to be invalid by reason of anything contained in sub-sections (1) and (2) of section 64 of the said Act.

10. Repeal of Ordinance IX of 1939.
The Income-tax (Removal of Difficulties and Validating) Ordinance, 1939, is hereby repealed.

Act No. XIII of 1940.

THE RESERVE BANK OF INDIA (SECOND AMENDMENT) ACT, 1940.

Received the assent of the Governor-General on the 26th March 1940, and is published in the Gazette of India, Part IV, dated March 30, 1940.

An Act further to amend the Reserve Bank of India Act 1934.

Whereas it is expedient further to amend the Reserve Bank of India Act, 1934, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

1. Short title.

This Act may be called the Reserve Bank of India (Second Amendment) Act, 1940.

2. Amendment of section 4, Act II of 1934.

In section 4 of the Reserve Bank of India Act, 1934, as adapted and modified in accordance with the Third Schedule to the India and Burma (Burma Monetary Arrangements) Order, 1937 (hereinafter referred to as the said Act), after sub-section (4) the following sub-section shall be inserted, namely :—

(4A) Without prejudice to the validity of any registration made before the commencement of the Reserve Bank of India (Second Amendment) Act, 1940, no person shall, after the commencement of that Act, be registered as a shareholder in respect of any shares held by him whether in his own name or jointly with another person or persons in excess of a total nominal value of twenty thousand rupees, or be entitled to payment of any dividend on such shares or to exercise any of the rights of a shareholder in respect of such shares otherwise than for the purpose of selling the shares."

3. Amendment of section 56, Act II of 1934.

In sub-section (2) of section 56 of the said Act after the words "registered in his name" the following words shall be inserted, namely :—

"or that any shareholder, to whom the provisions of sub-section (4A) of section 4 apply, is the holder of shares

in excess of a total nominal value of twenty thousand rupees."

ACT No. XIV of 1940

THE PARSİ MARRIAGE AND DIVORCE (AMENDMENT) ACT, 1940.

Received the assent of the Governor-General on the 6th April, 1940, and is published in the Gazette of India, Part IV, dated April 13, 1940.

An Act to amend the Parsi Marriage and Divorce Act 1936

Whereas it is expedient to amend the Parsi Marriage and Divorce Act, 1936;

It is here by enacted as follows:—

1. Short title.

This Act may be called the Parsi Marriage and Divorce (Amendment) Act, 1940.

2. Amendment of section 40 Act III of 1936.

In section 40 of the Parsi Marriage and Divorce Act, 1936,—

(a) in sub-section (1), after the words "the husband shall" the words "while the wife remains chaste and unmarried", shall be inserted;

(b) in clause (a) of sub-section (1), the words "while she remains chaste and unmarried" shall be omitted ;

(c) after sub section (2) the following sub-section shall be added :—

"(3) Where an order for alimony or maintenance in favour of a wife has been made either under the provisions of the Parsi Marriage and Divorce Act, 1865, or under the provisions of this Act, the Court, if satisfied that the wife has remarried or has not remained chaste, shall vary or rescind the order".

ACT No. XV of 1940.

THE EXCESS PROFITS TAX ACT, 1940.

Received the assent of the Governor-General on the 6th April, 1940, and is published in the Gazette of India, Part IV, dated April 13, 1940.

An Act to impose a tax on excess profits arising out of certain businesses.

Whereas it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities ;

It is hereby enacted as follows :

1. Short title, extent and commencement.

(1) This Act may be called the Excess Profits Tax Act, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette appoint.

2. Definitions.

In this Act, unless there is anything repugnant in the subject or context,—

(1) "accounting period" in relation to any business means—

(a) where the accounts of the business are made up for successive periods of twelve months, each of such periods ;

(b) in any other case, such period as the Excess Profits Tax Officer may determine ;

Provided that in determining any accounting period under sub-clause (b) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922 ;

(2) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Excess Profits Tax under section 3 ;

(3) "average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule ;

(4) "Board of Referees" means a Board of Referees appointed under section 3 ;

(5) "business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits on the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts ;

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society ;

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act ;

(6) "chargeable accounting period" means—

(a) any accounting period falling wholly within the term beginning on the 1st day of September, 1939, and ending on the 31st day of March, 1941, and

(b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term ;

(7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under section 3 ;

(8) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act ;

(9) "deficiency of profits" means—

(i) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the standard profits ;

(ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the amount of the standard profits ;

(10) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

(i) is a manager of the company or concerned in the management of the business ; and

(ii) is remunerated out of the funds of the business ; and

(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company ;

(11) "dividend" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922 ;

(To be continued.)

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(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under section 3;

(13) "income" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(14) "fixed rate" in relation to dividends on share capital other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax;

(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Commissioner of Excess Profits Tax under section 3;

(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;

(17) "person" includes a Hindu undivided family;

(18) "prescribed" means prescribed by rules made under this Act;

(19) "profits" means profits as determined in accordance with the First Schedule;

(20) "standard profits" means standard profits as computed in accordance with the provisions of section 6;

(21) "statutory percentage" means—

(a) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

(b) in relation to any other business, ten per cent. per annum;

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent.:

Provided further that where the business was commenced on or after the 1st day of July, 1938, the foregoing percentages shall be increased from eight, ten and six per cent. to ten, twelve and eight per cent. respectively;

(22) "written down value" has the mean-

ing assigned to that expression in sub-section (5) of section 10 of the Indian Income-tax Act, 1922.

3. Excess profits tax authorities.

(1) There shall be the following classes of excess profits tax authorities for the purposes of this Act, namely:—

(a) the Central Board of Revenue;

(b) Commissioners of Excess Profits Tax;

(c) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Commissioners of Excess Profits Tax;

(d) Excess Profit Tax Officers;

(e) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax, Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them:

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board

to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that nothing in this sub-section applies to a Board of Referees :

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business-experience, and one shall be a judicial officer who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and who has held judicial office for a period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Board of Referees.

4. Charge of tax.

Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") which shall, in respect of any chargeable accounting period ending on or before the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as may be fixed by the annual Finance Act :

Provided that any profits which are, under the provisions of sub-section (3) of section 4 of the Indian Income-tax Act, 1922, exempt from income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.

5. Application of Act.

This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is charge-

able to income-tax by virtue of the provisions of sub-clause (i) or sub-clause (ii) of clause (b) of sub-section (1) of section 4 of the Indian Income-tax Act, 1922, or of clause (c) of that sub-section :

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India unless the business is controlled in India :

Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident accrue or arise in British India or are deemed under the Indian Income tax Act, 1922, so to accrue or arise, then, except where the business being the business of a person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

6. Standard profits.

(1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of the business during the standard period, if in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period.

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease :

Provided further that in the case of a business which was commenced on or after the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

(2) For the purposes of this section the standard period shall, at the option of the person carrying on the business, be—

- (a) the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the income tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938; or
- (b) the "previous years year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939; or
- (c) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939; or
- (d) the "previous year" as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March, 1940:

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) If, within the period specified in the notice issued under sub-section (1) of section 13, the person carrying on the business makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might at the beginning of that period have been reasonably expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just:

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

(4) The standard profits shall be taken to be rupees thirty-six thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum:

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees thirty-six thousand shall for the purpose of this sub-section be increased or decreased proportionately.

(5) where the standard period includes

any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was part of British India, there shall, in computing the standard profits of a business under this section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

7. Relief on occurrence of deficiency of profits.

Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions:—

- (a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise:
- (b) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.

8. Successions and amalgamations.

(1) As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced.

(2) Where the change took place before

the 1st day of September, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits Tax Officer, elect that, for the purposes of the provisions of this Act relating to the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated for the purposes of the provisions of this Act relating to the computation of standard profits as if—

(a) it had been in existence throughout the period during which there were in existence any of the former businesses;

(b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business; and

(c) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business; and, in particular, in computing the capital employed in the resulting business, no regard shall be had to any consideration given in respect of the transfer of any of those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the 1st day of September, 1939, part of a business is transferred as a going concern by the person theretofore carrying it on to another person, the part transferred and the part not transferred shall each be deemed for the pur-

poses of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this section relating to amalgamations, shall apply accordingly, subject to any necessary modifications.

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just.

(7) Where, on or after the 1st day of September 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

9. Inter connected companies.

(1) Where any interest, annuity or other annual payment, or any royalty or rent, is paid by one company to another company, and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital, profits and losses of both companies shall be computed for the purposes of this Act as if—

- (a) the interest, annuity, annual payment, royalty or rent were not payable;
- (b) any debt in respect of which any such interest is payable did not exist; and
- (c) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.

(2) Where

- (a) a company (hereinafter referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India; and
- (b) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary company") is a subsidiary of the principal company,

the following provisions of this section shall, subject to the provisions of section 5, have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

- (i) the chargeable accounting period; or
- (ii) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in or as the case may be profits or losses arising from, the business of the principal company.

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing

or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

In this sub-section, the expressions "excess" and "deficiency" mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company.

(5) In any case to which sub-section (3) or sub-section (4) applies, such alteration, if any, of the periods which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the Central Board of Revenue may direct.

(6) For the purposes of this section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies or partly directly and partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

(9) The principal company shall be entitled to allocate to its subsidiary company or companies the respective proportionate shares of the excess profits tax payable by the whole group.

(10) The excess profits tax payable by virtue of this section by the principal company in respect of the profits of any subsidiary company shall, for the purposes of section 12, be deemed to have been paid by the subsidiary company and not by the principal company.

10. Artificial transactions.

(1) A person shall not for the purpose of reducing any excess profits which are

or would be chargeable to excess profits tax enter into a fictitious or artificial transaction, or carry out any fictitious or artificial operation.

Explanation.—For the purposes of this section an artificial transaction or operation includes every device of whatever nature adopted for the purpose of presenting the accounts of a business in a misleading form or manner with intent to evade or having the effect of evading any obligation imposed by this Act.

(2) Any such transaction or operation shall be treated as null and void for the purpose of computing the excess profits tax payable under this Act.

(3) If the Excess Profits Tax Officer is satisfied that any person has acted in contravention of the provisions of sub-section (1), he may with the previous approval of the Inspecting Assistant Commissioner direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to be evaded.

11. *Relief in respect of double excess profits taxation*

(1) The Central Government may by notification in the official Gazette make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions have been paid upon the profits of any business if it appears to the Central Government that the laws of the United Kingdom or of that Indian State or of that other part of His Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India:

Provided that where under section 19 of the Finance (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu of excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the

laws of which do not provide for any relief in respect of excess profits tax charged in British India, proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal to one-half thereof or to one-half of the excess profits tax payable in the said country, whichever is the less.

12. *Allowance of excess profits tax in computing income for income-tax purposes.*

(1) The amount of the excess profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period to the extent that such profits arose in the said country, after diminishing such amount by any amount which is allowable by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess profits tax has also been charged in British India:

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the said country without British India, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the chargeable accounting period in which the deficiency of profits occurs.

13. *Issue of notices for assessment.*

(1) The Excess Profits Tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be

otherwise liable to pay excess profits tax, to furnish within such period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of section 6 or the amount of deficiency available for relief under section 7:

Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom a notice has been served under sub-section (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require:

Provided that the Excess Profits Tax Officer shall not require the production of any accounts relating to a period prior to the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937.

14. Assessments.

(1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 13, assess to the best of his judgment the profits liable to excess profits tax and the amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment

shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

15. Profits escaping assessment.

If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that section.

16. Penalties.

If the Excess Profits Tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that section, or has concealed particulars of the profits made by or capital employed in the business, or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

(a) where the person has failed to furnish the return required under sub-section (1) of section 13, the amount of the excess profits tax payable; and

(b) in any other case, the amount of excess profits tax which would have been avoided if the return made had been accepted as correct:

Provided that the Excess Profits Tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner.

17. Appeals.

(1) Any person aggrieved by a decision made in pursuance of section 8, or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner:

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the first proviso to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule:

Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of section 8 or against any decision of the Board of Referees under sub-section (3) of section 6.

(2) An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made in this behalf by the Central Board of Revenue.

18. Appeal to Commissioner against Appellate Assistant Commissioner's orders imposing penalties or enhancing assessments or penalties.

(1) Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under section 16 or enhancing his assessment or enhancing a penalty under section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

(2) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

(3) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this section shall cease to have effect.

19. Power of revision.

(1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit:

Provided that he shall not pass any order prejudicial to a person to whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

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(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any Excess Profits Tax Officer or any person in respect of whose business an order under section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under section 16 or section 17 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

20. Rectification of mistakes.

The Commissioner may, at any time within four years from the date of any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies :

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

21. Application of provisions of Act XI of 1922.

The provisions of sections 4-A, 4-B, 10, 13, 21-B, 29, 36 to 44-C (inclusive), 45 to 48 (inclusive), 49-E, 49-F, 50, 54, 61 to 63 (inclusive), 65 to 67-A (inclusive) of the Indian Income Tax Act, 1922, shall apply with such modifications, if any, as may be

prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of section 3 as he exercises in relation to income-tax under the said Act :

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

22. Income-tax papers to be available for the purposes of this Act.

(1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

23. Failure to deliver returns or statements.

If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

24. False statement and declaration.

If a person makes in any return required under section 13 any statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

25. Institution of proceedings and composition of offences.

(1) A person shall not be proceeded against for an offence under section 23 or section 24 except at the instance of the Inspecting Assistant Commissioner.

(2) No prosecution for an offence punishable under section 23 or section 24 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner may, either before or after the institution of proceedings, compound any offence punishable under section 23 or section 24.

26. Power of Central Board of Revenue to grant relief in special cases.

(1) If the Central Board of Revenue is satisfied in the case of any business that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of sub-section (1) of section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just:

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded by the Board of Referees under sub-section (3) of section 6 is inadequate.

(2) Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following

circumstances, namely:—

- (a) that the capital employed in a business commenced on or after the 1st day of July, 1938, is so small in relation to the volume of the activities of the business that to compute the standard profits in accordance with the provisions of section 6 would be inequitable, taking into account the normal profits made in similar businesses; that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax;
 - (c) that the business is of a pioneer nature, that is to say, is concerned with an industrial process or a form of manufacture or production not undertaken in British India before the 1st day of April, 1932, and has not been in existence long enough to have paid income-tax for the previous year as determined for the purpose of the income-tax assessment for the year beginning on the 1st day of April, 1937.
- (3) If the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to any of the following circumstances, namely:—
- (a) any postponement or suspension, as a consequence of the present hostilities, of renewals or repairs, or
 - (b) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities, or
 - (c) difficulties in bringing into British India income arising outside British India where the country in which the income accrued prohibits or restricts by its laws the remittance of money to British India,

and loss in the remittance to British India of such income because of fluctuations in the rate of exchange between that country and British India;

the Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just:

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

27. Power to make rules.

(1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds;

(b) provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by section 21; or of any rules made under any such provision;

(c) provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investments for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the profits of which have been subjected to excess profits tax in British India;

(d) provide for any matter which by, or under, this Act is to be prescribed.

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income-tax Act, 1922.

SCHEDULE I.

[See section 2 (19).]

Rules for the computation of profits for purposes of Excess Profits Tax.

1. The profits of a business during the standard period, or during any charge-

able accounting period shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under section 10 of the Indian Income-tax Act, 1922:

Provided that where the profits during any standard period have already been determined for the purpose of an assessment under the Indian Income-tax Act, 1922, such profits as so determined shall, subject to the adjustments required by this Schedule, be taken as the profits during that period for the purpose of excess profits tax:

Provided further that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the business during any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof shall be made as appears necessary to arrive at the profit during the standard period or chargeable accounting period: and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

2. The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period.

3. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies.

(3) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of the excess profits tax, of the provisions of

sub-section (2) of section 24 of the Indian Income-tax Act, 1922.

4. (1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-rules (2) and (4) of this rule and not otherwise.

(2) In the case of the business of a building society, or of a moneylending business, banking business, insurance business, or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is included in the profits charged under section 10 of the Indian Income-tax Act, 1922, or is charged under any other section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

(3) Notwithstanding anything contained in sub-rule (2), where the profits of a subsidiary company are under the provisions of section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

(4) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under section 9 of the Indian Income-tax Act, 1922, or under any other section of that Act.

(5) Where the person carrying on a business is the beneficial owner of any investments, the income from which is by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments:

Provided that where the person carrying on the business is not a company, no such reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

5. If at any time after the close of the standard period, any increase in the capital

employed in a business has been effected by means of a loan from a bank carrying on a *bona fide* banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and, notwithstanding the provisions of rule 2 of Schedule II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business.

6. No deduction shall be made on account of liability to pay, or payment of, income-tax, super-tax, or excess profits tax.

7. (1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have a controlling interest therein,—

(a) if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is longer or shorter than the accounting period, in excess of a sum which bears to the sum paid for directors' remuneration in respect of the standard period the same proportion as the length of the accounting period bears to that of the standard period;

(b) if the standard profits are not computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration.

(2) In this rule the expression "directors' remuneration" does not include—

(a) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(b) the remuneration of any managing agent where such remuneration is included in profits of the managing agent's business for the purposes of excess profits tax.

8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period, except where such remuneration is subjected to excess profits tax in the hands of the managing agent.

9. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attributed to the accounting periods such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein :

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

10. In respect of any building erected on or after the 1st day of September, 1939, which during any chargeable accounting period has ceased to be required for the purposes of the business or has been sold, any amount by which the value of the building at the date when it ceased to be required for the purposes of the business or the price obtained for the building, as the case may be, falls short of the written down value of the building shall be allowed as a deduction in arriving at the profits of that chargeable accounting period.

SCHEDULE II.

[See section 2 (3).]

Rules for computing the average amount of capital.

1. (1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—

(a) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;

(b) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;

(c) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.

(2) The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value and, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

2. (1) Any borrowed money and debts shall be deducted, and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted :

Provided that any such debt for income-tax or super-tax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(a) in the case of income-tax and super-tax, on the last day of the period of time within which the tax is payable under section 45 of the Indian Income-tax Act, 1922;

(b) in the case of excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.

(2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

3. Any investments the income from which is by virtue of the provisions of the First Schedule not to be taken into account in computing the profits of the business, and any moneys not required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under the last preceding rule in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments:

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

4. Notwithstanding anything contained in rule 3, in the case of the business of shipping, to which this Act applies, the sale proceeds of any tonnage sold or the amount of compensation in respect of loss of ships or the amount of accumulation of reserves, whether invested or not, shall be taken into account in computing the average amount of capital employed in such business:

Provided that any income received from investment of such funds shall be included in computing profits for purposes of the excess profits tax.

5. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—

- (a) to have accrued at an even rate throughout the period; and
- (b) to have resulted, as they accrued, in a corresponding increase, or decrease, as the case may be, in the capital employed in the business.

6. Where, in accordance with the second proviso to section 5 of this Act, this Act

is applicable to part only of a business, the capital employed in that part shall be computed separately from any other capital of the person carrying on the business, and all references to capital employed in a business shall be construed as references to capital employed in that part of the business only.

SCHEDULE III.

[See section 9 (7)].

Rules for determining the amount of capital held by a company through other companies.

1. Where, in the case of a number of companies, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital of the third through the second and, if the third directly owns ordinary share capital of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall be deemed to own ordinary share capital of the fourth through the third, and so on.

2. In this Schedule—

- (a) any number of companies of which the first directly owns ordinary share capital of the next and the next directly owns ordinary share capital of the next but one and so on, and, if they are more than three, any three or more of them, are referred to as "a series";
- (b) in any series—
 - (i) that company which owns ordinary share capital of another through the remainder is referred to as "the first owner";
 - (ii) that other company the ordinary share capital of which is so owned is referred to as "the last owned company";
 - (iii) the remainder, if one only, is referred to as an "intermediary" or, if more than one, is referred to as a "chain of intermediaries";
- (c) a company in a series which directly owns ordinary share capital of another company in the series is referred to as an "owner";
- (d) any two companies in a series of which one owns ordinary share capital of the other directly, and not through one or more of the

other companies in the series, are referred to as being directly related to one another.

3. Where every owner in a series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own through the intermediary or chain of intermediaries the whole of the ordinary share capital of the last owned company.

4. Where one of the owners in a series owns a fraction of the ordinary share capital of the company to which it is directly related, and every other owner in the series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own that fraction of the ordinary share capital of the last owned company through the intermediary or chain of intermediaries.

5. Where—

(a) each of two or more of the owners in a series owns a fraction, and every other owner in the series owns the whole, of the ordinary share capital of the company to which it is directly related; or

(b) every owner in a series owns a fraction of the ordinary share capital of the company to which it is directly related;

the first owner shall be deemed to own through the intermediary or chain of intermediaries such fraction of the ordinary share capital of the last owned company

as results from the multiplication of those fractions.

6. Where the first owner in any series owns a fraction of the ordinary share capital of the last owned company in that series through the intermediary or chain of intermediaries in that series, and also owns another fraction or other fractions of the ordinary share capital of the last owned company, either—

(a) directly; or

(b) through any intermediary or intermediaries which is not a member or are not members of that series; or

(c) through a chain or chains of intermediaries of which one or some or all are not members of that series; or

(d) in a case where the series consists of more than three companies, through an intermediary or intermediaries which is a member or are members of the series, or through a chain or chains of intermediaries consisting of some but not all of the companies of which the chain of intermediaries in the series consists;

then, for the purpose of ascertaining the amount of the ordinary share capital of the last owned company owned by the first owner, all those fractions shall be aggregated and the first owner shall be deemed to own the sum of those fractions.

BREAKING DOORS FOR PURPOSE OF EXECUTING

The question whether a police officer charged with the duty of executing a warrant of commitment, is justified in breaking open doors to obtain entry to the premises where the defendant is residing, is sometimes of considerable importance, and as there appears to be no authority directly in point the matter is worth discussion.

"Paley on Summary Convictions" states: "A constable, in the execution of a warrant of commitment, may break open outer as well as inner doors of any house in which the offender is an actual inmate or resident. But he must first signify to those in the house the cause of his coming, and request them to give him admittance. It may be doubted whether the doors of a stranger can be forced upon the mere ground of the offender being within, if the latter be not an actual resident or inmate." Reference

is made to *Harvey v. Harvey* (1884) 26 Ch. Div. 644, and *Launock v. Brown* (1819) 2 B. and Ald 592; 106 E. R. 482. Any statement in Paley is entitled to respect, and we have no doubt that this is a correct statement of the law, but since many text-books are silent upon the point, and it is often considered to be in doubt, it seems desirable to look into such cases as bear upon it.

In *Launock v. Brown*, *supra*, the warrant in question under an old statute authorised entry and search, but Abbot, C. J., dealt with the general question of breaking doors in the execution of criminal process, and laid it down that in misdemeanours entry must first be demanded. It seems implied, therefore, that doors may be broken after such demand.

In *Eagleton v. Gutteridge* (1843), 8 J.

P. 643; 18 Dig. 275, it was held that in a distress for rent a forcible re-entry by breaking the outer door is justifiable under a warrant of distress where the party executing the warrant has been forcibly turned out of possession. Again, in *Bannister v. Hyde and Another* (1860), 24 J.P., 230, 18 Dig. 357, a person who was put in possession by a landlord under a distress went out for refreshment, intending to return. In his absence the tenant locked the outer door and refused re-admission, whereupon the man in possession broke open the door of the house and re-entered. It was held that the man in possession was justified in so doing, and that, in going out as he did he had in no way abandoned his distress. In these cases, be it noted, the distress was for rent, and there was no question of any criminal offence or process. It may be confidently argued that where a police officer is attempting to execute a warrant issued by a Court against a person convicted of an offence his powers are not less than those of a man in possession for rent.

The headnote in *Harvey v. Harvey*, *supra* reads: "Where a writ of attachment has issued against a party to an action for contempt of court in non-compliance with an order for the delivery over of deeds and documents, the officer charged with the execution of the writ may break open the outer door of the house in order to execute it." Chitty, J., in his judgment dealt with the history of the law on the subject, and drew a distinction between criminal proceedings and proceedings for contempt of Court on the one hand, and civil proceedings

concerning individuals on the other. From his observations it would seem that where the public weal requires that process should be executed the powers of an officer to break open doors where admission cannot otherwise be obtained may be considered as established. So far as warrants of commitment issued by Courts of summary jurisdiction are concerned, it is submitted that the public weal requires that penalties should be enforced and warrants executed, and that, therefore, a police officer in possession of a warrant of commitment may, after being refused admission, break open a door for the purpose of executing the warrant.

A warrant of commitment is, in fact, though not in form, also a warrant of apprehension. A warrant of commitment commands the constable to convey the defendant to a prison, and obviously a defendant who is at large cannot be conveyed to prison unless he be first apprehended. Therefore, wherever a constable has authority to break open doors to effect an arrest he must also have such authority for the purpose of executing a warrant of commitment. It would be strange if there were power to break open doors to arrest a person suspected of an offence, but no such authority to arrest a person who had been actually convicted of that offence.

We think, therefore, that doors may be broken for the purpose of executing a warrant of commitment, whether the adjudication be imprisonment without the option of a fine, or whether it be for the enforcement of fine, and that this applies to a conviction for any criminal offence.—J. P.

END OF VOLUME 187.

